

The Discretionary Nature of Judicial Review

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I. INTRODUCTION

The modern Canadian law of judicial review of administrative action finds its origins in the historic English prerogative writs system, through which the royal courts supervised the exercise of executive and administrative, as well as judicial power conferred on “inferior” courts and tribunals. Indeed, until comparatively recently, the principles of judicial review of administrative action depended very directly on the technical, often arcane, and sometimes perverse rules governing the issuance of the prerogative writs. Fortunately, as a result of modernization efforts throughout Canada over the last forty years, the malignant influence of the finicky requirements of the law governing the issuance of the prerogative writs has disappeared almost entirely¹ from the processing of judicial review applications of all kinds.

However, there is one critical aspect of the public law remedial scheme where the general principles have not in fact changed significantly from the era of the prerogative writs (supplemented eventually by forms of equitable relief such as the injunction and declarations of right). Even when applicants met the conditions for the availability of the various prerogative writs, the courts recognized an overriding discretion to refuse relief on various grounds. That dimension of the writ system of judicial review is captured well in summary form in the latest edition of *De Smith’s Judicial Review*:

¹ I suppose there might be an exception in the law respecting the content of the record on which the courts conduct judicial review. See for example: *142445 Ontario Ltd., carrying on business as Utilities Kingston v. International Brotherhood of Electrical Workers, Local 638*, [2009] O.J. No. 2011 (Div. Ct.), at paras. 10–33; and *Tembec Enterprises Inc. v. United Steelworkers IWA Council 1-1000*, [2009] O.J. No. 2476 (Div. Ct.), at paras. 26–28.

The award of the prerogative writs usually lay within the discretion of the court. The court was entitled to refuse certiorari and mandamus to applicants if they had been guilty of unreasonable delay or misconduct or if an adequate alternative remedy existed, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty.²

They were not writs that issued “as of course” or “*ex debito justitiae*,” but rather writs “of grace.” While the authors go on to note that the writs of prohibition and *habeas corpus* were different and not regarded as discretionary, it was also the case that the various maxims of equity imposed a similar discretionary element on the use of the injunction and the declaration for public law purposes.

We need not look further back than March 2009 to locate a present-day equivalent of the statement from De Smith. Rothstein J., in *Canada (Citizenship and Immigration) v. Khosa*, captures current Canadian law on the discretionary nature of judicial review well in stating:

The traditional common law discretion to refuse relief on judicial review concerns the parties’ conduct, any undue delay and the existence of alternative remedies: *Immeubles Port Louis Ltée v. Lafontaine (Village)*[³].... As *Harelkin*[⁴] affirmed, at p. 575, courts may exercise their discretion to refuse relief to applicants “if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty.” As in the case of interlocutory injunctions, courts exercising discretion to grant relief on judicial review will take into account the public interest, any disproportionate impact on the parties and the interests of third parties. This is [a] type of “balance of convenience” analysis.⁵

² Woolf, Jowell & Le Sueur (eds.), *De Smith’s Judicial Review*, 6th ed. (London: Sweet& Maxwell, 2007), at p. 783.

³ [1991] 1 S.C.R. 326, at p. 364.

⁴ *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

⁵ [2009] 1 S.C.R. 339, 2009 SCC 12, at para. 135.

This is not meant to suggest that the law respecting the discretionary nature of judicial review has remained constant over the years. It has not. As this paper will demonstrate, there has been considerable evolution. Part of this evolution, and consistent with the Canadian courts' expressed policy of deference to the expertise and exigencies of administrative processes, is a much more consistent concern with whether granting relief will interfere with the effective functioning of the administrative process, fail to sufficiently recognize the capacity of statutory authorities to themselves deal with the matters in issue, and involve an inappropriate use of the courts' own processes. At the same time, there has been a movement away from the idea that discretion to refuse to hear the matter or grant relief is not a factor where the matters in issue are jurisdictional. It is, however, the case that, in the continued evolution of a more functional approach, the courts' "discretion" has hardened in some contexts into what are often quite firm rules governing the exercise of that remedial discretion.⁶

It is also probably the case that, in some instances, matters that were formerly components of front-end issues relating to the technical requirements of the prerogative writs have now been subsumed within the discretionary elements of modern judicial review remedial law. I do not want to explore the precise parameters of that transference save to make the point later in this paper that the difference in approach between Rothstein J. and Binnie J. in *Khosa* provides an illustration of the extent to which the discretionary character of judicial review has become a repository for matters that were previously substantive remedial issues.

In this paper, I have two principal objectives. The first is to provide a primer on some of the various considerations that go into the decision of whether to withhold access to judicial review, with particular emphasis on the most common situations where those discretionary

⁶ In this respect, the Supreme Court of Canada still adheres to the notion that, on appeals from a first instance court's exercise of remedial discretion, the role of the appellate court is not to substitute its judgment on the merits but rather to confine itself to interfering only where no or insufficient weight has been given to considerations that as a matter of law are relevant to the exercise of the remedial discretion: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at paras. 103–104. However, the more structured remedial discretions become, the more room there is for appellate court reevaluation of the way in which first instance courts have determined and characterized factors relevant to the exercise of discretion in particular cases. A prime example can be found in the judgment of Lamer C.J. in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 5, at paras. 30–74.

factors come into play or where the law is in a state of flux. Secondly, in the course of describing the current state of the law, I want to explore why there is a differentiation between situations in which discretion is routinely exercised to deny relief and situations where discretion is rarely exercised, and to try to fathom whether that operational distinction is logical and sound in principle.

II. “JUMPING THE GUN”: PREEMPTIVE STRIKES OR PURE PREMATURITY

As described in the introductory section, the prerogative writ of prohibition was a form of relief that was available not as a matter of discretion but as of course or “*ex debito justitiae*.” Its objective was to prevent a judicial or *quasi*-judicial body proceeding without jurisdiction. Ostensibly, it was available from the moment at which the statutory authority announced proceedings until the point at which it had nothing further to do to complete its task. An affected person could apply for immediate relief from the court provided there was a question as to an initial lack of jurisdiction or even an excess of jurisdiction, often in the form of an interlocutory ruling, in the course of the hearing or proceedings.

