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DEFERENCE FROM *BAKER* TO *SURESH* AND BEYOND - INTERPRETING THE CONFLICTING SIGNALS

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Deference from *Baker*[1] to *Suresh*[2] and Beyond - Interpreting the Conflicting Signals [3]

There should really be no doubt in any reader's mind that the application of the functional and pragmatic approach to the discretionary decisions at stake in *Baker* marks not an extension of deference but a retreat from it.

JLH Sprague, 'Another View of *Baker*.'[4]

I Introduction

On December 21, 2001, over twenty years after she arrived in Canada as a visitor from Jamaica, Mavis Baker achieved her ambition: permanent resident status in this country.[5] In the course of her struggles to this end, Mavis Baker had a massive collateral impact. The judgment on her appeal to the Supreme Court of Canada involved a consideration and reevaluation of several concerns that are central to the ways in which statutory and prerogative authorities take decisions and particularly exercise discretionary powers. The consequences of *Baker* for Canadian judicial review theory was one of the main reasons for the conference which provided the basis for this collection.

The starting point for this chapter is *Baker*'s impact on the standard of review that the courts apply in reviewing exercises of public power; the degree of deference, if any they pay to the judgment of the designated decision-maker. One of the keenest debates about the impact of *Baker* has focussed on whether the principles for review of discretionary decision-making set out in the majority judgment of L'Heureux-Dubé J presaged an era of greater, the same, or less deference in the conduct of judicial review. What I will do first is to evaluate that question simply on the basis of *Baker* itself and its place in the development of Canadian judicial review of administrative action.

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1 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

2 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

3 This chapter owes a great deal to comments that I received on the conference version from both David Dyzenhaus and Evan Fox-Decent. It also benefitted from Evan's presentation of my paper at the conference and the questions he raised in that presentation, as well as many further insights that I gained from reading the other conference papers and listening to the various presentations and interventions. I am also very grateful to Allison Kuntz of Law '03 (Queen's) for her diligent unearthing and analysis of all Canadian judgments in which *Baker* had been cited until the end of 2001.

4 (1999) 7 *Reid's Administrative Law* 163 at 163.

5 C Gillis, 'Mother in battle over deportation legally a resident', *National Post*, December 22, 2001.

I will then consider how deference theory has fared subsequently mainly in the Supreme Court of Canada in the domains of both executive or discretionary decision-making and tribunal adjudications. Does the subsequent jurisprudence provide any answers or clues to the issue of whether *Baker* heralded renewed judicial interventionism in the administrative process? My answer to that question, as with my analysis of *Baker* on its own terms, is that the message is mixed. In some areas of judicial review, there are clear signs of a lessening of judicial deference or respect for statutory decision-making, though, in most instances, I believe it is difficult to attribute that to *Baker*. In the particular context of discretionary or executive decision-making, the opposite has been true or, perhaps more accurately, the Court has actually deployed *Baker* or concepts underpinning *Baker* to confirm and even increase traditional patterns of considerable deference to the highest levels of that form of decision-making. Here, the principal 'villain' is the Court's judgment in *Suresh v Canada (Minister of Citizenship and Immigration)*[6] in which a highly deferential approach was taken to the exercise of discretion in a case involving national security issues but which also, because of the possibility of a substantial risk of torture at the hands of another government, implicated rights protected under section 7 of the *Canadian Charter of Rights and Freedoms*.

In the final section of my paper, I will step back from the detailed evaluation of case law and attempt, by reference to an evaluation of what 'deference' as a concept is actually addressing, to suggest that the Supreme Court is beginning to get it all backwards. In other words, I will argue that, while I continue to applaud *Baker* itself, the Court has subsequently been lessening deference in domains where it is most justified and increasing deference in relation to decision-making where there is frequently strong justification for judicial scrutiny of the grounds on which those mainly discretionary decisions are taken. More specifically, I will argue that, where, as in *Suresh*, discretionary decision-making engaging *Charter* rights is at issue, without a fully articulated section 1 justification, it is perverse to adopt a standard of review, that of patent unreasonableness, which is less searching than that adopted in *Baker*. This is so irrespective of the way in which the Court's posture towards discretionary decision-making in *Baker* is interpreted.

II *Baker* and Deference

(a) Heightened Deference Indicators

One of *Baker*'s principal contributions to Canadian judicial review is its extension of the 'pragmatic and functional' approach to delineating the appropriate standard of review. To that point, this approach had been associated primarily with the determination of the appropriate standard of review for questions of law, mixed law and fact, and fact addressed by tribunals charged with resolving issues arising under what were often detailed statutory schemes. It had not been associated all that often with the review of grants of broad discretionary power to

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[6] *Supra*, note 2.

governmental officials. In *Baker*, L'Heureux-Dubé J noted the difficulty at the margins in drawing distinctions between the determination of issues of law and fact and the exercise of discretionary power. If that is so, why would standard of review analysis apply in one domain and not the other? More generally, was there any reason to believe that the bases on which the courts paid more deference to some tribunals than others were not also bases that would be useful in determining the extent to which the exercise of broader discretionary decision-making powers should be subjected to review? The Court, therefore, pronounced that henceforth all forms of decision-making would be subjected to a threshold standard of review analysis. On the basis of a pragmatic and functional analysis, which of the three commonly accepted standards applied: incorrectness, unreasonableness, or patent unreasonableness?[7]

