

The Role of the Judiciary in the Review of Administrative Policy Decisions : Issues of Legality

David J. MULLAN*

INTRODUCTION	315
I. DEFINITION	319
II. TRADITIONAL STANDARDS OF JUDICIAL REVIEW OF POLICY DECISIONS	320
III. NON-INTERVENTIONISM	322
IV. MUNICIPALITIES — NO LONGER A SPECIAL CASE? ...	335
V. SCRUTINY OF POLICY-MAKING AND IMPLEMENTATION BY TRIBUNALS	339
VI. FACILITATION OF POLICY-MAKING ROLES	343
VII. PROCEDURAL FAIRNESS AND POLICY-MAKING	347
VIII. JUDICIAL REVIEW OF IMPLEMENTATION OF THE “COMMON SENSE REVOLUTION”	351
IX. SPECIAL INTERESTS AND CONSTITUTIONAL VALUES — EXCEPTIONS TO THE OVERALL PATTERN	356

* Oster, Hoskin & Harcourt Professor of Constitutional and Administrative Law, Faculty of Law, Queen’s University. I am grateful for comments I received while preparing this from Margaret Allars, Phil Bryden, David Dyzenhaus, Hudson Janisch, Lorne Sossin, and Michael Taggart, and also to Shannon Chace Hall, Andrew Fitzpatrick, and Jennifer Golder for their research assistance.

X. THE IMPACT OF THE CHARTER	361
XI. THE IMPACT OF BAKER	365
XII. ACCOUNTING FOR THE CANADIAN POSITION	367
XIII. THE PROSPECTS FOR A DIFFERENT APPROACH	370

In public regulation of this sort there is no such thing as absolute and untrammelled “discretion,” that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute... [T]here is always a perspective within which a statute is intended to operate and any departure from its lines or objects is just as objectionable as fraud or corruption.¹

Although the Commission must consider the public interest, its powers are virtually unfettered... [This] is a policy decision in which the Commission and its members, who are close to the political/legislative extreme of the decisional spectrum, have the widest area of non-reviewable discretion.²

This paper is about the role of the courts in the supervision of the legality of the policy-making and implementation functions of public bodies. There is, of course, a very short description of that task — the courts ensure that those charged with such functions observe the law and, in particular, keep within their jurisdictional limits. However, as is the case throughout the law governing judicial review, the truth is much more complex than that.

The extent of judicial intervention in policy-making and implementation is highly contingent on the way in which the concepts of law and jurisdiction are conceived as operating or defined in this context. As well, the delineation of the judicial role will depend on how the courts divine the extent of implied limits on often broad statutory grants of discretion. This is an exercise that, on many

1. *Roncarelli c. Duplessis*, [1959] S.C.R. 121 at p. 140 (Rand J.).

2. *Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission)* (1997), 36 O.R. (3d) 41 (Ont. Div. Ct.) (Archie Campbell J.).

occasions, will be conditioned on assumptions about legislative intention in the delegation of authority to public bodies, assumptions which themselves may have more to do with values derived from normative judgments about the worth of certain kinds of interests than any actual manifestation of legislative intention. The sources of those normative judgments may be many and varied with the most credible legally being those based on firmly-established common law and constitutional principles.

Also relevant and articulated much more frequently will be a judicial sense of another and perhaps overarching constitutional value : that judges operating in our tradition have no role in policing the merits of particular exercises of discretionary or policy-making power. To engage in that would be to trespass on the assigned roles of the legislative and executive branches of government. Indeed, this posture stands in stark contrast to an alternative approach which starts from the proposition that, in an era where there is unavoidably so much delegated power, the courts have a significant constitutional role in policing it and ensuring that its exercise is confined to those situations which are authorized clearly by the relevant legislation. Under this vision, so characteristic historically of judges intellectually suspicious of an activist state but also prompted in some instances by a genuine concern with immoral or corrupt use of state power for which there are no other effective vehicles of accountability,³ the courts represent the citizens' bulwark against the executive branch of government.

In sum, on many occasions, pretensions of objectivity may disguise what in fact is a highly value-laden inquiry into the exercise of the policy-making and implementation roles of government and the extent of the courts' claims to a constitutional mandate to act as a restraining influence. In other instances, the values will be identified specifically in or discernible readily from the text of

3. The example of South Africa under apartheid and academic criticism of the failure of the judicial branch to act as sufficient check on the pernicious use of executive power provides a classic example of a situation where more extensive judicial review of discretionary power was seen as a means for providing some sort of antidote to an immoral regime. Thus, Hugh Corder in "Administrative Justice : A Cornerstone of South Africa's Democracy" (1998) 14 S. Afr. J. Hum. Rts. 38 at p. 42 writes of the performance of the South African judiciary during apartheid as follows :

"The practice of this judicial power was marked by a singular insularity and lack of creativity, such that advances in the field in comparable jurisdictions were seldom noted or implemented. There are also few who would deny judicial responsibility for this parlous state of the law, due mainly to favouring executive interests when they clashed with individual basic rights. Outside the judicial sphere, a corrupt and unaccountable executive allied with a craven majority in Parliament naturally did nothing to encourage judicial independence, openness of government processes, nor the creation of alternative means of holding the administration accountable."

judgments. Nonetheless, there is even today no universal consensus in such cases as to what is an appropriate starting point from which the courts should approach the task of evaluating exercises of policy making powers : protector of various private sector interests from state incursions for which there is not specific statutory warrant, or facilitation of the processes of governance by according considerable room and respect for the exercise of “executive” judgment under broad discretionary grants of power. Indeed, as Michael Taggart has pointed out recently, there is a tendency in this arena for some critics to change or modify their positions on this debate depending on whether the current government or fount of executive power is one of which they approve or disapprove in terms of their “politics”.⁴

This very jurisprudential or, perhaps more accurately, political debate has long been one of the abiding themes in the law governing judicial review in one particular area in Canada : the delineation of the appropriate scope for judicial interference with the decisions of administrative tribunals. After a long battle in both the courts and the professional and academic literature, a posture of judicial deference to or respect for the determinations of these bodies has triumphed as the dominant strain in our case law. With very few exceptions, tribunal findings on both questions of law and fact are largely immune from judicial quashing save in exceptional circumstances characterized by the patent unreasonableness or unreasonableness test for judicial intervention. In many senses, the fact that this has emerged as the prevailing value of the law governing the relationship between the courts and administrative tribunals marks the triumph of legislative and executive will over the perceptions of many courts that they represented the citizen’s only source of protection against an ever more intrusive state; the preservers of traditional common law, individualistic values. At times, it also amounts to a recognition by judges (albeit grudging in some cases) that there are certain tasks that are better left to the designated decision-maker than to the courts either in an original or reserve capacity.

In stark contrast, however, to the long struggle of administrative tribunals for credibility in the judicial arena particularly in their determination of questions of law, there is little equivalent Canadian history in the domain of judicial review of policy-making by the agencies of central government — the Cabinet, Ministers of the Crown, civil servants, and other policy-making bodies or individuals acting under delegated authority. By and large, Canadian courts have simply assumed that they should exhibit a highly deferential approach in the scrutiny of such

4. M. Taggart, “Reinvented Government, Traffic Lights and the Convergence of Public and Private Law”, Book Review of *Law and Administration* by Harlow & Rawlings [1999] Pub. L. 124 at pp. 124-129 particularly.

decision-making.⁵ This eschewing of any significant role in the policing of the exercise of policy-making powers not only is evident in judicial review applications or statutory appeals raising substantive grounds of judicial review but also manifests itself in the rejection of attempts to secure participatory rights.⁶ It is apparent too in the adjectival aspects of judicial review law such as restrictions on the securing of effective discovery⁷ and the unavailability of damages for negligence in the taking of policy as opposed to operational decisions.⁸ Indeed, judicial reluctance to intervene on substantive bases has extended to situations where Parliament and the legislatures have assigned particular policy-making roles in the form of broad discretions to administrative tribunals (rather than the executive, Ministers of the Crown, or other governmental officials).

In this paper, I will provide empirical evidence in support of this proposition as well as identify the pockets of judicial review jurisprudence where the courts have been somewhat more interventionist in the realm of policy-

-
5. For an example of earlier academic commentary on this point and comparison with the relatively more intrusive position (at least at times) of the British courts, see Hudson Janisch, "Annotation to" *MacMillan Bloedel v. Minister of Forests of British Columbia* (1984) 4 Ad. Law. Rev. 1 at p. 3. See also for invaluable comparative material, G.D.S. Taylor, "Administrative Law in the Wider Context of Government Policy-Making and Implementation", a paper delivered at the AIC Worldwide 6th Annual Administrative Law Summit, held in Canberra, A.C.T., Australia, on September 24-25, 1998. I have also developed some of these themes in an earlier paper, "Judicial Deference to Executive Decision-Making : Evolving Concepts of Responsibility" (1993) 19 Queen's L.J. 137.
 6. *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, as applied *e.g.* in *Canadian Association of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (C.A.).
 7. See *e.g. Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3, discussed *infra*, at text accompanying note 38. Often, when the holder of the discretion is not forthcoming as to the reasons and motivations for the decision and there is little background information available, the applicant for relief will be placed in the very difficult evidential position of having to establish the negative proposition that there could not possibly be any legitimate reason for the decision and, thereby, persuade the Court to presume that there has been an abuse of discretion. For a recent discussion of this possibility, see *Williams v. Canada (Minister of Citizenship and Immigration)* (1997), 147 D.L.R. (4th) 93 (F.C.A.) at p. 111. In addition, there is also the problem of meeting any claims of public interest immunity which in the federal domain is even more favorable to the government than the common law : *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 37-39. In particular, the courts cannot look behind a certificate that the information sought "constitutes a confidence of the Queen's Privy Council for Canada" which in turn is defined in troublingly wide terms : section 39. For a recent unsuccessful constitutional challenge to this particular provision and other aspects of the public interest immunity code, see *Singh v. Canada (Attorney General)*, [1999] F.C. 583 (T.D.), *aff'd*. [2000] F.C.J. No. 4.
 8. See *e.g. City of Kamloops v. Nielsen*, [1984] 2 S.C.R. 2.

making. I will also try to account for this phenomenon and, in particular, the bifurcated and, in a sense, contradictory nature of the courts' historical (if not current) perceptions of their role in relation to the executive, on the one hand, and many tribunals, on the other. Throughout the paper, I will pay particular attention to the potential impact of the judgment of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*,⁹ a case in which the Supreme Court (*inter alia*) brought judicial review for abuse of discretion in the exercise of ministerial as well as judicial powers within the "pragmatic and functional" approach so characteristic of the review of tribunal decision-making. Finally, I will propose a theory for the appropriate posture of the courts in the policing of policy-making, a theory that takes account of the potential role of the *Canadian Charter of Rights and Freedoms* as well as other "constitutional" values in this domain.¹⁰

I. DEFINITION

For the purposes of this exercise, I include within the realm of administrative policy decisions both the taking of decisions under broad or relatively unstructured grants of statutory power or exercises of residual or prerogative power as well as the formal and informal creation of general rules or policies by statutory and prerogative authorities. By the latter I mean, first, the promulgation of subordinate legislation and other forms of statutorily-authorized policy instruments; secondly, policy statements developed without explicit statutory authority by which statutory or prerogative authorities (for either internal or external purposes) indicate how they will or are likely to exercise discretionary authority conferred on them by statute or that exists by virtue of residual prerogative power; and, thirdly, the creation or development by a statutory or prerogative authority of a policy within the framework of a particular proceeding or adjudication.

I should, however, acknowledge that the latter category may by no means be self-evident in any particular exercise of a statutory or prerogative power. Thus, if one takes *Roncarelli v. Duplessis*¹¹ as a paradigm case, it is by no means clear whether Roncarelli's licence was revoked because, within the

9. [1999] 2 S.C.R. 817.

10. I will, however, as much as possible refrain from trespassing on the territory covered by Jean-Denis Archambault in the other paper presented at the same session of the Conference in which he dealt with issues of civil liability for negligence in the policy-making domain. I will also eschew any direct consideration of accountability mechanisms other than judicial review.

11. *Supra* note 1.

framework of the particular circumstances, the Premier of Québec and the Manager of the Liquor Commission had determined as a matter of policy that all licensees who provided bail for Jehovah's Witnesses should be ineligible to hold a restaurant liquor licence. An equally, if not more plausible explanation is that they acted in concert to revoke Roncarelli's licence without any such broad policy determination and that their actions, taken under an apparently open-ended statutory discretion, amounted simply to a condemnation of Roncarelli personally with no necessary ramifications for others who had behaved similarly. To the extent, however, that under either scenario the availability of judicial review is determined by whether there are any substantive restrictions on the exercise of a broad discretionary power granted by statute, it may be of little relevance which of these two possible constructs reflects more accurately the thinking of the statutory or prerogative decision-maker.

Within the framework of policy-making as defined, my main preoccupation will be the bases on which judicial review is available under Canadian law either for the direct challenge of a particular policy decision or policy instrument or, in effect, indirectly or collaterally, in the context of a challenge to a particular decision taken by reference to that policy.

II. TRADITIONAL STANDARDS OF JUDICIAL REVIEW OF POLICY DECISIONS

Until very recently, there has, in fact, been little controversy among Canadian jurists as to the principal grounds of review that may be deployed in challenging a policy decision made by a public body. Let me set them out in short order. In reaching a policy decision or in setting policy, a public body must adhere to any explicit jurisdictional preconditions to and limits on the exercise of its power. These limitations may be constitutional or quasi-constitutional arising out of the terms of the various *Constitution Acts* (including the *Canadian Charter of Rights and Freedoms*) and superior legislation such as the *Canadian Bill of Rights*, provincial Bills of Rights, and federal and provincial Human Rights Codes. The Act creating the ability to set policy or make policy determinations may also contain explicit limits (both substantive and procedural) on the role that the legislature has assigned to the public body. Indeed, frequently, policy makers will be subject to jurisdictional constraints imposed by other ordinary statutory regimes which either operate generally or apply to the particular function being exercised.

Beyond such explicit jurisdictional constraints, the Canadian courts generally have accepted that there are other implied restrictions on the exercise

of such powers. In some instances (particularly where the policy function is being performed by a tribunal), there may be an implied obligation of procedural fairness. Substantively, those exercising such functions are obliged to act in good faith. In general, those charged with making the decision or taking the action must personally exercise the power in issue meaning that, on the one hand, they must not act under the dictation or direction of someone with no authority over the matter in question, or, on the other, delegate their powers to someone equally having no authority. Where the statute calls for the exercise of judgment in individual instances, the authority on which the discretion is conferred must not be so constrained by pre-ordained policy positions as to preclude the proper consideration of the particular matter before it; the exercise of the relevant discretion must not be fettered unduly. Proceeding from the proposition that the relevant statute will generally impose implied limits on the exercise of such powers, a person making a policy decision will also act beyond her or his authority if he or she fails to take account of relevant factors, takes account of irrelevant factors, or, more generally, acts for a purpose that is contrary to that which the statute is aimed at achieving. On occasions, of course, the nature of what is relevant, what is irrelevant, and what is a proper purpose will be explicit in the language of the statute (and will be seen as an explicit jurisdictional constraint). However, more frequently, these grounds of review are invoked on the basis of inference or implication from the overall purposes of the statute, its structure, and its language. On rare occasions, this sense of lack of consonance between the decision reached and the statutory purposes has produced judgments that the particular exercise of a discretionary power has been so unreasonable as to attract judicial sanction.¹²

In terms of the focus of this paper, the crucial elements in this description are the various implied limitations on the scope of policy-making powers or decision-making and, in particular, the obligation to take account of relevant factors, taking account of irrelevant factors, acting for improper purposes, and unreasonableness. The occasions on which these grounds of judicial review are available and the scope that the courts attribute to them will determine in very large measure the nature of the interplay between the judiciary and policy-makers

12. In order to keep this initial description simple, I have avoided at this point any mention of the controversial question as to whether Canadian law does or should recognize any other more precise limitations on the exercise of discretionary decision-making such as proportionality and consistency, and the related question as to the basis for this kind of review and, indeed, unreasonableness review. Is it a matter of implied statutory intention or are these free-standing common law justifications excludable, if at all only by way of direct legislative provision? The latter is the subject of current and at times acrimonious academic debate in the United Kingdom but at least in this context does not bear upon the theories and the arguments that I am trying to advance.

and provide the most informative guide to the extent of the courts' conception of their powers of review.