That no longer represents Canadian law. Speaking in the context of judicial review of an interlocutory ruling—but in terms that are just as applicable to preemptive challenges to proceedings not based on an interlocutory ruling—the Nova Scotia Court of Appeal in late 2008 encapsulated the current Canadian position:

[A]bsent special circumstances, interlocutory decisions of an administrative tribunal should not be challenged until the tribunal renders its final decision on the merits.⁷

In justification of this principle, the Court relied on the judgment of the Federal Court of Appeal in *Zündel v. Canada (Human Rights Commission)*:

The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and

⁷ *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* (2008), 304 D.L.R. (4th) 238, 2008 NSCA 108, at para. 8 (*per* M.J. Hamilton J.A.).

expenses associated with such appeals can bring the administration of justice into disrepute.⁸

Creating a strong presumption against such challenges is one thing; applying it and, in particular, identifying the exceptional circumstances under which the presumption will be rebutted is another. It is also necessary to take into account the lingering effects of the traditional law. In many of the relevant authorities, including *Zündel*, the courts have either qualified the presumption as not applying where the challenge involves “jurisdictional issues”⁹ or as easily rebutted in such instances. Thus, in one of the most cited authorities in this whole field, the judgment of Finlayson J.A. in *Howe v. Institute of Chartered Accountants of Ontario*, it is stated:

[T]he court will only interfere with a preliminary ruling made by an administrative tribunal where the tribunal never had jurisdiction or has irretrievably lost it.¹⁰

This adds a further dilemma to that of the identification of exceptional circumstances. Is a challenge to jurisdiction an exception to the rule in the sense that such matters will always be entertained by the courts with no discretion to refuse, or is it simply an indicator of an exceptional circumstance that, when balanced with a range of other factors, may lead a court to entertain the challenge immediately? It is also necessary, particularly if the first articulation is accurate, to identify what count as issues of “jurisdiction” for these purposes.

In this context, there may in fact be a significant difference between a challenge to the authority of the decision-maker that is not preceded by an interlocutory ruling and one that follows an interlocutory ruling on that very question. It is now clearly part of Canadian administrative law that the courts have ceded to a broad range of administrative tribunals and statutory authorities the capacity to deal with all sorts of challenges to their proceedings, including issues as to the constitutional validity of their constitutive statutes,¹¹ other typically jurisdictional issues, and challenges based on a reasonable apprehension

⁸ [2000] 4 F.C. 255 (C.A.), at para. 10.

⁹ *Ibid.*

¹⁰ (1994), 19 O.R. (3d) 483 (C.A.), at 490.

¹¹ *Scotia (Workers' Compensation Board) v. Martin and Laseur*, [2003] 2 S.C.R. 504; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585.

of bias. Indeed, in most jurisdictions,¹² tribunals not only can but must deal with such questions. Among the justifications for this position is that this enables the building of a factual and legal record on the basis of which any subsequent judicial review application can be dealt with much more efficiently and expeditiously. Moreover, albeit that any subsequent judicial review will be conducted on the basis of a correctness, not a reasonableness standard, the reviewing court will have the benefit of the decision-maker's own perspective on the matter in issue.

As a consequence, it is not surprising that there is a very strong presumption against the entertaining of any application for judicial review, even one based on a complete lack of jurisdiction, in situations where the decision-maker has the authority to deal with such questions and has not had the opportunity to do so. The strongest example of this remains *Canadian Pacific Ltd. v. Matsqui Indian Band*, in which a majority of the Court refused to entertain the company's challenge to the Band's taxing of the land over which its railway lines ran, the basis for the challenge being that the land in question was not "in the reserve," allegedly a jurisdictional prerequisite to the authority to levy a tax.¹³ At least until such time as the Band had an opportunity to deal with that issue, it was premature for the Federal Court to entertain an application for preemptive judicial review.

What, however, is the position after the statutory decision-maker has dealt with the challenge to "jurisdiction"? Assuming the decision-maker's ruling is that jurisdiction exists or there is otherwise no basis for the challenge, should the courts at that point respond to a challenge to the

¹² Note, however, the legislative provisions in Alberta and British Columbia modify or withdrawing this capacity: *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, ss. 10–16, as inserted by S.A. 2005, c. 4; and *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 43–45.

¹³ *Supra* note 6. Interestingly, in light of the discussion that follows of preemptive intervention where there is an allegation of bias or lack of independence, a majority of the Court held that, in this instance, it was not a correct use of discretion for the first instance judge to treat a challenge to the institutional independence of the tribunals as premature even where those tribunals had not had a chance to deal with this issue. See the judgment of Lamer C.J., at paras. 61–74. There was, however, a strong dissent by Sopinka J.: para. 111. It should, however, be noted that the debate about prematurity in that case centred around the lack of a sufficient evidential record on which to decide the matter, an issue that had been raised for the first time before the Federal Court, Trial Division in oral argument. It was not based on the lack of an opportunity for the tribunals themselves to deal with the issue.

ruling or should they require the hearing to proceed to its conclusion before entertaining any challenge to the ruling?

Certain things are clear. The presumption against allowing judicial review of interlocutory rulings is at its strongest where the rulings in question are procedural ones such as the admissibility of evidence, disclosure and other aspects of hearing entitlement. In those cases, it will be very rare for the court to allow an application for judicial review to proceed.¹⁴

It is also the case that, even after a decision-maker has refused to recuse herself or himself on the basis of a challenge based on a reasonable apprehension of bias or lack of independence, judicial review of that ruling is not automatically available. The general presumption applies, though as Evans J., then of the Federal Court, accepted in one of the most significant considerations of this issue,

the burden of demonstrating the existence of “exceptional circumstances” may be somewhat easier to discharge when the impartiality of the tribunal is impeached in judicial review proceedings before the administrative process has run its course than it is when the applicant alleges other reviewable errors.¹⁵

In *Lorenz*, Air Canada raised the issue of bias six days into what was scheduled to be a twenty-three day hearing. After the adjudicator ruled against the motion that he recuse himself, Air Canada applied for judicial review of his ruling and the case had been stayed for two years pending the disposition of that application for judicial review. After noting that this was not a situation where there was a right of appeal from the adjudicator to another tribunal or the court, that the adjudicator’s ruling was not one that was entitled to curial deference, and that the record on which the application would be decided would not be enhanced by allowing the hearing to continue,¹⁶ Evans J. then identified the five factors that he believed were relevant to determining whether Air Canada had met the onus imposed by the presumption against permitting judicial

¹⁴ See e.g. *Doman v. British Columbia (Securities Commission)*, [1995] 10 W.W.R. 649 (B.C.S.C.)

¹⁵ *Air Canada v. Lorenz*, [2000] 1 F.C. 494 (T.D.), at para. 38. For subsequent applications by the Federal Court, see *Sanofi Pasteur Ltd. v. Canada (Attorney General)*, 2008 FC 286; *Sztern v. Canada (Superintendent of Brokers)*, 2008 FC 285; and *Chretien v. Canada (Attorney General)*, 2005 FC 925.