This extension of standard of review analysis to territory where it had not generally been a factor raises the obvious question: Would there now be more or less room to review discretionary decision-making? My early position was that, for the most part, it would in fact impose an even more deferential standard of review in such cases.[8] My basis for this was the manner in which the existing grounds for judicial intervention in discretionary decision-making were framed in the language of 'correctness'. Taking account of irrelevant factors, failing to take account of relevant factors, acting for a wrongful purpose or one not contemplated by the empowering legislation all spoke to the reviewing court determining on a correctness basis whether the decision-maker had erred in law in the interpretation of what factors were relevant and what were appropriate purposes in terms of the governing statute.[9] The vocabulary, if not the practice[10] of this area of

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[7] For the purposes of this paper, I am assuming that 'reasonableness' and 'reasonableness *simpliciter*' are the same beast and am ignoring other possible refinements such as British Columbia authority that suggests that, even within the correctness standard, there is room for deference: eg *Northwood Inc. v British Columbia (Forest Products Board)* (2001) 86 BCLR (3d) 215 (BCCA) at para. 36 (*per* Lambert JA). Indeed, this issue seems settled by the dogmatic statement of McLachlin CJ for the majority in *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 (December 20, 2002) at para. 5: 'The pragmatic and functional approach applicable to judicial review allows for three standards of review: correctness, patent unreasonableness and an intermediate standard of reasonableness'.

[8] See '*Baker* v. *Canada (Minister of Citizenship and Immigration)* - A Defining Moment in Canadian Administrative Law' (1999) 7 *Reid's Administrative Law* 145.

[9] Indeed, one of the problematic aspects of the foundational cases in modern Canadian administrative law on the need for deference to decisions taken by administrative tribunals within their home territory or expected area of expertise was that Dickson J (as he then was) left open the possibility that 'patent unreasonableness' would exist whenever a statutory authority was 'basing the decision on extraneous matters, [or] failing to take relevant factors into account': *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227 at 237, by reference back to his judgment in *Service Employees' International Union v Nipawin Union Hospital* [1975] 1 SCR 382 at 389. What this suggested is

judicial review law did not seem to concede to the decision-maker any room for manouevre in determining any of these questions save in situations where the relevant statutory provision conferred on the authority a subjective discretion as to relevance.[11]

What the judgment of L'Heureux-Dubé J suggested at various points was that the application of standard of review analysis to challenges based on these grounds[12] would involve the potential for much more deference to decision-making in which there was a high level of discretion. Only in rare cases would the inquiry still be a correctness one: Was the decision-maker correct in treating or failing to treat this as a relevant factor? Rather, in the vast majority of cases, the inquiry would become: Was the decision maker unreasonable or patently unreasonable in treating or failing to treat this as a relevant factor? If so, this was going to make it harder for those challenging on these grounds to succeed.

This sense emerges most clearly in the following extract from the judgment:

> Incorporating judicial review of decisions that involve considerable discretion into

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that the Court should determine on a correctness basis whether the decision-maker had taken into account irrelevant factors or failed to take account of relevant factors. If this had in fact happened, there was patent unreasonableness. Such an approach seems to leave little room for deference or respect for decision-maker appreciation of those factors or considerations that were relevant to the interpretation of a particular statutory provision or the exercise of a particular statutory power. In other words, there was a built-in contradiction in the theory developed by Dickson J and espoused by the Court.

[10] In fact, particularly in the domain of judicial review of executive decision-making, this rhetoric or theory was not one which led to many instances of judicial review. Deference to the higher levels of discretionary powers conferred on the executive branch (as opposed to tribunals) remained the practice with few examples of wrongful purpose, irrelevant consideration and failure to take account of relevant considerations review. I have developed this theme in 'The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality' in The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy (eds. Mossman and Otis) (Montréal, Les Éditions Thémis, 2000). Among the exceptions is, of course, *Roncarelli v Duplessis* [1959] SCR 121, which is cited in *Baker* at para. 53 and may provide some indication of one way to resolve the apparent inconsistencies in L'Heureux-Dubé J's judgment on review for abuse of discretion. I return to this matter below.

[11] See, for example, *Sheehan v Ontario (Criminal Injuries Compensation Board)* (1974) 52 DLR (3d) 728 (Ont CA).

[12] Obviously, the whole standard of review analysis has no application to a number of the other accepted bases for challenging exercises of discretion: bad faith, acting under dictation, wrongful delegation, and also (probably) wrongful fettering.

> the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the 'proper purpose' or 'relevant considerations' involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion is left to a decision-maker, the more reluctant the courts should be to interfere with the manner in which decision-makers have made choices among various options.[13]

Indeed, it is significant that in this statement L'Heureux-Dubé J extends the reach of deference to the decision-maker's discernment of the purpose of the relevant statutory provisions. Taken at face value, this is quite surprising since it amounts to a concession that, at least in certain contexts, the Court is accepting that the legislature's delegate will have a better sense of the legislative purpose than the reviewing court.[14] In other words, it suggests that the Court will not always be the best interpreter of the underlying purposes of the statute in general and the relevant provisions in particular. Rather, those involved in the day to day administration of the statute have claims to deference and respect from the reviewing court in their articulation of the underlying purposes in the context of giving meaning to particular terms or discerning the boundaries of broad discretions.