III. NON-INTERVENTIONISM

Some thirty-five years ago when I was an LL.B. student in New Zealand, we studied few Canadian cases. I do, however, recollect a Torts case involving a mink farm operation¹³ but especially *Roncarelli v. Duplessis*.¹⁴ The latter (and particularly Rand J.'s judgment) was presented in my Constitutional and Administrative Law class¹⁵ as an ideal in the judicial review of discretionary decision-making powers and as a precedent which opened up the possibility of more intense judicial supervision of the policy-making functions of government and its various agencies and emanations. More particularly, it presented a wonderful illustration of the range of grounds on which discretionary decision-making could be reviewed: the Premier of Québec had taken over the role of the Manager of the Liquor Commission and dictated illegally the cancellation of Roncarelli's restaurant liquor license. In so doing, he had also acted in bad faith or maliciously in the sense of "acting for a reason and purpose knowingly foreign to the administration".¹⁶ In taking these steps because Roncarelli had stood bail for Jehovah's Witnesses charged with offences, the Premier (and through him, the Chair) had not only taken account of irrelevant factors but they had also done so for the "alien purpose [of] punishing a person for exercising an unchallengeable right".¹⁷ In addition, the judgment raised the spectre of financial responsibility for public officials who stepped outside the ambit of their assigned functions.

Even today, *Roncarelli v. Duplessis* remains one of the shining lights of Canadian public law jurisprudence. Indeed, in the 1998 *Québec Secession*

13. I assume either or both of *Grandel v. Mason*, [1953] 1 S.C.R. 459 and *Caine Fur Farms Ltd. v. Kodolsky (c.o.b. as Capital Mink Farms)*, [1963] S.C.R. 315.

14. *Supra* note 1.

15. Taught by the Dean of the Victoria University of Wellington Faculty of Law, Dr. Colin Aikman, someone who had a profound influence in the development of the Constitution of Western Samoa as well as in the founding of the University of the South Pacific, and later New Zealand High Commissioner to India; Sir Kenneth Keith, now a justice of the New Zealand Court of Appeal; and Dr. Roger Clark, now Board of Governors Professor at the Rutgers (Camden) University School of Law.

16. *Supra* note 1 at p. 141.

17. *Ibid.* at p. 143.

Reference,¹⁸ the Supreme Court reiterated Rand J.'s identification of the rule of law as a "fundamental postulate of our constitutional structure"¹⁹ while, even more recently, in *Baker v. Canada (Minister of Citizenship & Immigration)*,²⁰ L'Heureux-Dubé J. referred again to the link that Rand J. had made between the rule of law and the need for those exercising discretionary power to do so "within a reasonable interpretation of the margin of manœuvre contemplated by the legislature".²¹ This reflects a continuing pattern of Supreme Court citation of this and other ringing declarations by Rand J. in that case.²²

Nonetheless, until the judgment in *Baker*, there had been few dramatic examples of judicial use of *Roncarelli* to justify the actual quashing of any form of exercise of discretionary power let alone one at the pure policy-making end of the spectrum of such functions.²³ Moreover, Harry Arthurs, in a recent article in the McGill Law Journal, pointed to the paucity of Canadian cases in which public officials have been found liable in damages under the *Roncarelli* principles.²⁴ In so doing, he reiterates Peter Hogg's 1989 comment to the effect that the academic commentary on the tort of abuse of power "is more voluminous than the cases".²⁵

The explanations for this are not difficult to find both within and externally to *Roncarelli v. Duplessis*. In many respects, *Roncarelli* was a highly unusual case. The conduct of Duplessis, the Premier of Québec was egregious as

18. [1998] 2 S.C.R. 217 at par. 70.

19. *Supra* note 1 at p. 142.

20. *Supra* note 9.

21. *Ibid.* par. 53.

22. Most recently in *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at p. 257, and now *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra* note 9 (both of which are discussed below).

23. In the Supreme Court of Canada, the only two examples found in which the Court even cited *Roncarelli* in striking down the exercise of a discretionary power are *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at pp. 275-276, and *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality)*, [1985] 2 S.C.R. 164 at p. 174 (both of which are discussed below).

24. H.W. Arthurs, " 'Mechanical Arts and Merchandise' : Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29 at p. 47, n. 31.

25. P.W. Hogg, *Liability of the Crown*, 2nd ed. (Toronto : Carswell, 1989) at p. 111, n. 159. Among the notable examples are *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976) 69 D.L.R. (3d) 114 (Man. C.A.); *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (though not itself establishing liability); and, just this past year, *Alberta (Minister of Public Works, Supply and Services) v. Nilsson*, [1999] 9 W.W.R. 203 (Alta. Q.B.), leave to appeal granted (1999) 181 D.L.R. (4th) 380 (Alta. C.A.).

reflected by the Court's finding that the Premier had so exceeded the bounds of his official capacities as to lose his ordinary entitlement to the benefit of the various statutory provisions aimed at protecting public officials from delictual or tortious liability. Secondly, Duplessis himself testified and, in so doing, laid the foundations for the findings that he had indeed been motivated by improper considerations and had dictated the course of action taken by the Manager of the Liquor Commission. Thirdly, while this case obviously was in the pre-Charter era, the Court was able to evaluate the decision to revoke Roncarelli's licence against principles of freedom of religion and speech and the civil right of citizens to stand bail for other citizens charged with offences. This is a theme to which I will return later. However, suffice it to say that such foundational constitutional principles or, nowadays, the rights and freedoms enshrined in the Charter or federal or provincial Bills of Rights will not always be available or relevant as yardsticks against which the courts can measure the exercise of broad discretion or the making of policy.

It is also instructive to parse Rand J.'s oft-quoted statement set out in the peroration to this paper. Note that he locates the principles that he relies upon in the context of "public regulation of this sort" suggesting that they may not be applicable in all situations involving broad discretion. Indeed, given that the function in issue in *Roncarelli* was the revocation of an occupational licence, nowadays classified as near the judicial end of the spectrum running from purely legislative action at one extreme to judicial at the other, there is some reason for suspecting that Rand's concerns were influenced significantly by this factor. This inference is reinforced by his seeming admission that judicial scrutiny on such grounds may be limited or eliminated by "express [legislative] language".

In fact, it is now quite clear in the wake of *Baker* that the scope of judicial review of broad discretionary powers, even those conferred at least nominally on Ministers of the Crown, will depend significantly on the range and nature of the various considerations that the authority will have to take into account in exercising the discretion. Thus, in *Baker*, the Court applied a relatively intrusive, intermediate reasonableness standard of review to the exercise of Ministerial power on whether or not to allow an overstayer to remain in Canada on compassionate and humanitarian grounds. In so doing, it emphasised that the power in question was characterized more accurately as one that :

...relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them.²⁶

At another point, it was asserted that this was not a “polycentric” problem.²⁷

At least, as far as broadly-based policy-making and implementation are concerned and the obvious implication that generally there will be little basis of judicial intervention or review, *Baker* is not, in fact, news. This is evident in the stark contrast between the language of Rand J.’s judgment in *Roncarelli* and at least two other important judgments of the Supreme Court of Canada, judgments which suggest quite strongly that our highest Court does not view the principles of *Roncarelli v. Duplessis* as immutable or universally applicable particularly where the policy-making component of the statutory discretion is in any way significant.

In *Thorne’s Hardware Ltd. v. The Queen*,²⁸ the applicant was challenging a federal Order in Council extending the limits of the port of St. John so as to bring within its boundaries riparian property owned by the applicant. Among the claims being made was that the Governor in Council had been motivated by the allegedly improper purpose of simply acting to expand the National Harbours Board’s revenue base. Dickson J. delivered the judgment of a unanimous Supreme Court of Canada rejecting this challenge.

While conceding that there could be review in “an egregious case” of the Governor in Council failing to observe jurisdictional limits or “other compelling grounds”,²⁹ Dickson J. observed that “[d]ecisions of the Governor in Council in matters of public convenience and necessity are final and not reviewable in legal proceedings”.³⁰ Later, in the context of an argument that the Court should review the evidential record to determine whether the Governor in Council had been motivated improperly in promulgating the Order in Council and thereby acted in bad faith, Dickson J. stated that it was “neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council”.³¹ In a seemingly approving manner, he also noted that “governments

26. *Supra* note 9 at par. 60.

27. *Ibid.* at par. 55.

28. [1983] 1 S.C.R. 106.

29. *Ibid.* at p. 111.

30. *Ibid.*

31. *Ibid.* at p. 112.

may be moved by any number of political, economic, social or partisan considerations”.³² In so doing, he emphasized that governments do not provide reasons for their decisions and that those reasons are ultimately unknowable. Notwithstanding this, he did examine the evidential record and opined that the Governor in Council obviously believed that he had reasonable grounds for promulgating the regulations while at the same time being careful to point out that the only reason for looking at the evidential record was to “show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence”.³³

The contrast with *Roncarelli* is immediately startling. In each case, the relevant statutory provision involved a very broad grant of discretion. In *Roncarelli*, the power of the Liquor Commission over licences was stated to be a matter of “absolute discretion”.³⁴ In *Thorne’s Hardware*, there was a bare, unadorned power to “determine from time to time” the limits of St. John Harbour.³⁵ Nonetheless, as opposed to *Roncarelli* (and now *Baker*), the Court in *Thorne’s Hardware* was concerned with an exercise in policy-making towards the legislative/executive end of the statutory authority spectrum. The decision was taken by a multi-member body which was not forthcoming as to the reasons for its actions at least in ways in which the Court was prepared to consider. Finally, there were no underlying constitutional rights and freedoms that the Court was willing to acknowledge as setting a limit on the exercise of such a discretion.

Subsequently, the Federal Court of Appeal was to rely upon *Thorne’s Hardware* for the further proposition that where there are both proper and improper motivations for or purposes behind the actions of the Governor in Council, there is no basis for judicial intervention; the existence of at least one proper purpose or motivation will protect any such exercise of statutory power from judicial review.³⁶ Then, in 1999, the Supreme Court in *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*³⁷ extended this proposition in the context of a municipal corporation appointing a board of inquiry under Ontario’s municipal legislation. In delivering the judgment of a once again

32. *Ibid.* at pp. 112-113.

33. *Ibid.* at p. 115.

34. *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, s. 35.

35. *National Harbours Board Act*, R.S.C. 1970, c. N-8, s. 7(2).

36. *National Anti-Poverty Organization v. Canada (Attorney General)* (1990) 60 D.L.R. (4th) 712 (F.C.A.).

37. *Supra* note 7.

unanimous Supreme Court of Canada and also relying on *Thorne's Hardware*,³⁸ Binnie J. held that the applicants for relief had no right to examine on discovery municipal councillors with a view to establishing that they had improper motives in voting for the creation of a board of inquiry. In this context, he stated that the "motives of a legislative body composed of numerous individuals are "unknowable" except by what it enacts".³⁹ It was not for a court to go behind the relevant resolution to ascertain whether any or all of the councillors voting for that resolution had been motivated by or were attempting to achieve improper purposes. In other words, provided there are no jurisdictional infirmities on the face of the text of the resolution appointing the board of inquiry, it may not matter whether all of the councillors acted on the basis of the most outrageous motivations or, put more accurately, it is not for the courts to assist the applicant in any way in an attempt to build an evidential record establishing that that was the case. Only if the information is volunteered explicitly and that information goes as far as establishing that all members of council voting for the resolution were acting in "bad faith" will there be any possibility of success on an application to enjoin the continuation of such an inquiry or, presumably, any other form of legislative or executive action.

In short, what this line of jurisprudence brings into question is the willingness of the courts to follow the path of *Roncarelli v. Duplessis* and probe the motivations or reasons for decisions taken by those with broad discretionary powers. However, also lurking in the not too distant background in these precedents is a broader sense that judicial interference with at least certain kinds of statutory or prerogative decision-making would constitute far too great an intrusion into the political arena. This is evident, for example, in Dickson J.'s statement in *Thorne's Hardware* seemingly endorsing the entitlement of the Governor in Council to be motivated by "any number of political, economic, social or partisan considerations".⁴⁰

Indeed, while there is some support for the proposition that the Supreme Court of Canada has accepted that Canada does not have a political questions doctrine limiting the courts' capacity to engage in judicial review at least in constitutional litigation,⁴¹ the weight of the evidence is now sufficient to justify

38. *Ibid.* at pp. 35-36.

39. *Ibid.* at p. 36.

40. *Supra* note 28 at pp. 112-113.

41. The clearest statement is to be found in Wilson J.'s concurring judgment in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at pp. 471-472. In the majority judgment delivered by Dickson C.J.C., he appears to be endorsing Wilson J.'s views when he states that he has "no doubt that disputes of a political and foreign policy nature may be properly

the assertion either that the Court does not in fact adhere to that position or that it involves the much more limited proposition that Canada does not have the precise form of political questions doctrine that serves as a brake on the capacity of the United States' courts to entertain constitutional challenges. Whether in the name of institutional limitations or justiciability, it is now abundantly clear that there are a number of policy-making areas into which the Supreme Court of Canada will not trespass.⁴²

Almost contemporaneously with *Roncarelli v. Duplessis*, the Court delivered judgment in *Calgary Power Ltd. v. Copithorne*.⁴³ While this case is known more today for the proposition that the Minister did not have to provide a landowner with a hearing before making an expropriation order establishing a right of way for power lines to be erected on his land, the Court was also responding to a challenge to the order based on an allegation of improper purposes. In rejecting this second limb of the action for declaratory relief, Martland J. pronounced as follows :

*His decision is as a Minister of the Crown and, therefore, a policy decision, taking into account the public interest, and for which he would be answerable only to the legislature.*⁴⁴

Of course, it might be argued that this principle is now just as questionable as the often criticized procedural fairness dimensions of the Court's judgment in that case. However, aside from the fact that its proximity in time to *Roncarelli v. Duplessis* provides further basis for scepticism as to the universal applicability of the Rand principles, the Court more recently has placed certain forms of decision-making beyond the effective reach of the courts. And, while the language used is not quite the same, the effective result is! Four examples and a nod back to some of the statements in *Thorne's Hardware* and *Consortium Developments* will suffice for present purposes.

cognizable by the courts". However, this statement appears in a section headed "Justiciability" : *ibid.*, at p. 459. Subsequently, LaForest J. (for the Court) in *Canada v. Schmidt*, [1987] 1 S.C.R. 500 at p. 524, refers to Wilson J.'s analysis but notes specifically that it has yet to be adopted or rejected by the Court.

42. For a fuller elaboration of this kind of argument, see Lorne Sossin, *Boundaries of Judicial Review : The Law of Justiciability in Canada* (Toronto : Carswell, 1999), Chapter 4.

43. [1959] S.C.R. 24.

44. *Ibid.* at p. 33.

As already noted, the judgment of Wilson J. in *Operation Dismantle v. The Queen*⁴⁵ provides the basis for the proposition that Canadian law does not have a political questions limitation at least on constitutional review.⁴⁶ It is, however, significant that her judgment was only a concurring one and the extent to which the majority supported her on this issue is ambiguous at best.⁴⁷ The same is also true of subsequent judgments in which reference is made either to her judgment or the “political questions” doctrine.⁴⁸ What is also significant in *Operation Dismantle* is the route taken by the majority disallowing an appeal from the striking out the plaintiff’s action for a declaration that the testing of United States cruise missiles in Canadian air space would constitute a violation of the right of Canadians to life, liberty and security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* because it would increase the possibility of nuclear war. In delivering that judgment, Dickson J. asserted :

*Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven.*⁴⁹

It may well be that it is unfair to read any more general principles into this statement. However, at the very least, it raises the spectre of the courts simply refusing to inquire into whether certain kinds of policy decision will or will not as a matter of fact have an impact which makes them *ultra vires*. Attacks on such decisions which are not on their face necessarily *ultra vires* may have to await the occurrence of the feared events. Of course, the unavailability of any form of preemptive attack will not always be as problematic as in the instance of possible nuclear responses. Nonetheless, what this amounts to is a considerable degree of judicial deference to the predictive capacities of policy-makers as to the impact of their policy decisions. This is a domain into which the courts may not enter.

45. *Supra* note 41.

46. *Ibid.* at pp. 471-472.

47. See the text to note 41.

48. In addition to the judgment of the Court in *Schmidt*, referred to in note 41, see also the judgment of the Court delivered by Dickson C.J.C. in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-92, and the judgment of the Court in *Reference re Québec Secession*, *supra* note 22 at p. 237.