¹⁶ *Ibid.* at para. 16.

review of the adjudicator's ruling on bias: hardship to the applicant, waste, delay, fragmentation, strength of the case, and statutory context.¹⁷

Aside from the potential waste involved (a not insignificant factor) if the case proceeded to a conclusion and Air Canada lost on the merits and then had to make its bias challenge, Evans J. did not regard any of the other factors as indicating that the interlocutory ruling was open to challenge. In particular, he emphasised delay in the proceedings, the potential fragmenting of various grounds for judicial review into separate proceedings, and his assessment that this was not by any stretch a cast-iron case for bias as the factors that led him to the conclusion that the application was premature.

Notwithstanding that Air Canada did not prevail in *Lorenz*, it is also clear that there will be situations where a refusal to recuse on the basis of bias will be immediately reviewable. Thus, for example, if, in *Committee for Justice and Liberty v. National Energy Board*, the National Energy Board itself had not stated a case to the Federal Court, it is highly likely that that Court would have entertained a challenge to the participation of the Chair in proceedings that were scheduled to last two years.¹⁸ The highly-problematic nature of the Chair's participation—and the waste involved were the matter to go through a two-year hearing only then to be challenged on the basis of a reasonable apprehension of bias—would have tipped the balance in favour of immediate review.

Indeed, even in the case of procedural rulings, there are cases that will constitute exceptional circumstances, as exemplified by *College of Physicians and Surgeons of Ontario v. Au*.¹⁹ The procedural issue there involved an order for the production of the confidential third-party records of ten of nineteen complainants of sexual misconduct against a doctor. Given that the main concern with such production orders is balancing the privacy interests of alleged victims against the respondent's right to full answer and defence, there is little possibility that the harm of inappropriate orders for disclosure can be undone by way of judicial review of the disclosure order following the ultimate decision.

That still leaves open the thorny question of “jurisdiction” in a substantive sense. Here, the law remains uncertain and the whole question may need reevaluation in the wake of *Dunsmuir v. New*

¹⁷ *Ibid.* at paras. 19–32.

¹⁸ [1978] 1 S.C.R. 369.

¹⁹ (2005), 195 O.A.C. 145 (Div. Ct.).

Brunswick. The Supreme Court of Canada reaffirmed the existence of a category of jurisdictional issues, but made a strong plea for judicial restraint in classifying issues as jurisdictional.²⁰ Suppose that a tribunal has ruled in favour of its own authority in the case of what is a clear jurisdictional issue—such as where there are two competing tribunals, only one of which can have jurisdiction over the particular matter. Would that be an instance where judicial review of the interlocutory ruling should be automatically available? Should the presumption still apply—though perhaps not so strongly as in the case of bias rulings?

My own preference, notwithstanding the contrary statements in some of the case law, is that judicial review of the interlocutory ruling on such a question of jurisdiction should not be automatically reviewable. Rather, there should be some room for the operation of the presumption against judicial review at that point though, as in the case of bias, with the courts' evaluation of prematurity focused very closely on the potential for waste should the tribunal proceed and ultimately be found to have lacked subject-matter jurisdiction as in the case of the duelling tribunals example.

III. EXISTENCE OF A RIGHT OF APPEAL OR OTHER APPROPRIATE REMEDY

Where there is an adequate right of appeal from the decision of a statutory authority, judicial review is routinely refused. Indeed, it is far closer to a rule than a discretionary ground for the refusal of relief notwithstanding that the principle is generally expressed with reference to the discretionary bases for the refusal of relief:

It is a well-established principle that, *given the discretionary nature of judicial review*, an application for judicial review should generally be declined if an adequate statutory right of appeal exists.²¹

The foundational and leading Canadian decision remains *Harelkin v. University of Regina*.²² While it was a controversial decision at the time and while it contained a strong dissent on this issue by Dickson J., its hold on our law has, if anything, been strengthened over the years, and it

²⁰ [2008] 1 S.C.R. 190.

²¹ *Milner Power Inc. v. Alberta Energy and Utilities Board* (2007), 80 Alta. L.R. (4th) 35, at para. 18, (*per* M. Paperny J.A.).

²² *Supra* note 4.

has found Supreme Court of Canada reaffirmation much more recently in *Matsqui Indian Band v. Canadian Pacific Ltd.*²³

As exemplified by *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, the clearest example where the principle applies is in situations where there is a statutory right of appeal to a s. 96 court.²⁴ As long as that statutory right of appeal covers the grounds on which judicial review is being sought (as, for example, in the case of a right of appeal on a question of law and jurisdiction), the courts will apply the principle automatically. Notwithstanding Dickson J.'s concerns in *Harelkin*, not even the classification of the matter in issue as jurisdictional in its strictest sense detracts from the force of the proposition.

What is also clear is that the principle does not apply simply to appeals to a s. 96 court. It also has purchase in the instance of internal appeals. This is made abundantly clear in the two leading Supreme Court of Canada authorities. In *Harelkin*, there was a right of appeal to the University Senate and, in *Matsqui*, to First Nation taxation appeal tribunals. It has also been held to apply where the applicant for judicial review has failed to exhaust a statutory right to apply to the original decision-maker for reconsideration.²⁵

As a consequence, the only question that is really relevant in these cases is whether the right of appeal is adequate in the sense of being a true alternative or equivalent to judicial review. Here too, *Harelkin*, supplemented by *Matsqui*, establish the criteria by which adequacy is assessed and they too remain the criteria applied today. In *Harelkin*, Beetz J. (for the majority) listed the following factors as bearing upon the adequacy of an alternative remedy: the procedure on appeal; the composition of the appeal tribunal; its powers and the manner in which they were probably going to be exercised; the burden of the previous finding; expeditiousness; and costs.²⁶ In *Matsqui*, Lamer C.J.C. put it somewhat differently. The criteria were:

the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (*i.e.* its investigatory,

²³ *Supra* note 6.

²⁴ *Supra* note 21.

²⁵ *B.C.G.E.U. v. British Columbia (Labour Relations Board)* (1986), 26 D.L.R. (4th) 560 (B.C.C.A.).

²⁶ *Supra* note 4 at p. 588.

decision-making and remedial capacities). I do not believe that the category of factors should be closed.²⁷

Harelkin also provides an excellent example of the reach of the principle. The applicant had been dismissed from an academic programme without the benefit of the rules of natural justice and had also been denied a rehearing. In assessing whether he should have first gone to the senate appeals committee rather than the courts, the majority expressed the view that the committee was capable of curing the natural justice defects of the first instance decision by giving a fair *de novo* hearing. It also had the capacity to give Harelkin the remedy he wanted—reinstatement into the program—and was a less costly and institutionally more appropriate way of dealing with the problem than resort to the courts, albeit that in some instances there might still be an application for judicial review.