What also seemed clear on the facts of *Baker* was that, to the extent that the Court adopted the 'unreasonableness' standard for review of the Minister's humanitarian and compassionate discretion conferred by the relevant regulation, it was relying upon some very particular considerations: the extent of the impact of the decision on Baker and her children, the absence of any polycentric dimensions in the regular exercise of this discretion, and, at least implicitly, the fact that low level officials were exercising the power on behalf of the Minister. The clear

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[13] At para. 56.

[14] In this context, compare the judgment of Sopinka J for the majority in *Shell Canada Products Ltd v Vancouver (City)* [1994] 1 SCR 231. There, he applied a correctness standard automatically in the context of a challenge to the City's decision not to trade with Shell Canada as long as its parent and a related company were still engaged in trade with apartheid South Africa. Despite the municipality's broad discretionary powers over governance of the City, the majority was clear that its assessment of what was a proper municipal purpose was entitled to no deference from the Court. In contrast, McLachlin J, speaking for a minority of four, would have accorded the municipality considerable deference in its assessment of what was appropriately for 'the good rule and government of the city' and 'for the health, welfare, safety and good government of the city'. In this context, the decisions of elected municipal officials has as strong a claim to deference as those taken by 'non-elected statutory boards and agencies' (at 246-47). In fact, in the light of *Baker*, it is questionable whether *Shell Canada* remains good law. In this regard, see *Chamberlain v Surrey School District, No. 36*, *supra*, note 7 and *Nanaimo (City) v Rascal Trucking Ltd* [2000] 1 SCR 342.

implication of all of this was that, in the domain of decision-making where the individual interests at stake were less valued and the determination not a stand alone one dependent on facts peculiar to a particular person, the standard of review for discretionary decision-making would be that of patent unreasonableness. Indeed, given the strength of the factors in *Baker* pointing towards more intrusive review, it is difficult to conceive of many instances where the Court would have taken the next step and moved to correctness as the standard save perhaps where *Charter* or other constitutional rights and freedoms were at stake,[15] an argument never reached by the Court in *Baker*. In so far as the focus remains on the determination of what constitute relevant factors and permissible purposes (as opposed to any assessment of the way in which those factors and purposes were applied to the facts of the particular case), this speaks to the extent of the movement away from intrusive correctness review in cases concerning the boundaries of the relevant discretion.

It is also worth recollecting that *Baker* was the first instance[16] in which, in the domain of general procedural fairness requirements, the Court clearly articulated that, in assessing the level of procedures that the common law required in the face of legislative silence or a gap, the procedural choices of the decision-maker were at least on occasion entitled to deference or respect. This was to be the case both where 'the statute leaves to the decision-maker the ability to

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[15] Indeed, as will be seen below, even that did not prove to be the case in *Suresh v Canada (Minister of Citizenship and Immigration)*, *supra*, note 2.

[16] There were, however, earlier judgments of the Court which seemed to acknowledge that administrative authorities were entitled to a certain leeway in their procedural choices. Thus, in the foundation case of *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 SCR 311, Laskin CJ (at 328), in referring the question of Nicholson's status back to the Board to be dealt with in accordance with the principles of procedural fairness allowed the Board discretion to reconsider the question of Nicholson's future as a police officer 'whether orally or in writing as the Board might determine'. In similar vein, in *Board of Education of the Indian Head School Division No. 19 of Saskatchewan v Knight* [1990] 1 SCR 653 at 685, L'Heureux-Dubé J made the following statement:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of the requirements of natural justice that must be observed by a court, but rather to allow **administrative bodies to work out a system** that is flexible, adapted to their needs and fair [emphasis added].

Such statements clearly foreshadowed the more explicit recognition of the need on occasion for deference to procedural rules and rulings. (*Quaere*, however, whether it is ever appropriate to go even further as suggested by *Knight* and to allow for contracting out of the procedural protections that the common law would normally require.)

choose its own procedures, **or** when the agency has expertise in determining what procedures are appropriate in the circumstances [emphasis added].'[17] While there had been some recognition of the need for deference to the exercise of explicit statutory conferrals of discretion over procedures,[18] the operating assumption in all other situations had been one of straight correctness review. Procedural issues were the domain *par excellence* of the superior courts.

On the basis of this, I assumed that *Baker* was in fact adding further dimensions to the application of principles of deference, and this despite the fact that the Court did intervene and review the decision on both procedural and substantive grounds.

(b) Heightened Intervention Indicators

For those, such as Sprague, who feared that *Baker* was ushering in an era of much greater judicial intervention in discretionary decision-making, the principal concern was that the judgment invited either straight incorrectness review or unreasonableness review of the substance of discretionary exercises of power. Indeed, his view was shared by some who rather than regretting such an innovation largely rejoiced in it.[19]

Their contention was that this altered dramatically the previously accepted law. That law was to the effect that, provided the decision-maker did not commit any of the very specific sins in discretionary decision-making (taking account of irrelevant factors, and so on), the decision-maker was almost completely immune from review. Only where the decision was, under the famous *Wednesbury* standard,[20] so unreasonable that no reasonable authority could ever have come to it, would there be intervention. This was a very high standard for challengers to meet as

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[17] At para. 27.

[18] See *Bibeault v McCaffrey* [1984] 1 SCR 176.