49. *Supra* note 41 at p. 452.

It should, however, be conceded that, despite the refusal of the Supreme Court to intervene and grant relief, *Operation Dismantle* does provide at least one other positive assertion of judicial review authority in Canadian public law : as well as there being no American political questions doctrine, the courts have authority in appropriate cases to review policy decisions taken under prerogative powers.⁵⁰ There is no general principle of immunity from judicial scrutiny in this domain even though, in the particular instance, there were evidential impediments to the plaintiff's success. However, what is also clear from the jurisprudence of the Court is that this did not amount to a complete rounding of the circle as far as the reviewability of all manner of government decisions be they statute or prerogative-based. Pockets of immunity still persist.⁵¹

A primary example of this is provided by *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*.⁵² This case involved legal proceedings taken by a very frustrated Auditor General of Canada. Relying on statutory entitlements to access to information provided in the *Auditor General Act*,⁵³ he had been seeking documentation on the takeover of Petrofina by Petro-Canada. Ministers of the Crown and their officials had not responded to those requests and the Auditor General asked the Federal Court to compel them to do so. The Supreme Court of Canada rejected this claim simply on the basis that it was non-justiciable. While acknowledging that *Operation Dismantle* had established that there was no general immunity from judicial scrutiny of political questions or matters, Dickson C.J., again delivering a crucial judgment in this domain, held (speaking for a unanimous Court) that the statute establishing the office and functions of the Auditor General contemplated that Parliament, not the courts was the venue for any complaints that the Auditor General had against Ministers and government officials not living up to their statutory obligations to produce information. These were policy judgments beyond the ken of the judiciary.⁵⁴

50. *Ibid.* at p. 447 (*per* Dickson J., agreeing with Wilson J. at pp. 463-464).

51. In addition to the cases discussed below, it is now interesting to speculate on whether *Operation Dismantle's* acceptance of judicial review of prerogative decision-making would now expose to judicial review the prerogative power of the Attorney General to stay criminal proceedings or lend support to relator proceedings. More generally, I have left out of this paper the admittedly very important topic of judicial review of policy-making and implementation in the law enforcement domain.

52. *Supra* note 48.

53. S.C. 1976-77, c. 34, s. 13(1).

54. *Supra* note 48 at pp. 97-104 particularly.

In view of the Court's earlier rejection of the American political questions doctrine, it is instructive to note the terms on which Dickson C.J., quoting Wilson J.'s judgment in *Operation Dismantle*, describes an issue that is not justiciable :

[A]n issue is non-justiciable if it involves "moral and political questions which it is not within the province of the courts to assess". An inquiry into justiciability is first and foremost a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making instruments of the polity.⁵⁵

Subsequently, the concept of justiciability, as developed by the Court in both *Operation Dismantle* and *Auditor General*, was deployed (along with *Thorne's Hardware*) by the Federal Court to justify not examining the motives behind the Federal Cabinet's granting (by Order in Council) a shorter extension of time in which to report than the Somalia Inquiry believed that it needed. In delivering the judgment of the Court in *Dixon v. Canada (Governor in Council)*,⁵⁶ Marceau J.A. (footnoting the relevant portion of Dickson C.J.'s judgment in the *Auditor General* judgment) stated :

the policy considerations which motivated the Governor in Council's decision to put an end to the life of the Somalia inquiry by June 30, 1997 may have been debatable or perhaps even suspect. But, it is a debate that a court of law, properly confined to its adjudicative role, ought not to have considered.⁵⁷

Justifications such as this have little or nothing to do with evidential concerns. Rather, they are founded directly on a constitutional evaluation. This is not a task that it is appropriate for the Court to perform irrespective of whether there is an evidential basis on which it could be established that the Governor in Council was propelled by crass political motives in "closing down" the Somalia Inquiry.

The courts' position in both this and the *Auditor General* case is also one which depends not so much on a sense that the political actors are justified legally under the relevant statutory regime in acting for reasons of political expediency — to save their skins. Rather, the assertion is more in the nature of

55. *Ibid.* at pp. 90-91.

56. [1997] 3 F.C. 169 (C.A.).

57. *Ibid.* at p. 184.

one to the effect that the determination of whether that conduct is illegal and, if so, how it should be sanctioned is for another forum — Parliament itself and, ultimately, the electorate. This, indeed, gives credence to the view that Canadian law does indeed have a political questions doctrine and that “justiciability” in these cases is no more than a rose under another name.

Much more recently, this notion that there can be issues of legality that simply are not the domain of the courts and that there are judgments of government officials and elected politicians that are not appropriate for challenge by way of judicial review but in the political arena only has gained further reinforcement from *Reference re Québec Secession*.⁵⁸ Here, the Court once again talked in terms of legal duties over which there would be no judicial policing : whether any secession question or majority vote on that question had been sufficiently clear and, once there was a clear majority on a clear question, whether there had been sufficient good faith negotiations over secession by the parties so as to comply with the obligations for a successful legal secession laid down by the Court in general terms in that case. These were matters that were “subject only to political evaluation, and properly so”.⁵⁹

In sum, what emerges from this body of largely Supreme Court jurisprudence are a number of significant limitations on the role of the courts in reviewing the policy decisions of public officials. More particularly, *Roncarelli v. Duplessis* notwithstanding, these judgments make it clear that for various reasons the general rules of review for abuse of discretion do not always apply. In general, if there is an overriding theme to these limitations on the traditional scope of judicial review, it is that of institutional incapacity or limitations. However, what is also apparent is that the judgment of institutional disqualification may result from a variety of causes. The relevant legislation (as in the *Auditor General* case) may specify directly or by necessary implication that any accountability for disobeying the law is to the legislature itself, not the courts. The nature of the matters in issue may make them non-justiciable in that

58. *Supra* note 48.

59. *Ibid.* at p. 271. As Lorne Sossin has suggested (*supra* note 42 at pp. 154-157), the Court’s position on this issue is compromised or at least complicated by its earlier ruling that it was appropriate to accept the Secession Reference. Whether Québec has a right to secede was seen as a legal question which did not have sufficiently extra-legal dimensions to put it beyond the competence of the Court or to lead to an exercise of discretion not to answer the questions posed because of such factors. However, on the other specified issues, while they had a legal content, it was not for the courts to deal with them. They could not be disentangled from the extra-legal dimensions. That surely opens up the question of how precisely a court is to discern when the mix of legal and extra-legal questions is so weighted in favour of the extra-legal components as to “disqualify” the courts from involvement.

they involve questions of politics and morality (as in the *Québec Secession Reference* and *Dixon*), judgment on which is the proper domain of the legislature, the electorate, and perhaps other communities. The wrongs alleged may also be non-justiciable in the more limited sense that they involve inquiries that are beyond the normal capacities of the adversarial system of adjudication : determining the purposes for which a multi-member body (such as Cabinet or a municipal council) acted (*Thorne's Hardware* and *Consortium Developments*) or predicting whether a particular exercise of a policy-making capacity will have an illegal impact (*Operation Dismantle*).

There is also a sense in which certain legislative conferrals of discretionary power or policy-making roles are so broad as not to admit of any substantive limitations on their exercise save as might arise explicitly out of the *Constitution Acts* and the *Canadian Charter of Rights and Freedoms*. The legislative grant of power is so unrestricted as to preempt any judicial review on substantive grounds even where the policy decision is taken for the basest of motives — self preservation rather than any considered judgment as to the possible demands of broader public interest save in the sense that the public interest is always better served by the perpetuation of the power of your political party rather than another.

Indeed, as exemplified by the judgment of Lesage J. in *Black v. Canada (Prime Minister)*,⁶⁰ the likelihood of judicial abnegation of any control is even more likely where the discretion under review, *Operation Dismantle* notwithstanding, is one founded on the residual royal prerogative. In striking out Black's action against the Prime Minister for declaratory and monetary relief based on abuse of power or misfeasance as well as negligence, Lesage J. accepted that for these purposes the Prime Minister's actions in effectively blocking an appointment to the House of Lords were non-justiciable.⁶¹ As matters involving "the conduct of foreign affairs and grant of honours pursuant to crown prerogative", they were beyond the ken of the courts.⁶² It mattered not what motivated the Prime Minister. Even if as alleged, he had acted because of pique at the way in which he had been portrayed in Black's newspaper, it was not for the court to inquire into the reasons.⁶³

60. [2000] O.J. No. 784 (Ont.S.C.).

61. In terms of the earlier discussion on whether Canada has a "political questions" doctrine, it is also significant that Lesage J. treated this particular issue as non-justiciable precisely because it was a political question. See *e.g.* par. 26.

62. *Ibid.* at par. 34.

63. *Ibid.* at par. 35.

In so doing, Lesage J. also quoted⁶⁴ from a judgment of Lord Roskill in the House of Lords to the effect that this kind of decision came within a wide range of prerogative powers which were immune from any form of judicial review save presumably as to their continued existence as prerogative powers and their outer limits :

64. *Ibid.* at par. 22.

*Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.*⁶⁵

To the extent that the judgment of the Supreme Court of Canada in *Operation Dismantle* might seem to suggest that such a broad immunity did not exist in Canada at least in relation to foreign affairs, Lesage J. went on to state that, as opposed to the situation in *Black*, *Operation Dismantle* involved a Charter-based attack on the exercise of foreign policy powers.⁶⁶

For the most part, of course, the policy-making functions in issue in these cases involve the primary political actors in our polity, the legislature and the Cabinet. At one level, it may be particularly disturbing that the courts have eschewed any substantial check on the way in which they exercise authority and, in particular, the powers delegated to the Cabinet by the legislature. Thus, as already suggested in the Introduction, it could be argued that it is in this context that the judiciary can play its most important role against the unbridled use of executive power. Later in this paper, I will return to examine the validity of that contention. However, for present purposes, the fact that the limitations on judicial review of policy-making described so far have arisen in that context does raise questions as to whether the same reticence has been the case with policy-making involving other public officials and agencies. Just because the courts are willing to defer to the judgment of political actors who are subject to other forms of constraint and accountability does not mean necessarily that the same posture should apply in the case of other forms of delegated policy roles. Indeed, *Roncarelli v. Duplessis* might still be read as supporting the proposition that the actions of individual political actors (including the Premier of a province) are subject to much closer judicial scrutiny than collectivities such as the Cabinet. On the other hand, the decision-maker in *Calgary Power v. Copithorne* was a single Minister of the Crown and, in *Consortium Developments*, a municipality. That suggests that the principles of deference or respect for “political” judgment may have a much wider reach.

65. *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H.L., Eng.) at p. 418 (per Lord Roskill).

66. *Supra* note 60 at par. 27.

IV. MUNICIPALITIES — NO LONGER A SPECIAL CASE?

Traditionally, the courts accorded municipalities rather less room for independent action than they have in the cases of central government and its agencies. Nowhere was this more apparent than in the judgment of the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver (City)*.⁶⁷ Here, the Court by a majority of five to four struck down municipal resolutions which had the effect of excluding Shell Canada from doing business with the City of Vancouver. This action was based on the continued trade between Shell Canada and South Africa still at that point living under the regime of apartheid.

In striking down the resolution, the majority held that it had been passed for an impermissible purpose and also involved unlawful discrimination. Sopinka J., in delivering the judgment of the majority, commenced his analysis of the legal issues by holding that the procurement policies and decisions of municipalities were not immune from public law judicial review.⁶⁸ This was not contested by the minority⁶⁹ and, as with the ruling of the Court in *Operation Dismantle* on the reviewability of the exercise of residual prerogative powers, this aspect of the judgment resolved what had been a matter of considerable uncertainty and division of opinion in Canadian Public Law.

In dealing with the argument that the municipality had acted for an impermissible purpose, Sopinka J. then started with the proposition that municipalities as creatures of statute have only those powers that are expressly conferred on them by statute or that arise by necessary implication from an explicit statutory grant of power.⁷⁰ While there is nothing necessarily problematic about that proposition, it foreshadowed an analysis of the matter in terms of jurisdiction or *vires* as opposed to discretion or policy. In stark contrast, the minority judgment delivered by McLachlin J. made a plea for a generous reading of general powers conferred on municipalities and, in so doing, argued that they should be accommodated within the mainstream of deferential, patent unreasonableness review characteristic of the courts' scrutiny of other often unelected administrative agencies.⁷¹ At the end of the day, this difference in the setting up of the problem was to prove decisive in the outcome of the arguments on the merits. Indeed, as McLachlin J. herself pointed out, that will frequently be

67. [1994] 1 S.C.R. 231.

68. *Ibid.* at pp. 272-275.

69. *Ibid.* at pp. 249-251.

70. *Ibid.* at p. 275.

71. *Ibid.* at pp. 244-248.

the case. In so doing, she cautioned against the tendency to hide assessments of a policy's reasonableness under the guise of *ultra vires* analysis.⁷²

What is also interesting about Sopinka J.'s evaluation of the impermissible purpose argument is that he finds justification for the striking down of the resolution in the terms of the various recitals.⁷³ In particular, the aspiration expressed in those recitals to have some influence on the conduct of Shell and, ultimately, on the apartheid regime itself condemned the policy as an *ultra vires* exercise of power. It established that the Council had the object or intention of influencing events elsewhere and the resolution was therefore not passed for municipal purposes or in terms of the relevant legislative provisions for "the good rule and government of the City".

However, it may well be that in subsequent jurisprudence involving the discretionary and policy-making powers of municipalities, the McLachlin philosophy has come to prevail. Thus, there are very clear echoes of her judgment in *Shell* in that of Binnie J. in *Consortium Developments*, particularly in his assertion of the problems of attributing a purpose to a multi-member agency such as a municipal council. This may, in effect, marginalize *Shell* or confine its application to those cases where the Council collectively articulates its purposes in promulgating a particular by-law or resolution, this generally meaning that the reviewing court will not be called upon to probe beneath the terms of the resolution in issue. In contrast, if *Consortium Developments* is taken seriously, it may be read as suggesting that the Courts will have no basis for intervening unless the improper motivation can be discerned clearly from the face of the relevant policy or legislative instrument.

Nonetheless, when viewed in tandem these two judgments still leave over a number of troubling questions. Does this mean that there would have been no review if there had been no recitals in *Shell*? Alternatively, would the majority have declined to intervene if the recitals had been couched in different terminology and the purpose of the resolution expressed in terms of it being better for the overall welfare of the residents of Vancouver if their municipal government did not do business with a regime that had become the pariah of the international community? Is it all a matter of form (as suggested by *Consortium Developments*) or should the courts be able to probe beneath the surface? And, if that probe reveals a rather more holistic explanation of the resolution, should the recitals still be completely determinative?

72. *Ibid.* at p. 258.

73. *Ibid.* at p. 277.

Of equal, if not greater significance in the potential marginalization of *Shell* is the even more recent judgment of the Court in *Nanaimo (City) v. Rascal Trucking Ltd.*⁷⁴ This involved a challenge to two resolutions passed by the City, the first declaring a pile of soil to be a nuisance in terms of a particular provision in the British Columbia *Municipal Act* and the second ordering the lessee of the land to remove it. Among the issues considered by the Court was the appropriate standard of review. To the extent that the challenge to the first resolution involved a question as to the scope or legal meaning of the relevant provision in the Act and, more particularly, whether a pile of soil was capable of coming within the expression “building, structure or erection of any kind”, Major J., delivering the judgment of a unanimous Court, held that the municipality would be held to a standard of correctness. This was not an issue on which any expertise could be expected. Rather, on a pragmatic and functional analysis, it was a question for the courts. In contrast, once the municipality had dealt correctly with that first question, the court should interfere with the municipality’s exercise of its discretionary “remedial” powers only if that action was “patently unreasonable”.

Of course, *Rascal Trucking Ltd.* did not involve a wrongful purpose challenge. Moreover, at one point in his judgment, Major J. stated that it was a different case from *Shell* in that the power in issue was, in contrast to *Shell*, an adjudicative, not a policy-making function.⁷⁵ Nonetheless, there seems little reason (particularly when *Baker* is also taken into account) to believe that the Court will not resort to a pragmatic and functional analysis when confronted in any future case with the standard of review to be applied to the policy-making functions of municipalities. In fact, later in the course of the judgment, Major J. seems to have given up in his attempt to salvage or distinguish the Sopinka judgment in *Shell*. Thus, right towards the end in justification of patent unreasonableness scrutiny of the municipality’s order,⁷⁶ he quotes the following passage from McLachlin J.’s judgment in *Shell* :

Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be

74. [2000] S.C.J. No. 14 (Q.L.) (March 2, 2000).