It is not, however, in every instance that the alternative remedy will be adequate. In a recent decision, the British Columbia Court of Appeal rejected an argument that the petitioner should have proceeded by way of an action for wrongful dismissal rather than by way of a petition for judicial review of his employer's rejection of his request for reinstatement to his position as the registrar of a college with responsibility for regulation of a health care profession.²⁸ Judicial review could potentially achieve reinstatement; an action for wrongful dismissal could not.

As is the case with prematurity, cases involving bias figure prominently in the case law on failure to exercise a right of appeal or take advantage of other forms of relief. Thus, for example, in *Spence v. Prince Albert (City) Police Commissioners*, the Saskatchewan Court of Appeal distinguished *Harelkin* on the basis that a statutory appeal authority would be unlikely to address the allegation that the first instance decision-maker was biased but rather would proceed immediately to the merits of the case.²⁹ It is, however, unlikely that Canadian courts would generally follow that decision today. Unless it was absolutely clear that the appellate tribunal did not have any authority to entertain an appeal based on a reasonable apprehension of bias on the part of the initial decision-

²⁷ *Supra* note 6 at para. 37.

²⁸ *Wong v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia* (2005), 50 B.C.L.R. (4th) 230, at para. 24.

²⁹ (1987), 53 Sask. R. 35 (Sask. C.A.).

maker or, more generally, a failure to accord procedural fairness, it is highly likely that a court would see the appeal process as at least a potentially adequate alternative remedy. Such situations also illustrate the overlap that exists frequently between the existence of an adequate alternative remedy and prematurity. Until the internal appeal right is exercised, any application for judicial review is also premature.

Indeed, the Alberta Court of Appeal decisively reaffirmed this very point in late 2008 in *Merchant v. Law Society of Alberta*, in the context of law society disciplinary processes.³⁰ Given the existence of a right of appeal to the benchers and thence to the Alberta courts, and the ability of both those forums to respond to allegations of a reasonable apprehension of bias on the part of the discipline committee, not only was there an adequate alternative remedy, but any application for judicial review was premature. In the course of its judgment, the Alberta Court of Appeal called *Spence* into question, in particular its characterization of the rule as one requiring resort to a domestic appeal only where that was “a more efficient remedy.” Rather, the *Harelkin* test was simply whether the domestic appeal was “an adequate alternative remedy,”³¹ albeit that efficiency is one of the factors that goes into any assessment of adequacy.

The Alberta Court of Appeal has also recently reiterated that a statutory right of appeal to the courts, unrestricted by a privative clause and not requiring leave of the appeal court, is an adequate alternative remedy to an application for judicial review.³² Indeed, earlier, that Court had not been deterred from applying the *Harelkin* rule to a situation where the leave of a judge of the Court was required to bring an appeal and where the first instance decision was also protected by a privative clause.³³ In so holding, the Court of Appeal reaffirmed that an appeal on a question of law and jurisdiction included an allegation of a reasonable apprehension of bias. The Court also rejected the argument that the rules respecting the record to be filed on an appeal would prevent a full consideration of an allegation of bias based on evidence that would not necessarily be part of the record. According to the Court, this was too narrow a reading of the procedural rules governing evidence on an appeal.

³⁰ (2008), 303 D.L.R. (4th) 351 (Alta. C.A.).

³¹ *Ibid.* at para. 23.

³² *KCP Innovative Services Ltd. v. Alberta (Securities Commission)* (2009), 448 A.R. 268.

³³ *Milner Power Inc. v. Alberta Energy and Utilities Board*, *supra* note 21.

IV. “WAITING IN THE WEEDS”: COLLATERAL ATTACK AND DELAY IN SEEKING REVIEW

As with the denial of review when there is an adequate alternative remedy, the Canadian position on collateral attack is more in the nature of a rule than a discretionary consideration. At least since 1998 and the judgments of the Supreme Court of Canada in *R. v. Consolidated Maybrun Mines Ltd.*³⁴ and *R. v. Al Klippert Ltd.*,³⁵ the position has been that litigants will not be allowed to challenge the validity of statutory or prerogative decisions and orders collaterally in proceedings, other than those available for the direct challenge of such decisions or orders: judicial review or statutory appeal.

Thus, in *Consolidated Maybrun*, the application of this principle meant that the company was unable to attack an administrative order directed against it by a statutory authority in the context of proceedings enforcing that order. The company had had the opportunity to attack that order directly by way of an appeal to an administrative appeal body. It could not frustrate the legislative objectives in creating such a right of appeal by failing to utilize the designated route for attacking such orders and waiting in the weeds until such time as confronted with compliance proceedings.

In delivering the judgment of the Supreme Court of Canada in both instances, L’Heureux-Dubé J. held that the issue of whether collateral attack should be permitted involved discerning legislative intention. Did the legislature, in establishing a particular review mechanism, whether it be an appeal to a court or an administrative tribunal, intend that to be the way in which affected persons should question decisions, to the exclusion of other means of attack on that decision? In that respect, it is founded on the same principles as, and overlaps with, the denial of relief for failing to utilize an appropriate alternative remedy; the principal difference being that, in this context, the rules operate with respect not to applications for judicial review but other ways in which decisions and orders can be potentially called into question, such as by way of defence to enforcement proceedings.

³⁴ [1998] 1 S.C.R. 706.

³⁵ [1998] 1 S.C.R. 737. See also *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, in which it was held that Taylor could not challenge the validity of an order in the context of contempt proceedings for failure to observe the terms of that order.

Casting the question in terms of legislative intention is not, however, without difficulty. As L'Heureux-Dubé J. herself seems to acknowledge in *Consolidated Maybrun*, the principle is also capable of operating where there is no statutory appeal or review mechanism but where the affected person has failed to avail herself or himself of an opportunity to apply for judicial review.³⁶ In those instances, the application of the rules against collateral attack springs from a more generalized policy that those affected by administrative decisions should launch any attack on their validity at the first possible opportunity and not be able to frustrate the administrative process and the need for finality in decision-making by raising the issue of validity at some later point in time.