[19] See D Dyzenhaus and E Fox-Decent, 'Rethinking the Process/Substance Distinction: *Baker v Canada*' (2001) 51 *University of Toronto Law Journal* 193, as well as aspects of D Dyzenhaus, M Taggart and M Hunt, 'The Principle of Legality in Administrative Law: Internationalization as Constitutionalization' (2001) 1 *Oxford University Commonwealth Law Journal* 5 and D Dyzenhaus, 'Constituting the Rule of Law: Fundamental Values in Administrative Law' (2002) 27 *Queen's Law Journal* 445. See also Lorne Sossin, 'Developments in Administrative Law: The 1997-98 and 1998-99 Terms' (2000) 11 *Supreme Court Law Review* (2d) 37.

[20] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 44 (CA). In fact, the *Wednesbury* test has in effect been replaced in English law by a more intrusive proportionality test. Eg *Daly v Secretary of State for the Home Department*, [2001] 2 W.L.R. 1622 (HL) and the discussion by M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"'

exemplified by the almost complete absence of Canadian case law where *Wednesbury* unreasonableness had been pleaded successfully.[21] Now, it was asserted, for many tribunals, it would be a case of open-ended unreasonableness or incorrectness review of the merits for a broad range of decision-making. This was seen as a significant derogation from deference.

Support for that argument took two forms. First, there was the Court's repudiation of the earlier 'governing' Federal Court of Appeal judgment in *Shah v Canada (Minister of Employment and Immigration)*.[22] There, the Court of Appeal had stated that the exercise of the humanitarian and compassionate authority was in effect substantively unreviewable in that it was 'wholly a matter of judgment and discretion.'[23] Even more pertinently, there was the heading to the merits portion of the judgment in *Baker* ('Was this Decision Unreasonable?') and the application of the standard to the facts that followed under that heading. Not only did this suggest at large unreasonableness review but, in this context, also considerable room for judicial reweighing of the various factors that the ministerial officials had taken into account. The question to be asked was not just whether the decision-maker had given any consideration to the interests of Baker's children but also whether the officials had given those interests 'serious weight,'[24] 'close attention,'[25] or 'alive, attentive, or sensitive' consideration.[26] Then, in terms of the consequences to Baker herself, the Court's view was that the decision-makers had 'failed to give sufficient weight or consideration'[27] to the potential hardship involved in a return to Jamaica.

All of this seemed to leave great latitude for a reviewing court to assess whether the decision-maker had weighed all the relevant considerations properly. Indeed, even though this was all to be done under the umbrella of unreasonableness review, it bespoke a version of unreasonableness that comes close to a straight reassessment of the merits of Baker's claim. Instead of asking whether it was unreasonable not to take account of the interests of Baker's children (a finding that the Court in effect actually made here), the reviewing court could, indeed should also inquire whether it was unreasonable not to give that consideration considerable weight in making the assessment that the exercise of the discretion requires. While this does not speak to the precise weight to be accorded to the children's interests, it obviously allows more room for intervention in the balancing of interests or considerations by the decision-maker. Also, to the extent that this

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21 See David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at 121-22.

22 (1990), 170 N.R. 238 (F.C.A.).

23 *Id.*, at 239.

24 At para. 65.

25 At para. 67.

26 At para. 73.

27 *Ibid.*

formulation became part of patent unreasonableness review in situations where that was the appropriate standard, it would have the same tendency to expand the granting of relief even under that most deferential of tests.

There was also another way in which many saw *Baker* as expansive. That was in the sense of its extension of the factors to which decision-makers would have to be attentive in making a decision. In *Baker*, the Court relied upon three primary indicators in reaching the conclusion that the interests of Baker's children was a relevant factor deserving of serious consideration: the purposes of the relevant legislation, the internal guidelines provided to immigration officials by the Minister, and the international Convention on the Rights of the Child.[28] Of these, the first was standard and uncontroversial. The second was novel but in its own way deferential in the sense that the Court was taking account of the views of those who were primarily responsible for giving effect to the exercise of discretion by developing policy guidelines for line officers. Presumably, their view as to relevance should count for more than that of the line officers themselves. It was, however, the third factor that attracted the most attention from commentators as well as the concurring judgment of Iacobucci and Cory JJ which demurred from the majority's use of a ratified but unincorporated treaty as an instrument to guide the assessment of what constituted relevant factors under domestic legislation.

According to the minority,[29] by requiring discretionary decision-makers to take account of ratified but unincorporated treaties, the majority was challenging the doctrine of legislative supremacy on which was based the rule that such treaties are not part of the domestic law of Canada.[30] More generally, it was seen by some as adding a new (and for the critics) problematic

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[28] Can TS 1992 No. 3.

[29] *Supra*, note 1 at paras. 79-81.

[30] In fact, L'Heureux-Dubé J tried to take a middle ground on this matter. While explicitly accepting that such ratified but unincorporated or unimplemented treaties could have 'no direct application in Canadian law', she did regard Canada's ratification of the Convention on the Rights of the Child as an 'indicator of the importance of considering the interests of children': *id.*, at para. 69. Reconciling these two statements is not all that easy. However, it might be that all she is saying in this paragraph is that, just as the ministerial guidelines provide good evidence of how a discretion must be exercised, so too must other executive acts (such as ratification) provide evidence of what constitutes relevant considerations to the exercise of an open-ended discretion. However, thereafter (at paras. 70-71), she goes on to speak more generally of the relevance of international law to the exercise of domestic discretionary powers. In this context, she seems to treat the Convention as part of a more general principle of international human rights law mandating the giving of serious consideration in all circumstances to the interests of children. In this domain, presumably, she is talking in terms of a peremptory norm of international law or customary international law, which do have force domestically irrespective of legislative implementation absent, according to parliamentary supremacists,

dimension to the exercise of statutory power - the requirement that line decision-makers know of and actually attribute appropriate weight to all ratified but unincorporated treaties.[31] Given this, there would obviously be more opportunities for judicial review. Moreover, to the extent that the Court had earlier in *Pushpanathan v Canada (Minister of Employment and Immigration)*[32] refused to accord the Immigration and Refugee Board any deference when deciding a question of international law, when that issue was raised, there would be correctness, not deferential review.