75. *Ibid.* at par. 27-28.

76. *Ibid.* at par. 36.

prepared to adopt the “benevolent construction” which this court referred to in [R. v. Greenbaum⁷⁷], and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.⁷⁸

Another reflection of this changing disposition towards municipalities can be found in those judgments of the Court where the majority accepted that in order to make out an allegation of bias against councillors engaged in the rezoning of land, the applicant is put to a far more onerous test than is normally the case in adjudicative settings. Establishing a reasonable apprehension of bias will not do. Rather, the applicant must demonstrate the impugned councillor or councillors had a “totally closed mind” in the sense of not being “amenable to persuasion”.⁷⁹

In sum, while *Shell* gives strong indications of the perpetuation of a judicial policy supporting greater intervention and less deference in the domain of municipalities than is the case with other statutory authorities exercising policy-making functions, it now begins to seem as though the Court is repudiating that kind of approach. In particular, its willingness in *Rascal Trucking Ltd.* to evaluate the powers of municipalities by reference to standard pragmatic and functional considerations bespeaks an era in which municipal policy-making may have as much of a claim to respect from the courts as is the case generally with the exercise of such roles.

77. [1993] 1 S.C.R. 674.

78. *Supra* note 67 at p. 244.

79. See *Old St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1120 and *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213.

V. JUDICIAL SCRUTINY OF POLICY-MAKING AND IMPLEMENTATION BY TRIBUNALS

Support for the proposition that judicial deference to policy-making and implementation is now the standard norm in Canadian judicial review law can also be found in the modern⁸⁰ case law involving broad discretions conferred on administrative tribunals. In propounding the theory of judicial deference towards the judgments of administrative tribunals operating in their home territory, Dickson J., in the two foundational judgments of the 1970's, *Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses' Association*⁸¹ and *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Commission*,⁸² incorporated explicitly into the list of errors that give rise to "patent unreasonableness" the so-called *Anisminic* categorization of defects that would cause an administrative agency to commit nullifying error. Drawn from the judgment of Lord Reid in the House of Lords in *Anisminic v. Foreign Compensation Commission*,⁸³ this species of error included acting for an improper purpose, taking account of irrelevant factors, failing to take account of relevant factors, and making a determination that was so unreasonable that no reasonable public authority could have ever reached it.⁸⁴

80. For a very useful view from "the inside" on the evolution of the Supreme Court's general attitude to administrative tribunals, see The Honourable Madam Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts and Maintaining the Rule of Law (1999) 12 Can. J. Admin. L. & P. 171. While the article, as its title indicates, is about tribunals and not executive power more generally, there are, however, points in it where the author assimilates the two particularly for the purposes of describing the "bad old days" when the Court, still operating under the sway of Diceyan concepts of the Rule of Law, was highly interventionist. Thus, at page 175, the following statement occurs :

"Until recently, courts strictly adhered to Professor Dicey's model which charged them with the duty of ensuring that neither the executive nor its agents assumed 'legislative' powers. Indeed, the argument went, to abandon those powers to the executive or its tribunals would threaten the essential freedom of the liberal individual."

While this statement can be sustained in the case of many administrative tribunals, I would argue that it is difficult to posit that as the theory that the Canadian courts were applying during the same period in their scrutiny of executive power. Deference to executive judgment was always a characteristic of the Canadian judiciary. In that sense, the courts were schizophrenic in the role they played. I return to this concern later in the text of the paper.

81. [1975] 1 S.C.R. 382.

82. [1979] 2 S.C.R. 227.

83. [1969] 2 A.C. 147 (H.L., Eng.).

84. *Supra* note 81 at p. 389 and *supra* note 82 at p. 237 (quoting himself in *Nipawin District Staff Nurses*).

While there are undoubtedly difficulties reconciling the seemingly open-ended nature of the errors on this list with Dickson J.'s general theory of deference, what has become clear in the twenty years since *New Brunswick Liquor* is that the Supreme Court has never deployed this statement in order, contrary to the spirit of a theory of judicial deference, to expose the decisions of administrative tribunals to wide-ranging scrutiny of their more discretionary determinations. Rather, the true state of judicial review in this domain can be seen reflected in the Court's recent jurisprudence involving broad grants of discretion to administrative tribunals in the fashioning of appropriate remedial responses : the exercise of such a grant of power will be reviewed only in the event of patent unreasonableness.⁸⁵

Moreover, the way out of the dilemma of how to make a fit of the *Anisminic* list with patent unreasonableness review is perhaps still indicated best by the judgment of the Ontario Court of Appeal in *Sheehan v. Ontario (Criminal Injuries Compensation Board)*,⁸⁶ a case decided a year after *Nipawin District Staff Nurses*, though without reference to it.

Sheehan involved a challenge to the Board's denial of compensation to an inmate of a federal penitentiary who had been injured in a riot. It was alleged that the Board, in refusing to provide compensation for these criminal acts, had taken into account irrelevant factors or considerations and, indeed, had produced a result that would make it impossible for an inmate of a federal penitentiary to ever make a successful claim on this provincial scheme. While it is arguable that there was much more to the substance of this argument than the Ontario Court of Appeal, reversing the Divisional Court,⁸⁷ gave credit for, what is significant for present purposes are the terms in which the Court of Appeal defined the appropriate scope for intervention in such cases. The Board was given a "discretion", the exercise of which was expressed to be "final and conclusive for all purposes". Additionally, it had authority to "have regard to all such circumstances as it considers relevant".⁸⁸ In short, the legislative indicators were all ones that pointed to extensive discretion on the part of the Board in the dispensing of what was a limited budget for compensating the victims of crime.

85. See e.g. *Royal Oak Mines Inc. v. Canada Labour Relations Board*, [1996] 1 S.C.R. 369 and *Canadian Union of Public Employees, Local 301 v. Montréal (City)*, [1997] 1 S.C.R. 793.

86. (1975), 52 D.L.R. (3d) 728 (Ont. C.A.).

87. (1973), 37 D.L.R. (3d) 336 (Ont. Div. Ct.).

88. *Compensation for Victims of Crime Act*, S.O. 1976, c. 57, ss. 3(1), 5.

After noting that the Act made the Board the judge of what was to be relevant,⁸⁹ Kelly J.A., delivering the judgment of the Court, then acknowledged that :
*even such a broad conferring of the power to act on what the Board considers relevant would not extend to authorize the Board to make relevant a consideration which is patently irrelevant.*⁹⁰

The effect of this is, of course, to provide a basis for blending the *Anisminic* list with the patent unreasonableness standard of review associated with judicial deference to the administrative process. Only where factors that are taken into account are patently irrelevant will there be judicial review in the face of such a broad discretion. One would also expect the converse situation to be covered by the same kind of analysis : only failures to take account of factors that are patently or immediately necessary for a proper exercise of a discretion would justify the label “patent unreasonableness” in the exercise of a discretion.

For many years, the approach suggested by Kelly J.A.’s judgment lay fallow in that it attracted no explicit attention from the Supreme Court of Canada. However, it did become apparent in recent years that the Supreme Court was much more likely to attribute a greater degree of deference to tribunals to the extent that they had a policy role. Thus, in *Pezim v. British Columbia (Superintendent of Brokers)*,⁹¹ Iacobucci J., in justifying judicial deference to the British Columbia Securities Commission notwithstanding the existence of a right of appeal to the regular courts, asserted that “Where a tribunal plays a role in policy development, a higher degree of judicial deference is warranted with respect to its interpretation of the law.”⁹²

He reiterated and expanded on this theme in delivering the judgment of the Court in *Canada (Director of Investigation and Research) v. Southam Inc.*,⁹³ while, even more recently and conversely, the lack of a significant policy development role was one of the justifications provided by the Supreme Court for a greater level of intervention in determinations of law by the Immigration and Refugee Board. In delivering the judgment of the Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,⁹⁴ Bastarache J. stated :

89. *Supra* note 86 at pp. 732-733.

90. *Ibid.* at p. 733.

91. [1994] 2 S.C.R. 557.

92. *Ibid.* at p. 596.

93. [1997] 1 S.C.R. 748.

94. [1998] 1 S.C.R. 982.

Also of significance are the range of administrative responses, the fact that an administrative commission plays a “protective role” vis-à-vis the investing public, and that it plays a role in policy development; Pezim, supra, at p.596. That legal principles are vague, open-textured, or involve a “multi-factored balancing test” may also militate in favour of a lower standard of review (Southam, at par. 44). These considerations are all specific articulations of the broad principle of “polycentricity” well known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies.⁹⁵

While the recent judgment in *Baker v. Canada (Minister of Citizenship and Immigration)*⁹⁶ concerns the discretionary powers of a Minister of the Crown exercised through line officials, as already noted, it reemphasises specifically the difference between decision-making which has as its specific target the rights, privileges and interests of a defined individual and discretionary powers with a much greater or more obvious polycentric dimension. Even more importantly for present purposes is the Court’s endorsement of the kind of approach to the grounds for review of broad discretion articulated by Kelly J.A. in *Sheehan*.

In delivering the majority judgment, L’Heureux-Dubé J. specifically takes on the task left unfinished by Dickson J. in the formulation of his theory of deference in *New Brunswick Liquor*: the reconciliation of the theory of review for abuse of discretion with the theory of review for jurisdictional infirmities and error of law, normally associated with tribunal or agency decision-making.⁹⁷ Her solution is to bring review for abuse of discretionary powers under the umbrella of the “pragmatic and functional” approach to discerning the appropriate scope for judicial review which is now standard fare in the case of adjudicative tribunals.⁹⁸

In so doing, she makes it clear that particularly when broad discretionary powers are at stake, courts will have to include within their “pragmatic and functional” analytic framework not only the nature of the matters which are the concern of the discretionary power but also the person on whom it is conferred, the language of the conferral, and the presence of privative clauses or other indicators of the need for judicial restraint. Within that context, the court is then to make a judgment as to whether the appropriate standard of review should be

95. *Ibid.* at par. 36.

96. *Supra* note 9.

97. *Ibid.* at par. 51-56.

98. *Ibid.* at par. 55-56 particularly.

that of incorrectness, unreasonableness, or patent unreasonableness, these being the three possibilities acknowledged by the Supreme Court up to that point in the domain of tribunal decision-making. Moreover, when the scope of judicial review is confined to one of the two deferential standards, the court is advised to “give substantial leeway to the discretionary decision-maker in determining the ‘proper purposes’ or ‘relevant considerations’ involved in making a given determination.”⁹⁹

Clearly, what this opens up is the possibility of the kind of scrutiny that characterized Kelly J.A.’s analysis in *Sheehan*: was it patently unreasonable for the tribunal or other discretionary decision-maker to take these factors into account in reaching this decision and, indeed, in appropriate cases, was it simply unreasonable or incorrect for the tribunal or other discretionary decision-maker to have regard to those considerations?

VI. JUDICIAL FACILITATION OF POLICY-MAKING ROLES

The Canadian courts have also acted in other ways to facilitate the policy-making roles of certain administrative tribunals. In *International Woodworkers of America, Local 2-69 v. Consolidated Bathurst Packaging Co.*,¹⁰⁰ reiterated though qualified in *Tremblay v. Québec (Commission des Affaires Sociales)*,¹⁰¹ the Supreme Court approved the practice of some agencies which sit in panels of meeting as a collectivity to discuss broader policy issues that have arisen in the context of an individual adjudication. Much earlier, and this has been endorsed on many subsequent occasions, the Court also approved the issuance, even without express statutory authority, of non-binding statements or

99. *Ibid.* at par. 56. Hudson Janisch is sceptical as to the wisdom of regarding the “proper purposes” of legislation as ever being anything other than a “correctness”, non-deferential question. Nonetheless, in situations where the purposes are not defined and the subject matter of the legislation complex, there is at least an argument that those involved in its day to day implementation may have insights as to its purposes that are not within the normal purview of the reviewing court. However, a countervailing consideration, which gives support to Janisch’s concerns is that of executive self-interest, a theme that I develop in much greater detail in my earlier piece, “Judicial Deference to Executive Decision-Making”, *supra* note 5, at pp. 164-175. As applied to wrongful purposes judicial review, this would at least indicate the need for a “hard look” in situations where policy makers are relying on an expanded and, particularly, changing conception of the breadth of the purposes of a statute in justification of new policies.

100. [1990] 1 S.C.R. 282.

101. [1992] 1 S.C.R. 552.

instruments indicating their likely position on certain policy issues.¹⁰² Indeed, in *Capital Cities Communications v. Canada (Canadian Radio-Television & Telecommunications Commission)*,¹⁰³ Laskin C.J. positively encouraged agencies to engage in such exercises and implicitly promised support for the later application of such policies in individual cases at least when they had been fashioned in consultation with affected constituencies :

*In my opinion, having regard to the embracive objects committed to the Commission under s. 15 of the Act, [...], it was eminently proper that it lay down guidelines from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under a regulatory regime as is set up by the Broadcasting Act. Although one could mature as a result of a succession of applications, there is merit in making it known in advance.*¹⁰⁴

This capacity is not one restricted to tribunals but applies across the range of statutory and prerogative bodies charged with policy development and implementation.

However, as Iacobucci J. took care to point out in *Pezim*, such statements must not “be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment”.¹⁰⁵ In short, the relevant decision-maker must preserve a reserve clause willingness in the context of individual cases either to modify the policy generally or not apply it in the particular instance. Subsequently, the immutability of a policy statement issued by the Ontario Securities Commission without express statutory authority led to successful judicial review in the Ontario Court of Appeal in *Ainsley Financial Corp. v. Ontario (Securities Commission)*.¹⁰⁶

102. *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141 at pp. 170-171 (per Laskin C.J.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; *Pezim*, *supra* note 91 at p. 596.

103. *Ibid.*

104. *Ibid.* at p. 171.

105. *Supra* note 91 at p. 596.

106. (1995), 21 O.R. (3d) 105 (C.A.).

Nevertheless, even there, the indicators provided by Doherty J.A., delivering the judgment of the Court, are sufficiently precise as to provide tribunals and agencies wanting to avoid this pitfall with a clear road map for doing so and this notwithstanding Doherty J.A.'s pronouncement that there "is no bright line which always separates a guideline from a mandatory provision having the effect of law".¹⁰⁷ That road map is made even clearer in the earlier Supreme Court of Canada judgment in *Maple Lodge Farms v. Canada*.¹⁰⁸ The expression "a permit will normally be issued" was said to be sufficient to avoid the characterization of a set of Ministerial guidelines on the availability of import licences as an unlawful fettering of discretion.¹⁰⁹ Indeed, as in the foundation case of *Capital Cities Communications v. Canada (Canadian Radio-Television & Telecommunications Commission)*,¹¹⁰ the Court, in a judgment delivered by McIntyre J., indicated its clear approval of policy-making in this form :

*There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and state general requirements for the granting of import permits. It will be helpful to applicants for permits to know in general terms what the policy and practice of the Minister will be.*¹¹¹

The jurisprudence sanctioning the practice of developing guidelines as to how discretion was likely to be exercised largely emerged from cases in which the attack was on the decision-maker's adherence to the policy in the particular case and the disappointed applicant was alleging an improper fettering of discretion. However, there is another side to the fettering coin. The maintaining of a reserve clause willingness to change one's mind not only protects the decision-maker in most instances in which the policy is actually applied in a particular case but it also provides a justification for the decision-maker not applying or changing the policy. More specifically, the room for the operation of any principle of estoppel in public law has been extremely limited : those charged with the exercise of statutory discretion cannot be prevented from changing their minds on issues of policy and thereby defeating the substantive claims of those who have relied upon earlier substantive representations of either a personal or general variety as in a policy statement. In other words, statutory

107. *Ibid.* at p. 110.

108. *Supra* note 102.

109. *Ibid.* at p. 6.

110. *Supra* note 102.

111. *Ibid.* at pp. 6-7.

authorities have traditionally had the best of both worlds in this domain : the ability to set constraints on the way in which they will generally deal with particular applications without being subject to an allegation of unlawful fettering, on the one hand, and, on the other, the right to depart from those constraints in any case that they choose irrespective of any reliance that has been placed upon them by affected constituencies.