In terms of detail, the Court, largely endorsing the judgment of the Ontario Court of Appeal,³⁷ identified five factors that courts should take into account in considering whether to permit collateral attack at least in the context of penal proceedings:

- (1) the wording of the statute from which the power to issue the order derives;
- (2) the purpose of the legislation;
- (3) the availability of an appeal;
- (4) the nature of the collateral attack; and
- (5) the penalty on conviction for failing to comply with the order.³⁸

This list corresponded to that developed by Laskin J.A. in the Ontario Court of Appeal. However, L'Heureux-Dubé J. took issue with Laskin J.A.'s elaboration of the fourth factor. Laskin J.A. had proposed a distinction between an attack based on "lack of jurisdiction *ab initio* and invalidity resulting from loss of jurisdiction."³⁹

The purpose in drawing this distinction was to establish the principle that collateral attack was more appropriate in the former situation than it was in the latter. Indeed, in the latter, collateral attack should generally not be permitted. According to L'Heureux-Dubé J., such a distinction was not viable or appropriate. More importantly, however, in acknowledging that collateral attack was not automatically available in the instance of "true jurisdictional" challenges, the Supreme Court of Canada put aside what had sometimes been seen as the operative rule

³⁶ *Supra* note 34 at para. 24.

³⁷ (1996), 28 O.R. (3d) 161 (C.A.).

³⁸ *Supra* note 34 at para. 45.

³⁹ *Ibid.* at para. 47.

regarding collateral attack: its availability hinged entirely on whether the challenge was a jurisdictional one.

Notwithstanding the very strong message that the Court gave about the general impropriety of collateral attack, it is clear that the Court does permit some species of collateral attack. Thus, it is not to be thought that the judgments in *Consolidated Maybrun* and *Al Klippert* call into question earlier judgments of the Court in cases such as *R. v. Sharma*⁴⁰ and *R. v. Greenbaum*,⁴¹ in which persons prosecuted for municipal by-law infractions were allowed to challenge the validity of those by-laws as a defence to the charges. There is, of course, a big difference between the validity of a by-law of general operation and an administrative order directed specifically at and served on a citizen or citizens. It is not generally to be expected that members of the public should be alert to the possibility of the invalidity of laws of general application at the time those laws were enacted as opposed to the point at which they come to bear on a particular member of the public in the form of a charge of by-law violation. In general, these are not cases involving waiting in the weeds.⁴²

Somewhat more problematic, however, but potentially highly relevant to some of the cases now before the Supreme Court of Canada, is the judgment of Iacobucci J. for the Court in *Garland v. Consumers' Gas Co.*⁴³ This was an action to recover monies paid by customers to Consumers' Gas. The theory of the action was an allegation that Consumers' Gas had been relying on an order of the Ontario Energy Board to collect interest on outstanding accounts, and that the terms of that order amounted to a criminal rate of interest. According to Iacobucci J., the action did not involve collateral attack

because here the specific object of the applicant's application is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders.⁴⁴

⁴⁰ [1993] 1 S.C.R. 650.

⁴¹ [1993] 1 S.C.R. 674.

⁴² Such a case might be, of course, where someone is well aware of a by-law (and indeed may have raised its potential legal frailty before the relevant Council when it was under consideration) but does not take legal proceedings at that point but chooses to wait until charged with a violation of it.

⁴³ [2004] 1 S.C.R. 629.

⁴⁴ *Ibid.* at para. 71.

In my opinion, that argument is specious. The cause of action depended necessarily on establishing the invalidity of the order on which the utility was relying in collecting interest. If the order had been valid, there would have been no cause of action. This was in every sense a collateral attack on the Board's orders. Collateral attack is not and never has been confined to situations where the challenge is by way of resistance to the enforcement of an order. It is also implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based, as in the famous instance of *Cooper v. Wandsworth Board of Works*.⁴⁵ That case involved a claim in damages for trespass to land by a public authority in which the plaintiff's claim depended on establishing that the order relied on by the authority was invalid by reason of its failure to accord the plaintiff procedural fairness before issuing an order for the demolition of a partially-constructed building.

This, of course, is not to say that the attack should not have been allowed. However, the appropriate way of dealing with the issue was by reference to the five factors identified by L'Heureux-Dubé J. in *Consolidated Maybrun and Al Klippert*, and, more particularly, treating the Board's orders as more in the nature of laws of general application akin to by-laws, as in *Sharma and Greenbaum*.

There is also a particular twist to the principles governing collateral attack when the subject of the collateral attack is a "federal board, commission or other tribunal" as defined in the *Federal Courts Act*.⁴⁶ This is central to the cases now on appeal to the Supreme Court of Canada.

Section 17 of the *Federal Courts Act* provides for the possibility of claims in damages against the Crown in right of Canada to be brought by way of action in either the Federal Court or the appropriate provincial court. However, the Federal Court of Appeal has taken the position that, in instances where the cause of action depends on establishing the invalidity of the decision or order of a federal board, commission or other tribunal, as defined in the *Federal Courts Act*, neither it nor any provincial court has jurisdiction to entertain such a claim until such time

⁴⁵ (1863), 143 E.R. 414; 14 C.B. (N.S.) 180 (C.P.).

⁴⁶ R.S.C. 1985, c. F-7.

as that decision or order has been set aside by either the Federal Court or Court of Appeal on an application for judicial review.

Among the justifications for the position, as expressed initially by Desjardins J.A. in *Canada v. Tremblay*⁴⁷ and then by Létourneau J.A., delivering the judgment of the Court in *Canada v. Grenier*⁴⁸ and, most recently, in *Manuge v. Canada*⁴⁹ is the collateral attack doctrine:

The principle of the finality of decisions likewise requires that in the public interest, the possibilities for indirect challenges of an administrative decision be limited and circumscribed, especially when Parliament has opted for direct challenges of the decision within defined parameters.

....

There is also a public interest in precluding the use of tort claims to engage in collateral attacks on decisions that are, or should be, final.⁵⁰

In fact, the Federal Court has gone even further in this domain than *Consolidated Maybrun*. It is not a matter for judicial discretion. Actions in damages in such situations are jurisdictionally impermissible. The basis for this position is the Court's reading of s. 18(1) of the *Federal Courts Act*. Létourneau J.A. has interpreted that provision's reposing of exclusive, original jurisdiction in the Federal Court or Federal Court of Appeal (under s. 28), with respect to applications for judicial review of the decisions or orders of federal boards, commissions or other tribunals, as excluding any possibility of any other form of attack on such decisions or orders unless specifically authorized by another legislative provision such as a right of appeal. More specifically, the ability under s. 17 to commence an action for damages or other money remedies against the Crown in right of Canada does not amount to such a legislative authorization. Therefore, to allow the s. 17 action to proceed without first having the relevant statutory decision set aside would undermine the Act's directive that decisions made by a federal board, commission or other tribunal by or under a statute or the Royal Prerogative be commenced by way of application to either the Federal Court or, where

⁴⁷ [2004] 4 F.C.R. 165 (C.A.).