More generally, L'Heureux-Dubé J stated that

> ...discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.[33]

At least three of these factors are uncontroversial (the statute, the *Charter*, and the principles of administrative law) A fourth, the rule of law is arguably a concept of such generality as not to have any free-standing force as a specific ground of review of exercises of discretion. However, to the extent that it is conceived of more expansively than in a formal Diceyan sense and is imbued with a substantive content, it may well have scope for providing 'new' limits on the exercise of discretionary power. Also, requiring the decision-maker to be attuned to the 'fundamental values of Canadian society' not only invites debate as to what precisely those values are or where they are to be found but also suggests room for judicial intervention if the court and the person exercising discretion are not in accord on what is fundamental.

Lurking in the background more generally and perhaps as part of the fundamental values of

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legislative abrogation. I have no problem with either of these conceptions in the sense that they both have strong claims for recognition as legitimate sources for constraining or empowering the exercise of broad discretionary powers and, indeed, the giving of meaning to legislative provisions. Statutes, and particularly those conferring powers on public officials, do not exist in a vacuum and must be parsed within the context of the entire legal and political environment. Indeed, there is also a case to be made for the direct application of certain ratified but not specifically incorporated treaties. Some treaty obligations can be seen as not needing direct legislative implementation because of the capacities of existing statutory regimes to absorb them by reason of the breadth of the discretion or terms of the statutory provision to which they are clearly relevant. For fuller analysis, see J Brunnée and SJ Toope's chapter: 'A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts'.

[31] This is not necessarily an insuperable problem as L Sossin argues in his chapter, 'The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion'.

[32] [1998] 1 SCR 982.

[33] At para. 56.

Canadian society are also the four underlying principles of the Canadian constitution identified in *Reference re Secession of Quebec*[34]: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.[35] These 'substantive limitations upon government action'[36] also presaged an era of greater scope for judicial review of administrative action.

(c) Reconciling the Two Polarities

Given these two very different readings of *Baker*, the question that naturally arises is whether this part of L'Heureux-Dubé J's judgment is internally inconsistent. Can the theory she develops[37] fit coherently with the application of that theory to the particular facts[38] of *Baker*?

One way of reconciling the two parts of the judgment that has the merit of simplicity is to see the application of the theory to the facts as amounting to a judgment by the Court that the line officers did not (other than negatively) take the children's interests into account in reaching their decision and that, under the appropriate standard, this was unreasonable. Moreover, to the extent that the Court spoke at least twice in terms of the obligation of the line officers to be 'alive, attentive, or sensitive' to the interests of the children, the Court was simply making a statement of what taking a factor into account, as opposed to not giving it any weight, actually involves. Tokenism will not suffice. Seen in this light, the Court is doing no more than saying that it was unreasonable for the line officers not to take the interests of the children into account. As such, it is consistent with the theory developed earlier in this part of the judgment.

However, this stands the danger of being branded as facile and disingenuous. After all, in other parts of the theory/fact application section, L'Heureux-Dubé J used language that clearly indicated that the Court was concerned with weight. As already noted, she spoke of the need to treat the best interests of the children 'as an important factor', and to give them 'substantial weight'. The same is true of Mavis Baker's own interests. The officials did not 'give sufficient weight or consideration' to the possible hardship she would suffer. Each of these statements goes beyond an evaluation of whether it was reasonable for the officials not to take particular factors into account. Rather they amount to assertions that reasonable officials were not only obliged to take them into account but to give them a certain weight. That clearly calls for another explanation of how the two relevant parts of the judgment jibe.

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34 Hereinafter '*Secession Reference*'.

35 [1998] 2 SCR 217.

36 At para. 54.

37 At paras. 49-56.

38 At paras. 63-75 particularly.

One other way of looking at it may be to focus on the characterization or description of the consideration or factor that the applicant for relief is claiming is relevant. If that characterization or description legitimately incorporates elements of weight or degree, then there may be a way out of the apparent dilemma of the judgment. Thus, in *Baker*, the question might be stated as whether or not it was unreasonable for the officials to value less than significantly the interests of the children and the hardship to Baker herself. Seen in these terms, the consideration for which the claim is being made is not just the interests of the children and the hardship to Baker herself but the seriousness of those interests and that hardship.

While that too may provide a neat way of reconciling the apparent contradiction or internal inconsistency in the judgment, there are some obvious objections to such a theory. The first is that it complicates even further the task of judicial review of discretionary decision-making. Not only does the reviewing court have to make a decision as to which of three standards applies to the actual decision but also it has to apply that standard to one of a number of possible variations on how the consideration is to be defined: permissibly relevant or mandatorily relevant and, if mandatorily relevant, entitled to just some weight, moderate weight, a lot of weight or decisive weight.[39] Thereafter, the next stage in the analysis will involve assessing whether the requisite attention has been paid to the consideration as defined. Thus, if on a patent unreasonableness standard, it would be patently unreasonable for the decision-maker not to give a lot of weight to a certain factor, the reviewing court will have to ask whether that considerable weight has in fact been given.