However, the Québec Court of Appeal, in a case now on appeal to the Supreme Court of Canada, has recently raised serious questions about the continued acceptability of the principle that statutory authorities are not subject to any form of the doctrine of promissory estoppel in the exercise of their powers. In *Centre Hospitalier Mont-Sinaï c. Ministère de la Santé et des Services Sociaux*,¹¹² the Court was confronted by a situation in which assurances had been given to a hospital that if it relocated its physical operations, the Minister would issue it with a permit that reflected the way in which it had *de facto* functioned for many years, a reality that did not correspond with its actual licence from the government. Acting on this assurance, the hospital, *inter alia*, engaged in a fund-raising campaign and eventually was able to relocate in the manner agreed upon. At that point, there was a new Minister with different priorities and the promised licence was refused. Offended by this change of position on the part of the Minister, the hospital applied for a writ of *mandamus*.

The hospital made its case for *mandamus* primarily on two grounds : the recently emerged doctrine of legitimate expectation and the principles of equitable or promissory estoppel. However, by the time the case reached the Québec Court of Appeal, it had become clear that, under Canadian law, the doctrine of legitimate expectation could not be used to generate substantive entitlements. In two cases,¹¹³ the Supreme Court of Canada had ruled that legitimate expectation could do no more than generate procedural entitlements and that was not good enough for the hospital. In delivering the judgment of the Court of Appeal, the presiding judge recognized the authority of those two decisions. Nonetheless, he went on to hold that nothing that had been said by the Supreme Court of Canada precluded the use of the principles of promissory estoppel to reach the same end. Thereafter, on the basis of a generous interpretation of the private law dimensions of that doctrine and, in particular, on the use of it as a sword to assert positive rights, he applied to the facts at hand and held that the Minister was estopped from going back on the assurances of his

112. (1998), 9 Admin. L.R. (3d) 161 (Qué. C.A.).

113. *Old St. Boniface Residents Association v. Winnipeg (City)*, *supra* note 79 and *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525.

predecessor. He therefore issued an order of *mandamus* compelling the issuance of the licence.

Should this novel use of the principles of estoppel in a public law setting hold up on appeal in the Supreme Court of Canada, a very important practical constraint will have been imposed on the exercise of discretionary powers. Even so, there are serious questions as to whether it could be applied to hold a statutory decision-maker to anything other than very specific kinds of assurance given to a particular individual. In other words, there have to be considerable doubts as to whether or not it could ever reach the kinds of non-binding policy guidelines that the courts have sanctioned as a legitimate activity of various statutory decision-makers.

Baker, however, does suggest a way in which such guidelines can be deployed to advantage by someone who is alleging abuse of discretion. In determining in that instance that there had been an abuse of discretion by reason of a failure to give sufficient weight to important considerations, the Supreme Court paid heed to the informal Ministerial guidelines issued to front line immigration officers as to how they were to exercise discretion on behalf of the Minister.¹¹⁴ Along with the Court's perception of the general purposes of the Act and the particular provisions and the terms of a ratified but as yet unimplemented treaty, the guidelines provided the evaluative framework within which L'Heureux-Dubé J. dealt with the abuse of discretion arguments.

VII. PROCEDURAL FAIRNESS AND POLICY-MAKING

As noted earlier, in his judgment in *Capital Cities Communications*, upholding the entitlement of the CRTC to engage in the development of policy statements, Laskin C.J. referred with approval to the fact that the policy in issue in that particular case had been forged on the basis of consultations with affected constituencies.¹¹⁵ However, that has not led to a situation where the courts now require those engaged in policy-making exercises to adhere to the common law principles of natural justice or procedural fairness.

That this was the position historically is clear from the judgment of the Supreme Court of Canada in *Calgary Power v. Copithorne*.¹¹⁶ There, as noted

114. *Supra* note 9 at par. 72-75.

115. *Supra* note 102 at p. 171.

116. *Supra* note 43.

already, the Court held that, despite the fact that an interest in land was in issue, a Minister of the Crown was not obliged to give the owner of a farm a hearing before authorizing the expropriation of a right of way over his land for the location of power lines as part of an electricity supply project. According to Martland J., this was an administrative decision in which the Minister was to be “guided by his own views as to the policy which in the circumstances he ought to pursue.”¹¹⁷

It might have been expected that this situation would change dramatically in the wake of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* in which the Supreme Court held for the first time that there was a duty of procedural fairness that attached to the exercise of purely administrative functions. No longer were such common law entitlements confined to the domain of judicial and quasi-judicial decision-making.¹¹⁸ Nonetheless, this has not led to any significant extension of the requirements of procedural fairness into the broad policy-making domain.

While *Nicholson* lowered the procedural fairness threshold bar considerably, in judgments such as *Board of Education of the Indian Head School Division N^o. 19 of Saskatchewan v. Knight*,¹¹⁹ the Supreme Court made it clear that there was, nonetheless, still a threshold. According to L’Heureux-Dubé J., procedural fairness demands could not normally be made with respect to decisions of a “legislative and general nature”; they were confined to “acts of a more specific and administrative nature”.¹²⁰ Indeed, almost immediately after *Nicholson*, Dickson J. (as he then was) had expressed similar sentiments in *Martineau v. Matsqui Inmate Disciplinary Board* : “A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection.”¹²¹

This kind of thinking has had a particular impact in the Federal Court. Thus, in 1984, in *Re Groupe des éleveurs de volailles de l’Est de l’Ontario and Chicken Marketing Agency*,¹²² Strayer J. ruled that procedural fairness was not a requirement of statutory authorities engaged in either formal or informal rule-

117. *Ibid.* at p. 34.

118. [1979] 1 S.C.R. 311.

119. [1990] 1 S.C.R. 653.

120. *Ibid.* at p. 670.

121. [1980] 1 S.C.R. 602 at p.628 He also repeated the statement in *Homex Realty and Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 at p. 1051.

122. (1984), 14 D.L.R. (4th) 151 (F.C., T.D.).

making. More recently, in *Canadian Association of Regulated Importers v. Canada (Attorney General)*, reversing a strongly argued judgment of Reed J., the Federal Court of Appeal held that a relatively small group of importers of hatching chicks and eggs had no procedural fairness claims before the Minister changed the quota distribution system in a way that would have a potentially drastic effect on their business.¹²³ According to Linden J.A., delivering the judgment of the Court,

*the exercise is essentially a legislative or policy matter with which the courts do not normally interfere. Any remedy that would be available would be political, not legal. It might have been a considerate thing for the Minister to give the respondents notice and an opportunity to be heard, but he was not required to do so.*¹²⁴

In so ruling, Linden J.A. noted that where Parliament wanted such a “notice and comment” process to be available to affected constituencies, it had made it clear in the empowering legislation. Thus, absent either such a specific provision or a general “notice and comment” requirement, as in Québec and Québec alone,¹²⁵ rule-making or broad policy-making does not attract procedural fairness protections.

In the provincial superior courts, the position may not be quite so cut and dry to the extent that some courts have been prepared to hold that at least certain kinds of policy-making do come within the realm of procedural fairness protection. Thus, for example, in both Ontario¹²⁶ and Newfoundland,¹²⁷ it has been held that school-closing decisions attract a duty of procedural fairness. However, in order to reach this conclusion, the Ontario Divisional Court had to struggle to distinguish a decision to close a school from a decision to reassign students within a school district. This was necessitated by the fact that earlier the Ontario Court of Appeal had ruled that affected parents had no procedural fairness entitlements at common law in the latter situation.¹²⁸ What this, of course, suggests is that there is a need to differentiate for these purposes between

123. [1994] 2 F.C. 247 (C.A.), rev’g [1993] 3 F.C. 199 (T.D.).

124. *Ibid.* at p. 259.

125. By virtue of the *Regulations Act*, S.Q. 1986, c. 22, sections 8-14.

126. *Bezaire v. Windsor Roman Catholic Separate School Board* (1992), 9 O.R. (3d) 737 (Div. Ct.).

127. *Elliott v. Burin Peninsula School District No. 7* (1998), 161 D.L.R. (4th) 112 (Nfld. C.A.).

128. *Vanderkloet v. Leeds and Grenville (County Board of Education)* (1985), 20 D.L.R. (4th) 738 (Ont. C.A.).

two categories of policy-making. If the number of people affected by the decision is too great or their interest are too diverse or perhaps where the considerations at stake are many and diffuse, there will be no obligations of procedural fairness. However, if the policy-making exercise affects relatively few in similar ways and where the relevant considerations are limited, there may be an obligation to have some sort of a hearing. Where the relevant line is to be drawn remains a highly problematic exercise.

For a time, it seemed possible the doctrine of legitimate expectation might have a role to play in providing a basis for procedural fairness arguments in situations where policy makers had actually promised participatory rights or had previously always accorded them albeit voluntarily. After all, the way in which that doctrine was expressed in the foundation Canadian decision was in terms of “an opportunity to make representations in circumstances in which there otherwise would be no such opportunity.”¹²⁹

To the extent that hearings were not otherwise required in policy-making exercises, this indeed seemed ideal terrain for the doctrine to be deployed.

However, as noted already, the hopes of those who welcomed this opportunity were apparently dashed when in the second case on legitimate expectation to reach the Supreme Court of Canada, *Reference re Canada Assistance Plan*,¹³⁰ Sopinka J., in elaborating on the reach of the Canadian doctrine, explained that it did not apply to “legislative functions” and, for good measure, defined¹³¹ legislative by reference to the statement of Dickson J. in *Martineau* quoted above. For these purposes “legislative” included “a purely ministerial decision on pure grounds of public policy”.

By denying the doctrine the capacity to do work where that work was needed most, the domain of policy-making, the Court may well have in effect gutted the doctrine’s potential in Canadian law. Indeed, in at least some subsequent judgments, the words of Sopinka J. have been applied literally to deny the doctrine’s application to policy making exercises. Thus, in *Sunshine Coast Parents for French v. Sunshine Coast (School District No. 46)*,¹³² among the reasons provided by Spencer J. for rejecting a legitimate expectation

129. *Old St. Boniface Residents Association v. Winnipeg (City)*, *supra* note 79 at p. 1204 (*per* Sopinka J.).

130. *Supra* note 113.

131. *Ibid.* at p. 558.

132. (1990), 44 Admin. L.R. 252 (B.C.S.C.).

argument was that the decision in question, the elimination of a French immersion programme was a policy decision to which the doctrine could not apply.

Since *Canada Assistance Plan*, the Court has not had another opportunity to consider the meaning to be attributed to Sopinka J.'s comments. Indeed, the only subsequent judgment in which a legitimate expectation argument has surfaced is *Baker* and there it was being deployed (unsuccessfully) to try to secure a higher level of procedural protection that would normally be the case. However, if that is not to be the only circumstance in which the doctrine has any bite in Canadian law, the Court will be forced to interpret Sopinka J.'s statements restrictively and narrowly. And, indeed, there is some basis for that. The situation in *Canada Assistance Plan* did not involve a typical departmental or ministerial policy making decision; the concern was with the application of the doctrine to the process of preparing and introducing legislation in Parliament. Moreover, it is clear from the reach of the United Kingdom doctrine of legitimate expectation from which the Canadian position is derived that there the doctrine does reach policy-making. Indeed, at another point in his judgment, Sopinka J. cites with apparent approval English jurisprudence in which the doctrine was applied to policy-making exercises, as, for example, in the case of *R. v. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators' Association*,¹³³ where what was in issue was whether the Corporation should change its policy and issue more taxi licences.

There is, therefore, room for treating Sopinka J.'s judgment on this point as ambivalent and resolving the ambiguity in favour of a broader doctrine which would have the potential to reach a broad range of policy-making exercises. However, until the Supreme Court itself takes that step, confusion will probably continue to reign. Moreover, it also needs to be recognized that, even conceding the theoretical application of the doctrine of legitimate expectation to policy-making still necessitates those using the doctrine to meet all the other requirements for its application. Almost of necessity, that will not happen all that often. In short, even a liberal interpretation of the reach of the legitimate expectation doctrine will leave Canadian law a long way short of general application of the principles of procedural fairness to policy-making exercises.

VIII. JUDICIAL REVIEW OF IMPLEMENTATION OF THE “COMMON SENSE REVOLUTION”

133. [1972] 2 Q.B. 299 (C.A.).

Perhaps nowhere is the reluctance of the Canadian courts to become involved in judicial review of the policy-making and implementation process exemplified better than in the recent series of cases in which challenges were launched against various aspects of the Conservative government of Ontario's so-called "Common Sense Revolution" programme.

Because the stakes were so high and because those affected primarily were "public" institutions fighting for their continued existence and having the budgetary capacity to engage in such litigation, challenges came thick and fast and on all sorts of grounds. Featuring prominently were arguments based on the *Constitution Act, 1867*, the *Charter of Rights and Freedoms*, as well as common law principles of judicial review of administrative action. As might be expected with a political agenda that the government wanted implemented quickly and decisively, procedural issues ranging from common law natural justice and procedural fairness through legitimate expectation to bias all surfaced at various points. In addition, at the level of merits review, they were linked frequently with challenges based on irrelevant considerations, failure to take account of relevant considerations, improper purposes, and, on occasion, patent irrationality. However, the vast majority of these challenges were unsuccessful and decisively so.

There have been five exceptions. Four of the successful applications (three raising essentially the same question) involved straight statutory interpretation, *ultra vires* challenges.¹³⁴ In only one case, did the court base its intervention on the merits of the exercise of the discretionary power under challenge and then only because the applicants were able to mount a successful constitutional argument.¹³⁵ In addition, Archie Campbell J., in an *obiter dictum*, questioned seriously the constitutionality of the use of King Henry VIII

134. *Scarborough (City) v. Ontario (Attorney General)* (1997), 32 O.R. (3d) 526 (O.C., G.D.) (appointment of transitional trustees for municipalities about to be amalgamated in advance of passage of relevant legislation held *ultra vires*); *Murphy v. Ontario (Attorney General)* (1996), 28 O.R. (3d) 220 (O.C., G.D.); *Hewat v. Ontario* (1998), 37 O.R. (3d) 161 (C.A.), and *Dewar v. Ontario* (1998), 37 O.R. 170 (C.A.) (each involving *ultra vires* dismissal of members of boards and tribunals).

135. *Lalonde v. Ontario (Commission de restructuration des services de santé)* (1999), 181 D.L.R. (4th) 263 (Ont. Div. Ct.), involving the closing of the province's only francophone hospital. I will deal more specifically with this judgment, now on appeal, below. Suffice it to say that other forms of constitutional challenge to various aspects of the government's programmes were unsuccessful, as for example, in the attempt to secure some kind of constitutional recognition for the status of municipalities about to be merged: *East York (Borough) v. Ontario (Attorney General)* (1997), 153 D.L.R. (4th) 299 (O.C.J., G.D.).

clauses.¹³⁶ Those instances aside, faced with statutes creating extremely broad discretions, the courts of Ontario were completely resistant to attempts to persuade them to enter the so-called merits of policy-making and implementation under the guise of legal principle and conventional grounds of review.¹³⁷

The most commonly litigated aspect of the government's agenda for change has been hospital restructuring. Primary responsibility for this task fell on the Health Services Restructuring Commission. It had very broad powers to order the closure or amalgamation of any public hospital in the province as well as the giving of other directions. The only express statutory constraint on its powers was "the public interest". This broad policy development role notwithstanding, various attempts were made to set aside aspects of the Commission's work on the basis that it had taken account of irrelevant factors, failed to take account of relevant factors, or made decisions or orders that were patently unreasonable. All failed. Two examples will suffice to provide a flavour of the Ontario courts' approach to these challenges.

Setting the scene for this set of cases is the judgment of the Divisional Court in *Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission)*.¹³⁸ There, in one of the quotations with which this paper commences and elsewhere in the unanimous judgment delivered by Archie Campbell J., the Court emphasises the breadth of the Commission's powers and the correspondingly limited role of the courts in reviewing its activities :

The court's role is very limited in these cases. The court has no power to inquire into the rights and wrongs of hospital restructuring laws and policies, the wisdom or folly of decisions to close particular hospitals, or decisions to direct particular hospital governance structures. It is not for the court to agree or disagree with the decision of the Commission. The law provides no right of appeal from the Commission to the court. The court has no power to review the

136. *Ontario Public School Boards' Association v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (O.C., G.D.) at pp. 362-365.