⁴⁸ 2005 FCA 348.

⁴⁹ 2009 FCA 29.

⁵⁰ *Grenier*, *supra* note 48 at paras. 31 and 61.

appropriate, Federal Court of Appeal under s. 18(1) or s. 28(1) of the *Federal Courts Act*. While these cases were determined in the context of actions against the Crown commenced in the Federal Court under s. 17, the logic or principles adopted apply equally (and perhaps from one perspective with even more force) to actions for money remedies commenced in the relevant provincial superior court or provincial court as contemplated by s. 17 of the *Federal Courts Act*.

In the course of justifying this outcome, Létourneau J.A. also made reference to the fact that, in direct judicial review proceedings, the court has to first establish a standard of review, which frequently will require deference to the decision or order under attack.⁵¹ However, it does not automatically follow that, in entertaining an action for damages depending on the validity of an administrative decision or order, a court will automatically apply a correctness test. It is perfectly feasible to incorporate standard of review analysis, where appropriate, into such proceedings.

The Quebec Court of Appeal initially endorsed the principle in *Grenier*,⁵² but more recently distinguished it as not applicable in the case of an extra-contractual claim against the Canadian Food Inspection Agency.⁵³ This case is now on appeal to the Supreme Court of Canada.⁵⁴ More generally, in *TeleZone Inc. v. Canada (Attorney General)*, the Ontario Court of Appeal, in the context of three consolidated appeals, decisively rejected the Federal Court of Appeal's approach.⁵⁵ Now, the Supreme Court of Canada also granted leave to appeal from these three judgments⁵⁶ as well as that of the Federal Court of Appeal in *Manuge*,⁵⁷ and the appeals were argued on January 21, 2010.⁵⁸

⁵¹ *Ibid.* at paras. 65–66.

⁵² *Canada v. Capobianco*, 2005 QCCA 209.

⁵³ *Agence canadienne d'inspection des aliments c. Institut professionnel de la fonction publique du Canada*, [2008] R.J.Q. 2093.

⁵⁴ Leave to appeal granted November 17, 2008: [2008] S.C.C.A. No. 469.

⁵⁵ (2008), 94 O.R. (3d) 19.

⁵⁶ [2009] SCCA Nos. 77–79.

⁵⁷ [2009] SCCA No. 144.

⁵⁸ Two other provincial Courts of Appeal have also rejected *Grenier* (see *Genge v. Canada (Attorney General)*, 2007 NLCA 60 and *Re Fantasy Construction Ltd.*, 2007 ABCA 335, while the Court of Appeal for Ontario has reiterated its stance after *Manuge* in *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009

In the meantime, some members of the Federal Court itself, as well as provincial superior courts, have struggled to distinguish the *Grenier* principles in a range of ways, such as by characterizing the true nature of what is at stake as a tort or breach of contract claim,⁵⁹ by asserting that the cause of action does not in the particular case depend on establishing the invalidity of a decision or order of a federal board, commission or other tribunal,⁶⁰ and by refusing to apply it when the cause of action is based on a failure to make a decision or order or to take action under a federal statutory or prerogative power.⁶¹ It is only with a ruling from the Supreme Court of Canada that the legitimacy of, and, indeed, need to resort to these devices will become clear.

In the meantime, it is worth reflecting that, if this had been the law in 1959 and *Roncarelli v. Duplessis*⁶² had taken place federally rather than in Quebec, that action would never have come to trial: it was not preceded by an application for judicial review setting aside the order removing Roncarelli's liquor licence! Indeed, this whole saga brings back to mind the protracted, costly and excessively technical struggles that went on under the original version of the *Federal Court Act* as to the respective original judicial review jurisdictions of the then Federal Court, Trial Division and the Court of Appeal as allocated by ss. 18 and 28. Thus, looking at the matter from the perspective of *Garland Coal*, the answer will sometimes depend on difficult technical questions as to whether the cause of action depends in any essential way on the validity of federal administrative action or is simply a cause of action in contract or tort.

As is also apparent from the recent judgment in *Irving Shipbuilding v. Canada (Attorney General)*,⁶³ there may also be questions raised as to whether public law relief is even available with respect to the exercise of some powers derived by statute but having as their primary driver the law of contract. This further underscores the difficulties facing

ONCA 326. See also the judgment of Joyce J. in *Drader v. Boyes*, 2009 BCSC 1185, refusing to apply *Grenier*).

⁵⁹ See e.g. *Peter G. White Management Ltd. v. Canada*, 2007 FC 686.

⁶⁰ See e.g. *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2002), 58 O.R. (3d) 417 (C.A.).

⁶¹ See e.g. *Khalil v. Canada*, 2007 FC 923, at paras. 137–151.

⁶² [1959] S.C.R. 121.

⁶³ 2009 FCA 116.

litigants whose ultimate objective is an action in damages against the Crown for breach of contract in procurement processes. Is this the kind of case governed simply by contract or is there an aspect of it covered by public law and for which judicial review should be sought first? Putting it another way, at present, at least in the Federal Court, the litigant always faces the spectre of *Grenier* by taking the risk and simply commencing an action for damages for breach of contract. On the other hand, being cautious and seeking judicial review first will be costly and ultimately unnecessary if the judicial review court determines that this is not a situation where public law remedies are available.

The rule also compromises the objectives of the 1990 amendments to s. 17 of the then *Federal Court Act* and the federal *Crown Liability Act* permitting litigants to choose to commence actions for money remedies against the Crown and its agencies in the appropriate provincial superior court or provincial court, as opposed to the Federal Court. If in instances in which such a claim depends on the invalidity of federal administrative action, the plaintiff has first to apply for and obtain judicial review relief in the Federal Court or Federal Court of Appeal, an important part of the objectives of the amendment will have been lost.

To the extent that the rules severely limiting the opportunities for collateral attack are based on the need for finality of decision-making and the problems involved in leaving decisions or orders potentially open to attack at some undefined point in the future, there is, of course, a very close connection with the more general discretionary ground to refuse relief for undue delay in commencing and pursuing an application for judicial review.