That leads into a second objection: the more gradations or variations that are recognized within this framework, the closer the ultimate stage becomes one of actually reweighing the manner in which the decision-maker exercised his or her discretion. Under some of the variations of this analysis (and in particular moderate weight and a lot of weight), it is virtually impossible to deal with the particular factor in isolation; it is only in relation to the other factors or considerations that were properly taken into account that a judgment can be made as to whether that particular factor was appropriately evaluated. At this stage, the task of the court is indeed one of reweighing albeit that the process of reweighing has been reached under the umbrella of an initial standard of review analysis.

Can this be justified either generally or on the particular facts of *Baker*? My belief is that, if there is a justification for a court going down this complex and ultimately interventionist path, it has to be based on strong reasons for that court accepting an applicant's argument that what counts as a consideration should be defined in terms of its importance or significance and not just its subject matter. If that indeed represents a substantial onus, then the general principles of deference are not necessarily compromised inappropriately. However, much will depend on what constitute the criteria that have to be addressed in meeting that onus.

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[39] Other classifications are also possible representing either synonyms or more refined variations: primary consideration; serious consideration, to take two variants from *Baker* itself.

In terms of this latter concern, *Baker* is in fact instructive. It is in the context of the three critical indicators that L'Heureux-Dubé J moves to asserting that the interests at stake require not just some attention but close or serious consideration. The Act's intention that the discretion be exercised in light of a general policy of keeping family members together, the reiteration of that policy in the ministerial guidelines, and the protection accorded to the interests of children under the Convention on the Rights of the Child and more general international law provide the backdrop against which the Court moves to defining the considerations that reasonably have to be taken into account in terms of both subject matter (the interests of Baker's children and the hardship to her) and weight.

Seen in this light, the Court is not in fact asserting a general competence to review the weight to be attributed to all factors that might bear upon the exercise of the humanitarian and compassionate discretion or, indeed, dictating that all such permissive considerations are mandatory ones. Rather, the Court is isolating particular factors that it sees on a reasonableness standard of review as having particular significance, thereby justifying the attribution of weight as a component of them as considerations which have to be taken into account. In general terms, that seems to me to be legitimate.

It is also worth noting in this context that, at least in terms of the way the judgment is crafted, it is not possible to accuse the Court of double counting. The initial analysis that produced unreasonableness as the appropriate standard of review proceeds at a far higher level of generality. Thus, in describing the nature of the question to be asked, the Court at this point confines itself to talking of it in terms of one that 'relates directly to the rights and interests of an individual in relation to government, rather than balancing the interests of various constituencies or mediating between them'.[40] It does not refer to the more specific interests of Baker and her children which will be affected by the ultimate decision. They only emerge once the standard of review is established and the Court has moved to a consideration of whether the line officers failed the relevance test within that standard. However, the fact that that is so does beg at least one question and that is why, if in general standard of review determinations are so context-sensitive, these factors were not actually accounted for in the initial determination of what constituted the standard of review. Why did the Court in this case proceed at such a level of generality? Will that always be appropriate when standard of review analysis is being conducted in the context of broad discretionary powers?

In fact, the route just described is not the only way of reconciling the possible inconsistencies in the L'Heureux-Dubé J judgment. There is at least one other account or, at the very least, a variation on or addition to the argument just outlined. In the very paragraph in which she accepts that deferential standards of review 'may give substantial leeway' to a discretionary decision-maker's assessment of what are proper purposes or relevant factors, she goes on to in effect qualify that by reference to the list which in a more general sense constitutes the boundaries within which discretion has to be exercised, including, as seen already, the rule of law and 'the

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[40] *Id.*, at para. 60.

fundamental values of Canadian society'. When the interests at stake come within the realm of these boundary-defining principles, either closer judicial scrutiny is required or the standard becomes a correctness one. Thus, it could be argued that when the Court later, by reference to the three indicators, becomes involved in the weight to be attributed to the interests of the children and the possible hardship suffered by Baker by a return to Jamaica, the Court is implicitly recognizing that these are factors that implicate the boundaries - principles of international law (as part of a substantive conception of the rule of law) in the case of the interests of the children and the fundamental values of Canadian society in the case of the hardship to Mavis Baker.

It is in this context that there are the strongest echoes of *Roncarelli v Duplessis*.[41] There, the Court, in reviewing what was a broad discretion over liquor licences, applied underlying conceptions of the Canadian constitution to conclude that the regulatory authority acting under the dictates of the Premier had proceeded on the basis of irrelevant considerations or for impermissible purposes in cancelling Roncarelli's liquor licence: taking religious affiliations into account and punishing someone for exercising a recognized civil liberty, that of posting bail for those charged with criminal offences. In *Baker*, underlying principles surface to impose on the discretionary decision-maker the obligation to attribute a particular weight to factors which arise out of those underlying principles. Once again, under this theory, it is not every potentially relevant factor that will justify this treatment but only those which arise out of the underlying principles listed in the judgment. In general, it is once again hard to take issue with this.