137. In addition to the hospital cases discussed below, *Masse v. Ontario (Minister of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Div. Ct.) (leave to appeal denied [1996] O.J. N^o. 1526 (C.A.) (Q.L.)) provides another graphic example. Here, the applicants argued unsuccessfully that the province's reduction of welfare payments was motivated improperly in that its principal concern was that of debt reduction contrary to the overriding purpose of the relevant legislation to provide assistance to those "in need". For a variety of reasons, the three judge court rejected this Administrative Law argument but what was common to the judgments was a commitment not to second guess the policy decisions of the government as reflected in the exercise of regulation-making powers of the Lieutenant Governor in Council.

138. *Supra* note 2.

*merits of the Commission's decisions. The only role of the court is to decide whether the Commission acted according to the law in arriving at its decision.*¹³⁹

Moreover, the opportunities left open by the concept of “act[ing] according to the law” proved both there and in the other cases to be quite limited. Review of legality did not include any significant measure of judicial evaluation of the relevance or irrelevance of various factors to the decision-making process. The breadth of the legislative language was seen as precluding that possibility. Thus, in *Pembroke Civic Hospital* itself, the Divisional Court gave very short shrift to the assertion that the Commission had taken into account improperly and given effect to in the particular instance representations as to the place of and need for denominational hospitals in the province of Ontario. There was nothing improper about considering these factors in making an order closing a non-denominational hospital in Pembroke and leaving in place a denominational hospital.

Seemingly, a rather more promising case¹⁴⁰ arose in the instance of the reverse scenario in the City of Kingston. There, the Commission had ordered that a denominational hospital cease operations on the basis of a scheme for the continuation of the City's principal non-denominational hospital and the establishing of a major new health care facility on the site of an existing psychiatric hospital, all to be under the governance of the board of the existing non-denominational hospital. Critics of this order pointed not just to the cost of the scheme contemplated by the Commission and the absence of any guarantee that it would ever be funded but also to the fact that there were major *Planning Act*¹⁴¹ impediments to its implementation. Ordering the religious order to cease operating its hospital and to surrender its operations and services to the existing major non-denominational hospital's governing board was seen by many as a classic case of getting the cart before the horse.

These concerns also translated into potential legal arguments. Aside from the general assertion that to make an order of this kind was patently unreasonable, it was also contended that the Commission was either under a specific statutory mandate to have regard to planning matters in the formulation of its orders or, alternatively, that, at the very least, these were highly relevant considerations which should have been taken into account. To close a hospital

139. *Ibid.* at p. 44.

140. *Russell v. Ontario (Health Services Restructuring Commission)* (1998), 114 O.A.C. 280 (Div. Ct.), aff'd (1999), 175 D.L.R. (4th) 185 (Ont. C.A.), leave to appeal denied [1999] S.C.C.A. N^o. 395 (Q.L.).

141. R.S.O. 1990, c. P. 13.

and transfer its operations to another hospital before it was known whether the basis for the making of such an order could ever be effectuated constituted a clear abuse of the Board's admittedly very broad discretion.

However, here too, the courts were completely unsympathetic. In both the Divisional Court¹⁴² and the Court of Appeal,¹⁴³ the assertion that the *Planning Act* obliged the Commission to take account of planning matters was rejected on the basis of a statutory interpretation argument to the effect that the Commission was not a body with any authority to affect planning matters. Because of this, it was simply a matter of choice for the Commission as to whether or not it paid any regard to planning considerations in the making of its orders.¹⁴⁴ Moreover, according to the Court of Appeal :

*[G]iven our view that planning considerations are not the concern of the HSRC, problems of implementation cannot render patently absurd the direction to proceed with the restructuring that the HSRC considers necessary to maintain an effective health care system.*¹⁴⁵

The Court (echoing the Divisional Court¹⁴⁶) went on to emphasise that, if problems arose subsequently and, in particular, Ontario Municipal Board approvals were not obtained, adjustments or variations could be made to the Commission's order. The Commission was not obliged to ensure that all details of its scheme were or would be put in place before making an order to close a hospital.¹⁴⁷

This judgment, perhaps more than any other, exemplifies the extreme reluctance of the Ontario courts to play any supervisory role over bodies on which the legislature has conferred broad policy-making mandates. After all, to the extent that the Commission's order in this instance was predicated on the viability of its grand scheme for the restructuring of health services in the recently expanded City of Kingston, there is something logically suspect about ordering the closure of an important, existing facility before it is clear that that scheme is indeed feasible. Moreover, the mere fact that the Commission or its successor has the power to revise or modify its orders when faced with planning

142. *Supra* note 140, 114 O.A.C. at par. 37-39.

143. *Ibid.* at par. 9-12.

144. *Ibid.* at par. 12.

145. *Ibid.* at par. 13.

146. *Supra* note 140, 114 O.A.C. at par. 24 particularly.

147. *Supra* note 140 at par. 11 and 14.

or other impediments to implementation may be of little or no practical use to the religious order if, in the meantime, it has ceased to operate its hospital and its management and service functions have been transferred to another governing body.

What is also significant about this series of cases is the degree of judicial respect for the government's choice of policy-making instrument. The Health Services Restructuring Commission was established to fill the role that would previously have been exercised by the Minister. However, this creation of an arms length body with the resulting diminution in normal levels and channels of political accountability did not have any consequences at all in terms of subjection to judicial scrutiny or review. Rather, the courts allowed the legislative conferring of extremely broad discretion to be given full play.

IX. SPECIAL INTERESTS AND CONSTITUTIONAL VALUES — EXCEPTIONS TO THE OVERALL PATTERN

To this point, the thrust of this paper has been to the effect that the Canadian courts across a range of situations and for varying reasons have been singularly unwilling to interfere with policy-making and policy-based decisions by public bodies. Deference in various guises is even more evident in this domain than it is in that of administrative tribunals charged with the adjudication of rights-based claims and the determination of questions of law. There are, however, occasions on which the courts are more interventionist in their policing of discretionary powers. For the most part, this heightened scrutiny is most likely to occur in contexts where the court regards the interests at stake as ones that have been valued by the common law or that have "constitutional" dimensions to them.

Thus, as noted already, In *Roncarelli v. Duplessis*,¹⁴⁸ the intrusion of more general constitutional values was obviously a critical factor in Rand J.'s willingness to brand the basis for the withdrawal of Roncarelli's licence as improper. Explicitly, the actions of the Premier and the Chair of the Liquor Commission represented an unwarranted sanction for the exercise of what was a civil right. As is also evident from Rand J.'s other judgments affecting the civil rights of Jehovah's Witnesses,¹⁴⁹ the overall impact of the activities of the Québec government on their practice of their religion as well as their right to

148. *Supra* note 1.

149. *Saumur v. Québec (City)*, [1953] 2 S.C.R. 299; *Boucher v. R.*, [1951] S.C.R. 265; *Switzman v. Elbling*, [1957] S.C.R. 285.

participate in democratic life was a factor in his willingness to rein in the exercise of discretion in this case.

Indeed, in an earlier Rand judgment, *Smith & Rhuland Ltd. v. The Queen*,¹⁵⁰ “constitutional” values also had a direct impact on the decision to intervene. In this instance, the Nova Scotia Labour Relations Board had refused a union’s application for certification as the bargaining of a group of employees on the basis that the union was under the dominance of a Communist secretary-treasurer. Notwithstanding the open-ended discretion of the Board as to whether or not to grant certification, Rand J. found this to be an irrelevant consideration. In so doing, he stated :

*There is no law in this country against the holding of such views nor of being a member of a group or party supporting them. This man is eligible for election or appointment to the highest political offices in the province; on what ground can it be said that the legislature of which he might be a member has empowered the Board, in effect, to exclude him from a labour union? or to exclude a labour union from the benefits of the statute because it avails itself, in legitimate activities, of his abilities?*¹⁵¹

Rand J. himself then proceeded to provide the answer to this almost rhetorical question. The actions of the Board would be justified only if it could be established on the evidence that the union rather than seeking certification for the benefit of its members was doing so with the intention of destroying “the very power from which it seeks its privileges”.¹⁵²

In the days before the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, the ascription of constitutional or even plain “common law” values as needing protection from the actions of the State was, of course, not an easy exercise. Much has been written of the so-called implied Bill of Rights derived principally from the terms of the Preamble to the *Constitution Act, 1867*, a theory of which Rand J. was the most prominent apostle.¹⁵³ That gave rise to judgments in various contexts based on conceptions of fundamental freedoms, mainly involving or seen as promoting democratic values such as

150. [1953] 2 S.C.R. 95.

151. *Ibid.* at p. 98.

152. *Ibid.* at p. 99.

153. See e.g. Peter W. Hogg, *Constitutional Law of Canada*, Loose-leaf edition (Scarborough : Carswell, 1992 (updated 1997)) at ch. 31.4(c).

freedom of the press,¹⁵⁴ speech,¹⁵⁵ and political action,¹⁵⁶ and also extending on occasion to religion.¹⁵⁷ However, there was much controversy as to which freedoms actually qualified for some degree of recognition as constitutional categories as evidenced by the Court's consideration and rejection of freedom of assembly.¹⁵⁸ Moreover, on other occasions, other allegedly fundamental values were brought to bear as justifying judicial intervention in the exercise of discretionary powers.

Indeed, in *Roncarelli* itself,¹⁵⁹ Rand J. also placed much emphasis on the freedom to pursue an avocation as an important value which the courts should be protecting in their policing of executive action and that consideration has also been significant in other litigation particularly in the context of municipal occupational licensing.¹⁶⁰ Not surprisingly, constitutional conceptions of the sanctity of property rights have also played a role from time to time in providing a justification for judicial intervention.

Here, the municipal arena is one where examples can be found such as the judgment of Wilson J. in *Oakwood Developments Ltd. v. Rural Municipality of St. François Xavier*.¹⁶¹ After emphasising the whole regime of subdivision approval was an interference with common law property rights,¹⁶² she went on to consider whether the Municipality had failed to take account of relevant considerations in refusing subdivision approval on the basis of concerns about possible flooding. The developer had argued that the very taking into account of the potential for flooding was in itself a ground for intervention on the basis of having regard to an irrelevant consideration. While rejecting this argument,¹⁶³ Wilson J. did, however, accept that the municipality was obliged to take into account and evaluate properly the potential for corrective action to eliminate or

154. *Reference re Alberta Statutes*, [1938] S.C.R. 100.

155. *E.g. Boucher v. R.*, *supra* note 149.

156. *Ibid.*

157. *E.g. Saumur v. Québec (City)*, *supra* note 149; *Switzman v. Elbling*, *supra* note 149.

158. *Canada (Attorney General) v. Dupond*, [1978] 2 S.C.R. 770.

159. *Supra* note 1 at pp. 139-140.

160. See *e.g. R. v. Sharma*, [1993] 1 S.C.R. 650; *R. v. Greenbaum*, *supra* note 77.

161. [1985] 2 S.C.R. 164.

162. *Ibid.* at p. 169.

163. *Ibid.* at p. 174.

reduce the possibility of that harm. As it had not done so, the municipality had not exercised its discretion in accordance with proper principles.¹⁶⁴

There are, of course, major problems with this mode of analysis. At one level, there is the matter of choosing among the various candidates for recognition as possessing transcendent constitutional or common law values. On what principles should such a choice be made and, assuming some sort of ranking is possible, how should the weight the courts attribute to the values in question depend upon where in the “constitutional” or “common law” pecking order the particular value is slotted? At a more pragmatic level, the very act of characterizing occupational interests and interests in land as having some claim to recognition as principles to be given weight in the judicial scrutiny of policy-making or implementation has the impact of claiming for the courts potentially broad review powers whenever a discretion has any impact on either one of those interests. Moreover, while neither of these interests achieved explicit constitutional recognition in the *Canadian Charter of Rights and Freedoms*, this problem of weighting has not disappeared; it has merely assumed new dimensions. Are occupational and landed interests part of the penumbra of any of the explicit rights and freedoms contained in the Charter and, even if they are not, does their pre-Charter status continue to provide them with some claim to recognition in the judicial evaluation of the extent of discretionary powers and the conditions on which they must be exercised?

What has, however, become clear is that, even in the era of the Charter, the concept of underlying constitutional values still has a role to play in the development of Canadian law in general and the control of policy-making functions in particular. Indeed, it is of some significance that the whole idea of an implied Bill of Rights resurfaced recently albeit in a context not strictly relevant to the focus of this paper. This was in the judgment of Lamer C.J.C. in *Reference re Remuneration of Judges of Provincial Court of Prince Edward Island*,¹⁶⁵ where he suggested that one basis for a constitutional guarantee of independence for provincially-appointed judges could be the Preamble to the *Constitution Act, 1867* and its expression of the desire of the founding provinces to have a “Constitution similar in principle to that of the United Kingdom.” In so doing, he made approving reference to a number of the older authorities in which the relevant judges had derived the existence of an implied Bill of Rights from the same source.¹⁶⁶

164. *Ibid.* at pp. 175-176.

165. [1997] 3 S.C.R. 3.

166. *Ibid.* at p. 75.

Of even greater moment, however, may be the terms of the Court's advisory opinion in *Reference re Secession of Québec*.¹⁶⁷ In its identification of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities as the four organizing principles behind the Canadian Constitution, the Court has opened up the possibility for the assertion of those values as limits on the exercise of broad, discretionary or policy-making powers.

Already the arguments are being made and, indeed, it was one such argument that captured the attention of the Ontario Divisional Court and led to the most dramatic loss that the Conservative Government has so far suffered in defence of its "Common Sense Revolution" programme. This was in *Lalonde v. Ontario (Commission de restructuration des services de santé)*.¹⁶⁸ While not convinced by any arguments based on section 15 of the Charter or straight Administrative Law grounds, the Court held that the decision to order the closing of the Montfort Hospital should be quashed and remitted on the basis that in taking that decision the Commission had failed to take account of

*the broader institutional role played by Hôpital Montfort as a truly francophone centre, necessary to promote and enhance the Franco-Ontarian identity as a cultural/linguistic minority in Ontario, and to protect that culture from assimilation.*¹⁶⁹

In so doing, it had ignored an "independent principle underlying our constitution", the protection of respect for minority rights.

Now, *Baker*¹⁷⁰ has added still further potentially far-reaching dimensions to this daunting task of determining which values or interests are worthy of heightened respect in the judicial evaluation of the exercise of policy-making powers. First, the judgment settles what has been a matter of considerable controversy for some time : the principles of International Law, including the terms of ratified but as yet unimplemented treaties, can be relevant to the exercise of discretionary decision-making powers.¹⁷¹ Of course, as with the *Charter of Rights and Freedoms* and the explicit provisions of the various other *Constitution Acts*, there is at least a concrete dimension to such sources. Far more problematic is the judgment's incorporation into the list of potentially restricting

167. *Supra* note 22.

168. *Supra* note 135.

169. *Ibid.* at par. 107.

170. *Supra* note 9.

171. *Ibid.* at par. 69-71.

considerations “the fundamental values of Canadian society”.¹⁷² What precisely that term embraces beyond the norms recognized in already existing sources of control (such as the Charter, the common law, and the principles of the Rule of Law) is very difficult to grasp particularly given the ever-increasing diversity of Canada’s population at the start of the new millennium.¹⁷³

It may, of course, be no more than another way of referring to the underlying constitutional values recently articulated by the Court in *Reference re Secession of Québec*. However, if the intention had been so restricted, the Court would surely have used the same terminology. This is confirmed by the interests that the Court did identify in branding unreasonable the exercise of Ministerial discretion. One factor leading to this conclusion was the failure of the actual decision-makers to have sufficient regard to the diverse nature of Canadian society and to be especially sensitive in situations where diversity interests were at stake.¹⁷⁴ The Court also stated that “[c]hildren’s rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.”

To the extent that considerations of diversity can be linked to the protection of minorities, one of the four principles identified in *Reference re Québec Secession*, that may have come within the reach of the four underlying constitutional values. However, the interests of children as a “fundamental value of Canadian society” comes from other sources and those listed by the Court do not include the Charter or any other formal constitutional instrument. What other values count remains to be seen.

X. THE IMPACT OF THE CHARTER

In this domain, the advent of the Charter has at least given legitimacy to, indeed made an imperative of judicial measurement of the exercise of policy-making and policy implementation roles against the explicit rights and freedoms which the Charter enshrines. If the exercise of a discretionary power infringes

172. *Ibid.* at par. 56.