Where, as is commonly the case, there is no statute of limitations on the bringing of applications for judicial review, the courts apply a much more broadly expressed discretion in determining whether to dismiss an application for judicial review on the grounds of delay. Unlike the highly-structured discretion applicable in collateral attack cases, the question is simply whether the delay in seeking relief is unreasonable, with the courts taking into account the reasons for the delay and whether allowing the application for judicial review would prejudice either the administrative process or other persons who may have relied on the decision in the meantime.⁶⁴ Also relevant, as under the prematurity test

⁶⁴ See e.g. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, supra note 6; *R. v. Board of Broadcast Governors, Ex parte Swift Current Telecasting Co. Ltd.* (1962), 33 D.L.R. (2d) 249 (Ont. C.A.).

articulated by Evans J. in *Lorenz*,⁶⁵ may be the nature of the error alleged and the strength of the applicant's case.⁶⁶ In every instance, however, the Supreme Court has emphasised that the outcome "will turn on the facts of each case."⁶⁷

V. FUTILITY OR LACK OF UTILITY

It is, then, clear that the Canadian courts have adopted a position that is favourable to statutory and prerogative authorities. In each instance, while the ground for denial of access to the relief sought is expressed as discretionary, the principles and criteria are generally weighted heavily in favour of denying persons affected the right to proceed with their claim or argument. Principal among the considerations that infuses all three domains is respect for the efficient and effective functioning of the administrative process (including legislative choice of the decision-maker as having primary responsibility for the functioning of the relevant regulatory scheme) as well as a concern not to trench unnecessarily upon scarce judicial resources. These same factors are also paramount—or at least highly relevant—with respect to a number of the other "discretionary" reasons for denying access to remedies against public authorities: waiver in the case of bias and indeed other hearing entitlements, mootness, misconduct, and even justiciability.

There is one domain, however, where the courts sometimes confront competing demands in terms of the integrity of administrative processes. This occurs when the respondent in judicial review proceedings asks the reviewing court not to grant relief because to do so would be futile. One very particular example of this is in situations where the basis on which judicial review is being sought is a violation of the principals of procedural fairness and the respondent's claim is that the substantive outcome would have been, and likely will be in the event of a remand, the same even after a hearing compliant with the requirements of procedural fairness.

⁶⁵ *Supra* note 15.

⁶⁶ See *e.g. MacLean v. University of British Columbia* (1993), 109 D.L.R. (4th) 569 (B.C.C.A.), postponing consideration of an application for dismissal of an application for judicial review on the basis of the delay until the hearing of the main application on the basis that the merits of the claim were relevant to the decision whether to invoke delay against the applicant.

⁶⁷ *Friends of the Oldman River Society*, *supra* note 6 at para. 105 (*per* La Forest J.).

In such situations, there is, on the one hand, the concern that courts should be reluctant to allow technical procedural arguments to obscure the substantive correctness of the decision under attack or to force the decision-maker to go through a decision-making process all over again—but this time observing the rules of procedural fairness—when the ultimate outcome will almost certainly be the same. On the other hand, there is an argument that, in procedural fairness cases, the courts have no business making an assessment of likely substantive outcomes. The argumentation will be primarily focussed on the procedural fairness of the process. The reviewing court will not have all the information before it on which the outcome on the merits depends, either because of the content of the judicial review record or simply by virtue of the fact that the applicant may not yet have had the chance to confront all relevant material or to bring to bear her or his own proofs and arguments. Moreover, the efficient conduct of judicial review is jeopardized in such instances to the extent that courts respond to pleas to expand the scope of the proceedings by allowing an enhanced record and, more generally, by becoming concerned with the substantive merits of the matter. Even more importantly, respect for the statutorily-designated authority would seem to demand that the reviewing court does not attempt to preempt that authority by itself determining an issue the primary responsibility for which vests in the decision-maker, not the reviewing court.

For the most part, the Supreme Court has leaned in the direction of the second set of considerations and adopted a self-denying role as far as any consideration of the merits is concerned. In this regard, the following statement by Le Dain J. in *Cardinal v. Director of Kent Institution* continues to generally hold sway⁶⁸ in such cases:

I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice to which any person affected by an administrative decision is entitled. It is not for a court to deny that right and sense of justice on the basis

⁶⁸ See e.g. *Wong v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, *supra* note 28 at para. 25.

of speculation as to what the result might have been had there been a hearing.⁶⁹

Cardinal was a case involving the *audi alteram partem* limb of the rules of procedural fairness or natural justice, as they were described in 1985. However, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, Cory J., for the Supreme Court of Canada, subsequently ruled that the same held where a decision was under attack on the basis of a reasonable apprehension of bias.⁷⁰

In one respect, however, the Court has modified the universality of this position. This was in *Mobil Oil Canada v. Canada-Newfoundland Offshore Petroleum Board*.⁷¹ In that instance, the application for judicial review involved both procedural and substantive grounds, with the Court finding that, on the substantive issue, the Board had no authority as a matter of law to grant the relevant application. In other words, the Court made a definitive finding that, even with the benefit of a fair hearing, there was no basis on which the applicant could have prevailed, even if there had been a fair hearing. Assuming that the substantive issue was properly before the Court on the merits, this was an appropriate outcome. It is also significant that, in adopting this position, Iacobucci J. (for the Court) made it clear that this derogation from *Cardinal* was an exceptional situation reserved for cases where the applicant's case on the substantive merits was "hopeless."⁷²

It is also important to recognize that courts will sometimes refuse relief on the basis that a tribunal's failure to observe statutory procedural provisions classified as directory (as opposed to mandatory) did not lead to a substantial wrong or miscarriage of justice. Even where the procedural claim is based on common law principles, as in *Kane v. University of British Columbia*, the Court may inquire whether the breach of the rules of procedural fairness might have worked to the prejudice of one of the parties.⁷³ However, in such instances, the primary focus is on whether the failure in issue prevented the complaining party from having

⁶⁹ [1985] 2 S.C.R. 643, at p. 661.

⁷⁰ [1992] 1 S.C.R. 623, at paras. 40–41 (with reference to *Cardinal*).

⁷¹ [1994] 1 S.C.R. 202.

⁷² *Ibid.* at pp. 228–29, citing H.W.R. Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988), at p. 535.

⁷³ [1980] 1 S.C.R. 1105.

a fair opportunity to present proofs and arguments, as opposed to prejudice in the form of an adverse substantive outcome.⁷⁴

Somewhat more controversially, the Federal Court of Appeal, in *Society Promoting Environmental Conservation v. Canada (Attorney General)*, has held that, among the factors that should be taken into consideration in determining whether a failure to adhere to statutory procedures, at least in instances of policy decisions having a broad impact, is whether setting aside the decision will lead to significant public inconvenience.⁷⁵ However, to the extent that this represents Canadian law, it is important to recognize that the Court treated this as just one factor among many that had to be taken into account, and that the Court was not dealing with a decision that targeted a particular individual but rather an expropriation order on broad public interest grounds affecting provincial ownership rights over the seabed. Moreover, in so doing, the Court was simply applying earlier Supreme Court of Canada authority⁷⁶ and not asserting an at-large capacity to deprive private citizens of their procedural rights on the basis of overriding public interest concerns.