There is, however, one aspect of the application of both this theory and the earlier one to the facts of *Baker* that is highly problematic. The way I have constructed each of these theories makes them out to be exceptions to the normal process of reviewing for abuse of discretion under an unreasonableness or patent unreasonableness standard. They each assert that, even in the exercise of broad discretions attracting a generally deferential posture on the part of the courts, considerations may become relevant and which, because of their significance, demand closer scrutiny in the context of judicial review. They may have to be not just taken into account but also given appropriate weight. They may even dictate that the discretionary decision-maker correctly define their content and accurately or precisely calibrate their relevance to the particular facts.

Even though the interests of children is likely to be a recurring issue in the exercise of the humanitarian and compassionate discretion, in the light of the Convention, general international law and, indeed, the fundamental values of Canadian society, it is a factor or consideration that presents strong claims for special treatment. Moreover, to the extent that it will not be a factor in every case, according it special status does not undercut the more general policy of being deferential to the 'Minister's' discretionary determinations and the reflection of that in the adoption of an unreasonableness standard. However, the same cannot be said of the issue of the hardship to Ms. Baker herself. The potential hardship caused to the applicant by deportation will always be a factor in any claim to a favourable exercise of the Minister's discretion. To therefore

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[41] *Supra*, note 10.

decide at one level that the Minister's discretion deserves deference but then to assert, in the name of hardship to the applicant, a more intrusive level of scrutiny and one which concerns itself with the weight to be attributed to hardship, is to undercut the initial determination of the standard of review. Going back to a point made earlier in the context of the first theory, to the extent that the plight of applicants is a matter that will be relevant in every exercise of the discretion, it is a factor that should have been taken into account specifically in the determining the initial standard of review and not postponed to emerge as a consideration dictating more intrusive scrutiny within that standard. This was a general factor; it was not one peculiar to Ms. Baker or a subset of applicants for the favourable exercise of this discretion.

Indeed, if the initial issue of the standard of review was to be addressed appropriately, it probably did demand that the Court take seriously and not ignore the applicant's contention that her *Charter* rights were at stake here. To define the general standard of review in terms of an intermediate standard of deference without considering whether her *Charter* rights were implicated was to short change the applicant. Of course, it could be said that this omission was more than compensated for by the reality that the applicant was successful. However, as argued, the way in which that outcome was accomplished was troubling at least in so far as it depended on the ranking of hardship as a special consideration in the specific exercise of the discretion. It also postponed for another day the issues of whether the rights at stake here did engage the *Charter* rights of the applicant and, more generally, of how review of this kind of discretion was to be conducted when *Charter* rights were in issue.

None of what has been said to this point, however, accounts for the fact that the Court headed the relevant portion of the judgment: 'Was this decision unreasonable?'.[42] Indeed, the Court[43] by reference to the judgment of Iacobucci J in *Canada (Director of Investigation and Research) v Southam Inc*,[44] then went on to describe an unreasonable decision as 'one that, in the main, is not supported by any reasons that can stand up to a somewhat proving examination.' That suggests that the Court is accepting that, in the context of review for abuse of discretion, the test of unreasonableness is one that addresses the overall conclusions of the decision-maker as well as the various component parts of the relevant decision. In other words, it invites a stepping back from the detail of the reasons provided and asking whether, in the light of all the circumstances, the decision itself is unreasonable on the facts.

In such an exercise, the reviewing court will of necessity have to assess the way in which the discretionary authority balanced all considerations. Indeed, in terms of the claims made above, this exercise is legitimized by the Court not in terms of special considerations relating to the rule of law and the values of Canadian society and the rule of law but 'by reference to the boundaries

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[42] Between paras. 62 and 63.

[43] At para. 63.

[44] [1997] 1 SCR 748 at para. 56.

set out by the words of the statute and the values of administrative law.'[45] The process of overall assessment is one that must take place generally and not just when more underlying interests are at stake. When the standard of review is unreasonableness, the residual or catchall category of review exemplified by the *Wednesbury* standard shifts from a decision so unreasonable that no reasonable authority could ever have reached it (a type of patent unreasonableness standard) to one of straight unreasonableness. This obviously does have the potential for more intrusive review at least to the extent the courts become more inclined to treat discretionary decisions as subject to reasonableness rather than patent unreasonableness review.

However, it is worthwhile noting that, in the very context of this discussion, L'Heureux-Dubé J does not engage in any overall balancing exercise but focusses very specifically on the way in which one factor, the interests of the children was treated by the line officers.[46] The unreasonableness is related to a more specific ground of judicial review - failure to take account of relevant considerations. It does not depend on a global assessment. It is also worthy of reiteration that, in Canadian law, the *Wednesbury* standard has seldom been invoked successfully, and part of the reason for this may well be that, in any case approaching the *Wednesbury* standard, there will almost inevitably be present one of the more specific bases for intervention rendering any overall assessment of the merits redundant. There is at least a hint in L'Heureux-Dubé J's judgment at this point that she is more inclined to see unreasonableness in the context of the more specific grounds of judicial review for abuse of discretion than in terms of a global assessment.[47] Also, in her reference to the work of Dyzenhaus and the concept of deference as respect,[48] she implies that one of the major concerns of the Court under the reasonableness standard is to ensure that the discretionary decision-maker both recognized the relevant considerations and justified the conclusion reached by reference to those considerations. Reasonableness in this sense becomes more a matter of adhering to a modality of decision-making.

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[45] At para. 66.

[46] At paras. 64-65.