173. Of course, perhaps this factor in itself might be seen as providing at least one concrete manifestation of the “fundamental values of Canadian society”, the need to recognize diversity. Indeed, there are strong hints of this in that part of L’Heureux-Dubé J.’s judgment in *Baker* where she deals with an allegation of a reasonable apprehension of bias. In sustaining this argument (at par. 47), she proclaims that decisions taken by public bodies “require a recognition of diversity, an understanding of others, and an openness to difference”.

174. *Supra* note 9 at par. 47.

Charter rights and freedoms, that exercise of power will be struck down unless the state can justify the infringement by reference to section 1.

*Slaight Communications Inc. v. Davidson*¹⁷⁵ continues to provide an excellent factual example as well as the Supreme Court's articulation of the appropriate approach to take towards applications for judicial review founded on this basis. There, the Court held that aspects of a remedial order made by an adjudicator under the *Canada Labour Code*¹⁷⁶ infringed the employer's freedom of speech in that they required an employer to write a particular form of reference for and to refrain from saying anything else about an employee who had been dismissed unfairly save as permitted by the adjudicator's order.¹⁷⁷ However, this exercise of discretion was found to be justified by reference to section 1 of the Charter.¹⁷⁸

Aside from the fact that the majority engaged in the then standard *R. v. Oakes*¹⁷⁹ analysis in applying section 1 to the order under challenge, the judgment is significant for its clarification of two subsidiary dimensions of the place of section 1 in Charter adjudication in general and the evaluation of exercises of discretionary powers in particular.

First, in what was couched deliberately as *obiter dictum*, Dickson C.J.,¹⁸⁰ disagreeing with his successor, Lamer J. (as he then was)¹⁸¹, suggested that, if the exercise of a statutory discretion infringing Charter rights and freedoms could pass muster by reference to section 1, there was thereafter little or no possibility of review on the administrative law basis that it was, nonetheless, patently unreasonable. Subsequently, the Court was to adopt this as its considered position in *Ross v. New Brunswick School District, No. 15*.¹⁸²

175. [1989] 1 S.C.R. 1038.

176. R.S.C. 1970, c. L-1, s. 61.5(9)(e).

177. Dickson C.J.C., delivering the judgment of the majority, accepted that both aspects of the order infringed the employer's freedom of speech but that each could be justified by reference to section 1. In so doing (at p.1050), he endorsed Lamer J.'s analysis of the positive portion of the order but disagreed with Lamer J. to the extent that he was not willing to sustain the negative aspect of the order.

178. *Ibid.* at pp. 1050-1057.

179. [1986] 1 S.C.R. 103.

180. *Supra* note 175 at pp. 1048-1050.

181. *Ibid.* at pp. 1075-1078.

182. [1996] 1 S.C.R. 825 at pp. 850-851.

Secondly, in so far as the remedial provision of the Act under which the challenged order had been made contained no specific language which could be said to amount to a “limit prescribed by law”,¹⁸³ it became clear from that point onwards that those words in section 1 did not involve a requirement that any exercise of discretion by a governmental authority which infringed a Charter right or freedom had to be based on specific legislative language limiting expressly that Charter right or freedom before section 1 could be invoked. “[P]rescribed by law” no longer represented a requirement of legislative deliberation before violations of the Charter could be sustained by the courts. Indeed, traditional or existing limitations arising from the common law were not a necessary surrogate for specific legislative prescription.¹⁸⁴ Rather, in the case of broadly-based, legislatively-conferred discretions, the extent of the discretion was in and of itself the requisite legislative prescription of or limitation on Charter rights and freedoms. In short, the term was denuded of any content.

This proposition was also confirmed in the context of cases in which the challenge was to the legislative provision on which an order had been based as opposed to a straight attack on the order itself. The mere fact that a legislatively-conferred power could be exercised in such a way as to violate Charter rights and freedoms did not in and of itself give rise to invalidity of the relevant provision in the empowering statute.

Thus, in *R. v. Jones*,¹⁸⁵ the fact that an official in the Ministry of Education might exercise a discretionary power on whether to allow home education in such a way as to infringe a parent’s liberty interests or freedom of religion was not sufficient in and of itself to invalidate the relevant provision. La Forest J., delivering the principal judgment of the majority of the Court, emphasised the practical need to confer discretion on someone to make judgments on such questions¹⁸⁶ and also stressed the capacity of traditional judicial review to police the exercise of such discretions with the scope of that judicial review encompassing not only arbitrary conduct but also decisions which interfered unduly with the Charter rights and freedoms of parents.¹⁸⁷ He noted as well the impossibility of giving “precise definition” to the legislative standard by

183. *Supra* note 175 at pp.1080-1081 (*per* Lamer J.), approved by Dickson C.J.C. for the majority at p. 1048.

184. As in *Hunter v. Southam*, [1984] 2 S.C.R. 145.

185. [1986] 2 S.C.R. 284. See also *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

186. *Ibid.* at pp. 303-304.

187. *Ibid.* at p. 303 and p .307.

which an application for home schooling was to be considered “efficient education” :¹⁸⁸

*While some guidelines could probably be spelled out, in many if not all aspects, simply requiring efficient instruction may, from a practical standpoint be as precise a standard as the nature of the subject matter will allow; in any event, such a standard in this context is not unreasonable.*¹⁸⁹

Nevertheless, as exemplified by a limited but nonetheless significant body of jurisprudence, the Charter may act as a brake upon the very conferral of certain kinds of discretion and policy-making roles. Structuring has in some instances become an imperative; relevant factors or considerations as well as purposes may need to be prescribed by the legislature if judicial striking down is to be avoided.

Two judgments in particular exemplify the demands that the Charter may place on legislatures to structure discretions when fundamental rights and freedoms are at stake. First, the British Columbia Court of Appeal in *Wilson v. British Columbia (Medical Services Commission)*¹⁹⁰ struck down a medical practitioner registration scheme affecting the “liberty” interest of doctors on the basis that the scheme allowed for too much discretion. Aside from the fact that it did not provide sufficient procedural safeguards for doctors applying for a number which would entitle them to bill the Commission for the servicing of patients, the legislative regime “is based on the application of vague and uncertain criteria, which combined with areas of uncontrolled discretion, leaves substantial scope for arbitrary conduct.”¹⁹¹

Moreover, in contrast to *Jones*, the Court rejected an argument that the normal processes of judicial review could be used to police the exercise of the relevant discretion. It was “so procedurally flawed that it cannot stand”.¹⁹²

188. *Ibid.* at p. 306.

189. *Ibid.*

190. (1988), 53 D.L.R. (4th) 171 (B.C.C.A.).

191. *Ibid.* at p. 196.

192. *Ibid.* at p. 198.

In the same year, in the Supreme Court of Canada, a similar fate befell the therapeutic abortion provisions in the *Criminal Code*. In *R. v. Morgentaler*,¹⁹³ the Court held that these provisions infringed the rights of women under section 7 of the Charter. Among the bases for this conclusion was the failure of Parliament to confine the discretion of therapeutic abortion committees by defining with sufficient specificity what constituted a sufficient threat to the “health” of a woman to justify an abortion. This was far too imprecise to amount to an adequate legal standard when “life, liberty and security of the person” were at stake.¹⁹⁴ Indeed, parallels to this kind of analysis can also be found in cases where offences are tested for conformity with section 7 and the “principles of fundamental justice” by reference to a standard of vagueness.¹⁹⁵

Obviously, what is problematic about the jurisprudence just described is knowing when the courts will be prepared to apply Charter analysis to strike down the very legislative conferral of discretion as opposed to leaving any Charter challenges to individual exercises of power. Clearly, the mere fact that a legislatively-conferred discretion can be exercised in such a way as to infringe Charter rights and freedoms will not call into question the validity of that discretion or require that it be structured with sufficient regard to the rights and freedoms that might be affected by its exercise.

What is, however, distinct about *Wilson* and *Morgentaler* as opposed to *Jones* is the fact that, in each of those cases, where structuring was held to be mandated by the Charter, the very subject matter of the discretion was the Charter right or freedom that the litigants were asserting. Of necessity, any exercise of the discretion “traded in” or affected Charter rights or freedoms. By way of contrast, in *Jones*, it was only some exercises of the discretion that could affect the Charter rights and freedoms on which Jones was relying. This then might provide one factor or indicator of where the possibility of striking down of the provision conferring the discretion opens up.

Thereafter, of course, the questions that will be raised are themselves complex. There will be some discretionary powers which will not survive Charter scrutiny even if they are confined and structured. Whether within the framework of the relevant Charter provision or an attempted section 1 justification, they may simply limit too extensively the protected right or freedom. On other occasions, the structuring and confining of the discretion will save the provision in question.

193. [1988] 1 S.C.R. 30.

194. *Ibid.* at p. 69.

195. See e.g. *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

By defining relevant terms with precision, limiting the extent to which the discretion can be exercised, and providing appropriate processes for the exercise of that discretion, the legislature may avoid a characterization of the relevant provision as a deprivation of a Charter right or freedom or provide at least part of the basis for a section 1 justification.

XI. THE IMPACT OF BAKER

Throughout the course of this paper, I have made frequent reference to the judgment of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*.¹⁹⁶ Indeed, there is no doubt that it will have a very significant impact on some aspects of the judicial review of discretionary decision-making. As already described, it brings review for abuse of discretion within the theoretical framework of the “pragmatic and functional” approach to this point associated generally with error of law and jurisdiction review as opposed to abuse of discretion review. It also adds to the list of considerations or factors that must be taken into account by the courts in the evaluation of the exercises of discretionary power. Now, as outlined already, the terms of ratified but as yet unimplemented treaties, the contents of ministerial guidelines on the exercise of particular discretions, and, most tantalisingly, “the fundamental values of Canadian society” take their place alongside explicit constitutional norms, the principles of administrative law, the rule of law, and the Charter as sources external to the relevant statute which may be called in aid of controlling and policing the exercise of discretionary power.¹⁹⁷

However, it would almost certainly be a mistake to treat *Baker* as increasing necessarily in any significant way the extent to which Canadian courts should or will scrutinize the policy development or formulation functions of statutory or prerogative authorities. First, it must be emphasised once again that the context in which *Baker* arose was that of a regime which had as its focus the consideration of an application by a specific individual. Indeed, as already noted, L’Heureux-Dubé J., in delivering the judgment of the Court, took great care to make it clear that this was not a “polycentric” policy-making function that was in issue.¹⁹⁸ It involved “the rights and interests of an individual in relation to the

196. *Supra* note 9.

197. *Ibid.* at par. 56.

198. *Ibid.* at par. 55.

government, rather than balancing the interests of various constituencies and mediating between them.”¹⁹⁹

In expanding the boundaries of the “pragmatic and functional” analysis on the basis of which the scope of judicial review of administrative action is determined, the Court also emphasised the importance of heeding the terms in which the discretion was created as well as the character of the holder of the power and any likely degree of expertise in relation to the matters in question.²⁰⁰ Indeed, on the first of these considerations, the Court,²⁰¹ citing *Brown and Evans*, *Judicial Review of Administrative Action in Canada*, acknowledged the existence of discretionary powers “where the decision-maker is constrained only by the purposes and objects of the legislation.”²⁰²

All this obviously points in the direction of the continuation of very constrained review in the instance of broad policy-making functions and especially those conferred on political actors in open-ended or unstructured subjective terms.²⁰³ Further force is given to this argument by the Court’s emphasis that deference in this arena will involve deference to the decision-maker’s conception of the proper purposes of and considerations relevant to the exercise of statutory power.²⁰⁴ Indeed, in such instances, it is highly unlikely that the courts will ever review the exercise of discretion by reference to a standard of incorrectness or unreasonableness *simpliciter*. Moreover, while review on the basis of *Wednesbury* unreasonableness²⁰⁵ as such may now have disappeared

199. *Ibid.* at par. 60.

200. *Ibid.* at par. 55-56.

201. *Ibid.* at par. 54.

202. (Toronto : Canvasback Publishing, 1998) (Loose leaf) at pp. 14-47.

203. I should, however, concede that, to the extent that the Court gives ratified but unimplemented treaties status in the delineation of the boundaries of statutory discretion, it may be possible to argue in some contexts that the Court is opening the door to indirect review of an otherwise highly discretionary executive power : the decision on whether or not to prepare and introduce legislation. If for whatever reason the government of the day has decided not to implement legislatively the terms of a treaty which Canada has ratified, the utilization anyway of the terms of that treaty in the interpretation of existing legislation and the confining of broad discretions may in some cases amount to judicial review of the decision not to legislate. In some respects, this is the thinking behind the partial dissent of Iacobucci and Cory JJ. in *Baker* itself.

204. *Supra* note 9 at par. 56.

205. For Lord Greene M.R., the catchall category which subsequently came to be named “*Wednesbury* unreasonableness” was “something so absurd that no sensible person could ever dream that it lay within the powers of the authority” or “a conclusion so unreasonable that no reasonable authority could ever have come to it” : *Associated Provincial Picture Houses Ltd.*

from the rubric of Canadian judicial review law, its replacement in the domain of such discretions is not some more generous conception of intervention but, almost invariably, the patent unreasonableness standard which to this point has proved so tough a hurdle to negotiate in challenges to the decisions of administrative tribunals.

XII. ACCOUNTING FOR THE CANADIAN POSITION

Speculation as to the reasons behind the posture of the Canadian courts towards policy-making and implementation is a highly problematic exercise. However, there are some factors which have probably had a significant impact in sustaining what has always been a deferential approach to the judicial review of policy-making particularly by the political arms of central government.

In my view, one very important starting point is the historic unwillingness of the Canadian courts to recognize any constitutional constraints on legislative delegation of authority to the executive branch of government.²⁰⁶ The failure of attempts to establish any kind of anti-delegation doctrine bespeaks a judiciary that historically was committed by and large to a strong brand of executive government and this notwithstanding the lack of explicit constitutional status for the executive branch in the *Constitution Act, 1867*. Why precisely this state of affairs came about is a rather more difficult question to answer.²⁰⁷ However, my hunch is that much may have to do with a state of affairs that still prevails today — the ease of movement between the executive branch and the upper reaches of government judicial service, and the bench. Appointing judges attuned as a result of their previous status to the exigencies of executive power can obviously have an impact on the extent to which those judges are willing to

v. *Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.) at p. 229 and p. 234.

206. See Peter W. Hogg, *Constitutional Law of Canada*, *supra* note 115, at Chapter 14, and 14.2 particularly.

207. In making these arguments, I should not be read as philosophically opposed to the inevitable and, for the most part, desirable extensive delegation of discretionary powers in the modern state, even one in which deregulation has become one of the primary objectives. There is, however, some room for a reevaluation of whether some features of the admittedly much-criticized United States anti-delegation doctrine has any lessons for Canada. Indeed, “new” dimensions have recently been given to that doctrine in the United States by the judgment of the Court of Appeals for the District of Columbia in *American Trucking Association Inc. v. Environmental Protection Agency*, 175 F. 3d. 1027 (D.C. Cir. 1999), in which the Court struck down rules developed by an agency on the basis that they did not provide adequate standards for the exercise of its statutory discretion in particular cases. This is provoking a plethora of very divided academic commentary in the United States. See *e.g.* Cass Sunstein, “Is the Clean Air Act Unconstitutional?” 98 Mich. L. Rev. 303 (1999).

question or even inquire about the actions of their former colleagues and/or political masters and mistresses. Nonetheless, in the absence of sustained empirical work in this area, I hesitate to be dogmatic on this point.

Another political reality, particularly at the federal level but also in many provinces, may well be the domination of two centre leaning political parties. Judicial review of policy-making is probably a more likely phenomenon in situations where there are more sharp divides in the politics of the contending parties and where the judicial branch by background and temperament is more disposed to one side of that split than the other. Some evidence for this may well be found in the domain where the Supreme Court was at its most interventionist in the policing of executive power — the era of the Duplessis government in Québec. The autocratic activities of a Catholic- dominated government which was seen as paying insufficient respect to the traditions of the Westminster model of parliamentary democracy and the unwritten principles of the British Constitution produced some rather predictable reactions in the Anglophone members of the Supreme Court of Canada.

Indeed, these same considerations may have a lot to do with the historically different perspectives that the courts brought to bear in their policing of certain tribunals as opposed to the review of the policy making functions of the executive branch. Labour boards, workers compensation boards, and human rights commissions, for example, represented the limited excursions of Canadian governments into collectivist, transformative regimes. Moreover, they operated (in theory at least) at arms length from the traditional wielders of executive power and often were fulfilling functions that had been exercised previously by the courts themselves or held to be contrary to common law principles. In such a context, restraint was not to be expected.