VI. STATUTORY REGULATION

Statutory regulation of remedial discretion is not a common phenomenon. Rather, there are examples of statutory remedial regimes that simply reaffirm the discretionary nature of judicial review. Section 2(5) of the 1971 Ontario *Judicial Review Procedure Act* provides an example:

Where, in any of the proceedings enumerated in subsection (1), the court had before the 17th day of April 1972, a discretion to refuse to grant relief on any grounds, the court has a like discretion on like grounds to refuse to grant any relief on an application for judicial review.⁷⁷

⁷⁴ *Society Promoting Environmental Conservation v. Canada (Attorney General)*, 2003 FCA 239, at para. 40 (*per* Evans J.A.).

⁷⁵ *Ibid.* at para. 57 particularly.

⁷⁶ *Ibid.* at paras. 29–30, relying on *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41.

⁷⁷ R.S.O. 1990, c. J.1

Moreover, the Ontario courts have never seen this discretion as qualified by the terms of s. 2(1), which confers discretion to grant relief on an application for judicial review “despite any right of appeal.” The existence of an adequate right of appeal has remained a basis for the denial of relief in Ontario, as exemplified by *Howe v. Institute of Chartered Accountants of Ontario*, and others.⁷⁸ However, perhaps out of abundance of caution or perhaps to expand what was seen as a limited judicial discretion, s. 3 of the Ontario statute does codify the law with respect to a “defect in form or technical irregularity.” Provided there has been “no substantial wrong or miscarriage of justice,” the Court may not only refuse relief but also, if a decision has already been taken, make an order validating that decision.

As with s. 2(1) of the Ontario *Judicial Review Procedure Act*, s. 18.1(4) of the *Federal Courts Act* expresses the availability of judicial review when one of the specified grounds is established in discretionary terms: “may grant relief.”⁷⁹ However, the French version of that provision is expressed somewhat differently. It provides that “[l]es mesures prévues au paragraphe (3) sont prises” if the Federal Court is convinced that the applicant has made out one of the listed grounds of review. Translated literally (“are or shall be taken”), this is not the language of discretion.

Nonetheless, in *Canada (Citizenship and Immigration) v. Khosa*, the Supreme Court, after an examination of the principles and rules governing the interpretation of legislation where there is an apparent conflict between the official English and French versions, reaffirmed the primacy of discretion as expressed by “may” in the English version.⁸⁰ I see nothing problematic about that. What produced a difference of opinion among the members of the Court was the extent of the reach of the discretion.

Section 18.1 of the *Federal Courts Act* specifies the grounds on which the Court can grant an application for judicial review. It does not say anything about the standard of review to be applied in conducting judicial review with reference to the specified grounds. In *Khosa*, the Court considered whether the common law requiring identification of a standard of review as an integral part of any application for judicial

⁷⁸ *Supra* note 10.

⁷⁹ R.S.C. 1985, c. F-7 (as amended).

⁸⁰ *Supra* note 5.

review was superimposed on the grounds of review contained in s. 18.1, or whether the silence of the legislature on this issue should lead to the conclusion that judicial review on all the specified grounds should proceed on a correctness basis, with no room for deference (as now reflected in unreasonableness review) with respect to any of the specified grounds. On this issue, Binnie J. (delivering the judgment of the majority on this point) and Rothstein J. differed. Binnie J. deployed the discretionary nature of judicial review under s. 18.1 to justify his conclusion that standard of review analysis was required under that provision. It was part of the “discretionary” component of judicial review:

Of course, the discretion must be exercised judicially, but the general principles of judicial review dealt with in *Dunsmuir* provide elements of the appropriate judicial basis for its exercise.⁸¹

While Rothstein J. had no problem accepting the position that s. 18.1 preserved the discretionary nature of judicial review, he would have no truck with Binnie J.’s position that, for these purposes, that discretionary nature also included the principles on which courts are meant to select a standard of review for substantive issues:

By linking remedial discretion to *Dunsmuir* “general principles of judicial review,” Binnie J. conflates standard of review (deference) with the granting of relief.... [T]he discretion contained in s. 18.1(4) speaks to the withholding of relief in appropriate cases: it does engage the standard of review. Reliance upon it by the majority to support the view that it opens the door to the *Dunsmuir* standard of review analysis is, with respect, misplaced.⁸²

I have no doubt that Rothstein J. has the better of this part of the debate. Remedial discretion has no purchase or bearing upon settling the standard of review to be applied in establishing whether there is a basis for judicial review of a substantive determination. That does not, of course, mean that standard of review analysis is necessarily excluded from the process of review under s. 18.1 of the *Federal Courts Act*. There may well be other justifications for that conclusion. However, the use of the word “may” in s. 18.1 and the discretion that brings with it is a spurious basis on which to assert that the section necessarily implicates

⁸¹ *Supra* note 5 at para. 36.

⁸² *Ibid.* at para. 134.

standard of review analysis. It distorts and conflates two separate issues. Fortunately, however, it is difficult to see how this particular argument will on an ongoing basis otherwise affect the conduct of judicial review in the Federal Court, Federal Court of Appeal, or elsewhere. It appears to be a makeweight argument with no practical consequences beyond the immediate issue that arose in *Khosa*.

VII. CONCLUSIONS

One of the principal characteristics of Canadian judicial review law over the past thirty years has been the extent to which the Supreme Court of Canada has preached the gospel of restraint in the judicial supervision of decisions by statutory authorities. In determining whether to review the decisions of statutory and prerogative authorities, it is now mandatory for the courts to conduct a standard of review analysis to determine whether or not they should afford deference to the substantive (and, at times, procedural) determination of those authorities. What is also clear in the case law governing public law remedies, and especially the principles governing the discretionary principles on which relief is given or denied, is that this same sense of the need for deference to or respect for the integrity of administrative processes imbues much of the courts' work. While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes—and particularly where there is any suggestion that the applicant or plaintiff is seeking to manipulate the functioning of that process and its remedial scheme to her or his own advantage—the courts will generally deny relief. And, so it should be! It makes no sense to have a policy of paying respect to legislative choice and expertise in the review of substantive determinations but which fails to do so at the remedial end of the process.