Today, of course, the judicial attitude towards most tribunals (though not human rights adjudicators²⁰⁸) has changed dramatically.²⁰⁹ Judges, taking their lead (sometimes reluctantly) from the Supreme Court of Canada, apply highly deferential standards of review in the scrutiny of administrative tribunals. If anything, of course, the consequence of this has been a strengthening of judicial

208. As exemplified by *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

209. Among the many influences which led to this change have to be the teaching and writing of such prominent Canadian legal academics as John Willis, Bora Laskin, Paul Weiler, and Harry Arthurs, all of whom railed against the interventionist tendencies of the Supreme Court. It is also fair to say that all four had little sympathy with arguments against extensive legislative delegation of discretionary power to the executive branch. There too, they favoured restricted judicial intervention in both the delegation itself and the exercise of powers that had been delegated.

resolve not to be interventionist in the policy-making and implementation roles of central government. As McLachlin J. asked rhetorically (albeit to no effect at that time in the municipal context) in *Shell Canada*,²¹⁰ if the courts have accepted a posture of deference to non-elected, arms length administrative tribunals, should not they adopt or continue to apply the same or an even stronger version of that policy in the case of elected politicians (and one can add to that senior civil servants for whose actions the members of the executive are theoretically answerable)?

In terms of jurisprudential tradition, Canadian courts have also generally been highly respectful of a version of the Rule of Law which has at its centrepiece parliamentary sovereignty. When judges of that philosophical commitment are confronted by the statutory conferral of broad discretions on the executive branch of government, there is an understandable tendency to read the empowering language literally and to decline any invitation to intervene on broader principles of common law rights and implied constitutional principles.

In an earlier era,²¹¹ the failure of Rand J. to ever secure a majority for his implied Bill of Rights theory provides strong evidence for this assertion. More recently, it is found in the abnegation by the Ontario courts of any role in the confining of the extremely broad discretions that the Conservative government has created for itself and its statutory emanations. Only in the struggles of the courts over the decades of the forties, fifties and sixties against the regime of tribunals²¹² can we detect any real dominance of underlying common law principles over legislative intention. And, of course, in its own way, that era of interventionism well illustrates the dilemma²¹³ of those who are apostles of Dicey's version of the Rule of Law, that of how to reconcile the principles of

210. *Supra* note 67 at p. 247.

211. Indeed, it appeared to have been explicitly rejected by the Supreme Court in *Canada (Attorney General v. Dupond*, *supra* note 158 at p. 776 (*per* Beetz J., delivering the judgment of the majority). It is, however, interesting to note the extent to which Lamer C.J.C. appears to be an apostle of the Implied Bill of Rights theory in his concurring judgment in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at pp. 71-78. Indeed, Beetz J. himself appears to have had some second thoughts in his judgment in *Ontario Public Service Employees Union v. Ontario*, [1987] 1 S.C.R. 2 at p. 57.

212. Most critics view *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425 as the high water mark of this era of interventionism. Chapters 2 and 5 of Paul Weiler, *In the Last Resort* (Toronto : Carswell Methuen, 1974) remain the best account and critique of this body of jurisprudence.

213. "Dilemma" may, of course, be the wrong term; "delicious choice" may be more appropriate — as a judge you rely upon which of the two contesting components of Dicey's Rule of Law that suits your purposes in the particular case.

parliamentary sovereignty with an abhorrence of law administered by other than the regular courts. For a time, in the case of tribunals but not the executive, the latter prevailed!

XIII. THE PROSPECTS FOR A DIFFERENT APPROACH

Whether change is indicated in this domain will in large measure depend on the extent to which one supports the judicial policing of policy-making and implementation as a significant task or obligation of our courts.

In the United Kingdom (as intimated earlier), much of the current debate in this whole area is captured by the differences between two schools of thought. First, there are those who see the task of judicial review as dominated by a concern with whether or not particular exercises of power are *ultra vires*, a process that is characterized by an attention to discerning the intention of the legislature.²¹⁴ In contrast, there are those who regard the *ultra vires*, interpretation approach as a charade in that the search for legislative intention is most times a futile one.²¹⁵ Rather, they would treat various principles of the common law and constitutional tradition as providing the framework for judicial review with legislative intention counting, if at all only when specifically expressed. Moreover, for these purposes, the mere conferral of strong discretion is insufficient to justify overriding the protections of these common law and traditional constitutional principles. Also, those in the latter school in many instances reject parliamentary sovereignty as the cornerstone of judicial review and see review as legitimated by a version of the Rule of Law that has significant substantive content or political core.

In Canada, it is the former view that prevails at least in the judgments of the courts, though the argument that there is substantive content or political core

214. See, in particular, H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 7th ed. (Oxford : Clarendon Press, 1994) at pp. 41 and 44 and also the elaborations by Christopher Forsyth, "Of Fig Leaves and Fairy Tales : The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" (1996), 55 Can. L.J. 122 and Mark Elliott, "The *Ultra Vires* Doctrine in a Constitutional Setting : Still the Central Principle of Administrative Law" (1999), 58 Can. L.J. 129.

215. Starting with Dawn Oliver, "Is the *Ultra Vires* Rule the Basis of Judicial Review?", [1987] Pub. L. 543 and taken up by, among others, Sir Stephen Sedley, "Human Rights : A Twenty-First Century Agenda", [1995] Pub. L. 386; Sir Robin Cooke, "Fundamentals", [1988] N.Z.L.J. 58; Sir John Laws, "Law and Democracy", [1995] Pub. L. 72 and "Illegality : The Problem of Jurisdiction" in M. Supperstone and J. Goudie (eds.), *Judicial Review*, 2nd ed. (London, 1997) and Paul Craig, "*Ultra Vires* and the Foundations of Judicial Review", [1998] Can. L.J. 63.

of liberal values to the Rule of Law that informs the world of judicial review of public authorities has at least one very prominent advocate in the person of Professor David Dyzenhaus of the University of Toronto Faculty of Law.²¹⁶ To the extent that the “New Rule of Law” approach therefore represents the contending rather than the established position, there is merit in setting out in summary form one version of it, though not necessarily one to which all adherents (and especially Dyzenhaus) assent without reservation or qualification.

In his essay, “Fairness, Equality, Rationality : Constitutional Theory and Judicial Review”, T.R.S. Allan argues for a version of administrative law “which embodies a coherent conception of the common good, reflecting widely accepted norms of fairness and equality”.²¹⁷ In greater detail, this involves the following :

*The dignity and autonomy of the individual citizen are understood to be integral values of the rule of law, whose integrity government and Parliament are bound to observe. The interpretation of statutes and the review of executive action should equally reflect judicial deference to both the legislative will and official expertise, but subject always to insistence on standards of fairness which enforce a reasonable proportionality between public purpose and private disadvantage. As a reflection of society’s fundamental moral commitments, the common law will develop and adapt to changing perceptions of value. It cannot remain aloof from debate within the community about the meaning of equal citizenship - the related responsibilities as well as the associated rights. It must be sustained by arguments drawn from political theory which build on ideas already widely accepted in the community. It can thus provide a legitimate defence against oppressive government action, even where such action is apparently backed by a legislative majority intent on achieving its immediate political goals.*²¹⁸

In his use of the language of “fundamental moral commitments”, parallels can be drawn between Allan’s conception of the scope for judicial controls or limits on the exercise of discretionary power and L’Heureux-Dubé

216. See particularly, “The Politics of Deference : Judicial Review and Democracy” in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford : Hart Publishing, 1997) at p. 279.

217. In Christopher Forsyth and Ivan Hare (eds.), *The Golden Metwand and the Crooked Cord - Essays on Public Law in Honour of Sir William Wade* (Oxford : Clarendon Press, 1998) 15 at p. 36. See also, Dawn Oliver, “The Underlying Values of Public Law” in Taggart (ed.), *The Province of Administrative Law*, *id.*, at p. 217, in which she identifies five values (“dignity, autonomy, respect, status and security”) which in turn have as their underlay or foundation three paramount values : democracy, participation and citizenship.

218. *Ibid.* at pp. 36-37.

J.'s assertion in *Baker* of the "fundamental values of Canadian society" as one of the external controls on the exercise of even the most broadly-based executive discretion. However, as already intimated, I believe that there are many problems inherent in the use of such terminology and in signing on to it as anything other than mostly a rhetorical statement about the limits of discretionary power.

Indeed, as also intimated earlier, I have the same difficulty with the use of common law rights as a value which also serves a limiting function and as a justification for judicial review. The delineation of what counts as a "common law right" for these purposes is an inherently difficult exercise and, in the "wrong hands", can be manipulated readily to secure the perpetuation of historic economic and other advantages against the intention and effective operation of transformative statutory regimes. Substantive fairness, as identified by Allan as a basis for control, also has the potential for damaging consequences when it is defined in terms of enforcing "a reasonable proportionality between public purpose and private disadvantage". Here too, there is much capacity for frustration of legitimate state schemes in the nature of the inquiry suggested by this formulation. Arguments based on and judicial determination of what is "disproportionate" in any particular situation without the interpolation of other refining and constraining influences would all too easily and often descend to the level of partisan, political and philosophical debate.

Of course, as the Allan quotation intimates, to reject totally the relevance of these and other proposed constraints may well be to endorse a particularly impoverished version of the common law in the judicial review of statutory and prerogative discretions in general and policy-making and implementation in particular. It can also amount to a blindness to the inevitable overlaps between law and politics particularly in the domain of the exercise of public power. It may even be seen as a repudiation of the values which enabled intervention in the egregious circumstances of *Roncarelli v. Duplessis*. Nonetheless, it is as well to recollect the context in which Allan is writing — that of a jurisdiction without (at least to this point²¹⁹) an entrenched Bill of Rights and one in which there is a long tradition of judicial according of recognition to certain commonly-accepted though unwritten, base level constitutional norms.

It was on the basis of those norms and the political theory underlying them as well as a perception of their incorporation implicitly into the

219. All of this is about to change once the *Human Rights Act*, 1998 incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms comes into force supposedly some time during 2000. For useful commentary on its likely impact, see K. Malleon, "A British Bill of Rights : Incorporating The European Convention on Human Rights" (1999), 5 (1) Choices 21.

Constitution Act, 1867 that Rand J. was able, in judgments such as *Roncarelli v. Duplessis*, to justify intervention in the exercises of broad administrative discretions. Now that Canada has a *Charter of Rights and Freedoms* embracing those same norms and explicitly, in its equality and fundamental justice provisions in particular, recognizing rights reflecting Allan's "dignity and autonomy of the individual citizen" and "equal citizenship", the opportunity or room for further controls based on underlying conceptions of the essential nature of our polity would seem to be limited and, if pursued too far, massively controversial and too intrusive in the political domain.

Against the backdrop of a constitutional scheme which provides the opportunity for rights and freedoms-based constitutional claims against the exercise of discretionary power, it is, therefore, highly contentious whether there should be room for any or many other kinds of appeal to fundamental values in the policing of policy-making and implementation. Indeed, further weight is given to this argument by the fact that the Charter at the same time still assigns considerable weight to legislative and executive prerogatives (most notably in the existence of section 33 and the entitlement that it creates for legislative override of all but a few of the rights and freedoms protected by the Charter).

This leads me to conclude that, by and large, advocacy of increased judicial policing of policy-making and implementation should be much more modest in its objectives than we see in the position adopted by theorists such as Allan or, indeed, in some of the British jurisprudence. In this, Dyzenhaus and the work of Etienne Murenik,²²⁰ which Dyzenhaus builds upon, have much to offer particularly in their emphasis on the concept of "justification". In fact, in developing his own version of the Rule of Law with a substantive content, Dyzenhaus is critical of Allan and others for "maintaining judges at the apex of the legal order and in equating the values of the legal order with common law values understood in the individualistic way which implies hostility to the administrative state."²²¹

Instead, Dyzenhaus proposes that courts recognize that "...the substance of the rule of law is the equality of all citizens before the law and the form of the rule of law is the procedures whereby public officials demonstrate that they have lived up to — are accountable to — that substance."²²²

220. See e.g. "Reconsidering Review : Participation and Accountability" [1993] *Acta Juridica* at p. 35.

221. *Supra* note 216 at p. 286.

222. *Ibid.* at p. 387.

In the domain of substantive review, this is applied under the caption, adopted by the Supreme Court of Canada in *Baker*,²²³ of “deference as respect”.²²⁴ Putting it in slightly different terms, as Hudson Janisch did some years ago,²²⁵ deference has to be earned and the principal way in which it is earned is by “justification” or providing reasoned bases for the making of decisions and the taking of actions. Thereafter, the role of the courts is to pay “respectful attention to the reasons offered”²²⁶ and “to take the tribunal’s reasoning seriously”²²⁷ but to ensure, in so doing, that the decision maker has acted on a rationally supportable basis and, where the legislation in question is “equality promoting”, with ample regard to that objective and the particular equality interests that are stake.²²⁸ What might this mean in practical ways in the review of the exercise of policy-making and implementation powers?

Generally, I see the argument based on justification²²⁹ as demanding that the courts act more aggressively in ensuring transparency in such processes. More specifically, I would recommend a reevaluation of the current Supreme Court of Canada position that procedural fairness and legitimate expectation claims cannot be made with respect to the exercise of legislative (including broad policy-making) functions. As an alternative, a rather more aggressive role for the operation of the principles of estoppel in public law has much to commend it. I would also urge the Court to rethink its eschewing of any capacity to probe the motives of multi-member bodies charged with the exercise of broadly-based or open-ended discretions and those conferred on the Governor General and Lieutenant Governors in Council in particular. I would reject any general

223. *Supra* note 9 at par. 65. Dyzenhaus has also found an ally in the new Chief Justice, McLachlin J. In her article, “The Roles of Administrative Law and Courts in Maintaining the Rule of Law”, *supra* note 80 at p. 174 and pp. 186-187, she draws considerably on his concept of “justification”, though also noting (at note 6) that she does not necessarily endorse all the views he expresses in his “Politics of Deference” paper.

224. *Supra* note 216 at p. 286.

225. “The New Rules of the Canadian Transportation Commission” (1983), 1 *Ad. Law Rev.* 173, at p. 174. Indeed, it is by no means a coincidence that L’Heureux-Dubé J.’s citation of Dyzenhaus comes in a judgment in which the Supreme Court had earlier accepted for the first time the existence of a common law duty to give reasons for a decision involving the exercise of a broad discretion.

226. *Supra* nte 216 at p. 286.

227. *Ibid.* at p. 304.

228. *Ibid.* at pp. 304-307.

229. I leave for another day the fascinating and vital question of whether Dyzenhaus’s substantive or core liberal component of the Rule of Law, the principle of the “equality of all citizens before the law” differs and, if so, in what ways from the version of equality adopted by the Supreme Court in giving content to section 15 of the Charter.

acceptance of the rule that excuses the making of policy for wrongful purposes or on the basis of irrelevant considerations in cases where there were also permissible purposes and considerations or factors present.

As well as reflecting the principle of justification, the more vigilant policing of the purposes for which the executive acts also has the merit of also attempting to preserve some integrity for parliamentary processes. In this domain, I would also look for clarification of the Canadian position on justiciability and political questions as threshold concepts in the calling of the executive branch to account. As well, I would take up the suggestion of Archie Campbell J. and, by reference to a new or resurgent anti-delegation principle, condemn the use of Henry VII clauses and, indeed, in at least some circumstances, the conferral of unstructured, broad discretions unless accompanied by an obligation to engage in broadly-based notice and comment procedures in the development of policy under the terms of such delegations. Finally, as advocated in my earlier 1993 article, I would approach with more scepticism and less deference the exercises of discretion in which there are obvious opportunities for illegitimate self-interest to influence the making or implementation of a particular policy.

Moreover, if asked to provide my own principled justification for most of these arguments, I would fall back principally on the philosophy behind some of the implied Bill of Rights and other arguments based on inferences from the content of the *Constitution Act, 1867* and now enshrined in the *Charter of Rights and Freedoms* — the preservation and enhancement of democratic institutions including the recognition of new modalities of democratic accountability when traditional institutions and instruments atrophy or fail to fulfill optimally their constitutional role.

In most other respects, I am inclined to accept that our existing common law principles of judicial review of policy-making and implementation powers founded on respect for legislative and executive authority have just about got it right!