[47] Further evidence that the Supreme Court sees it this way is provided by the judgment of the majority (delivered by McLachlin CJ) in *Chamberlain v Surrey School District No. 36*, *supra*, note 7. There the Court adopted a reasonableness standard with respect to a school board decision prohibiting the use of certain books for classroom instruction. Once again, however, the finding that the decision did not meet those standards is for the most related to very specific failure to take account of a number of factors made relevant by primary and subordinate legislation as well as other failings that the Court in effect classified as errors of law.

[48] At para. 65. See D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy" in M Taggart (ed), *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) at 279.

In sum, there are many currents at play in *Baker* on the standard of review issue and how it plays out in the context of discretionary decision-making generally and the specific grounds of abuse of discretion review in particular. To the extent that the judgment does not explicitly tie many of these strands together, the judgment's message is unclear and it is not surprising that this has generated debate on whether, in applying the pragmatic and functional approach to discretionary decision-making, it opens up the door for more intrusive review of that form of decision-making thereby lessening the deference or respect that officials exercising such authority have commonly received from Canadian courts.

This undoubtedly left the lower courts with some dilemmas and, most notably, in cases where the applicant was urging that a decision was unreasonable in the sense that the decision-maker, while not ignoring a mandatory relevant factor, had nonetheless acted unreasonably in the weight attributed to it or in balancing it against other relevant considerations emerging from the facts of the case. To what extent did *Baker* mandate or authorize the reviewing court to deal with such an argument?

III Deference in the Post-*Baker* Era.

(a) General

In the immediate aftermath of *Baker*, there is no doubt that first instance courts, sometimes quite reluctantly, saw the Supreme Court as having established the principle that, in the review of exercises of statutory power, including broad discretions, the courts' task now involved an assessment of whether proper weight had been given to those factors identified as relevant. Perhaps not surprisingly, this was particularly so in the case of the Federal Court, Trial Division in immigration matters.[49] Lawyers also began to plead the underlying principles of constitutional law from the *Secession Reference* as grounds for setting aside exercises of statutory and prerogative power. As well, the invocation of international law both conventional and customary became more common.

However, in the past twelve months, there has been a sea change at least in the domain of immigration discretions, and a more restrictive interpretation of *Baker* has begun to emerge. Primary responsibility for this rests with the Supreme Court's revisiting of *Baker* in *Suresh v Canada (Minister of Citizenship and Immigration)*,[50] to which I will return in more detail below. Thus, shortly after *Suresh* was handed down, the Federal Court of Appeal reversed a Trial

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[49] See H Janisch and E Smith, *Administrative Law Supplement*, a supplement to JM Evans, HN Janisch, DJ Mullan & RCB Risk, *Administrative Law - Cases, Text and Materials*, 4th edn (Toronto, Emond Montgomery Publications, 1995) at 156-58. This includes reference to a statistical study conducted in June, 2001 by B Ellis and E Smith, then students at the Faculty of Law, University of Toronto.

[50] 2002 SCC 1.

Division judgment which had featured prominently in the case of those who asserted that *Baker* had increased dramatically the room for reviewing courts to reweigh the factors or considerations relevant to the taking of a decision. This was in *Legault v Canada (Minister of Citizenship and Immigration)*.[51] Here, the Court accepts what it describes as the 'process'[52] interpretation of the relevant aspect of *Baker*. It is the court's task to ask whether the decision-maker took a relevant factor into account and that requires being 'alert, alive and sensitive to it', as opposed presumably to mere tokenism. However, once the reviewing court concludes that requirement has been met,

> ...it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to reexamine the weight given to different factors by the officers.[53]

Leave to appeal was denied in this case[54] and presumably, at least for the present, this represents the Court of Appeal's riding instructions to the Trial Division. This should lead to less intrusive scrutiny of the various discretions created in the immigration and other federal legislation.

Nonetheless, it does not resolve all issues arising out of *Baker*. Left dangling still is the question of the relationship between the standard of review and the prescription that the decision-maker be 'alert, alive and sensitive' to the best interests of the child. Is that formula descriptive of a reasonableness standard? Beyond this, however, there remains the problem of what precisely constitutes the difference between a court engaging in 'illegitimate' reweighing and being assured that the decision-maker has been 'alert, alive and sensitive' to a relevant factor. This is well exemplified by a later Federal Court of Appeal judgment on review of the humanitarian and compassionate discretion: *Hawthorne v Canada (Minister of Citizenship and Immigration)*.[55]

In *Hawthorne*, all three members of the Court held that the immigration official had not been 'alert, alive and sensitive' to the interests of the child of the female applicant. While acknowledging the authority of *Legault*, the majority held that the immigration official had ignored various components of what went into making up the child's best interests and, in particular, the child's own concerns and the financial implications for the child of her mother's

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51 (2002) 212 DLR (4th) 139 (FCA), rev'g [2001] 3 FC 277 (TD).

52 *Id.*, at para. 5.

53 *Id.*, at para. 11.

54 On November 21, 2002. See [2002] SCCA No 220 (QL).

55 2002 FCA 475 (November 28, 2002).

removal.[56] This looks like review based on a failure to take account of facts that were relevant to the consideration of the child's bests interests. In somewhat different vein but to the same ultimate effect, the concurring judgment, that of Evans JA, held that the official had erred by viewing the best interests of the child from the negative perspective of whether demonstrable harm would result to her if her mother was forced to leave Canada, as opposed to considering her interests from the positive perspective of the benefits that would likely accrue to her were her mother not removed. As opposed to the majority, this is more like a judgment to the effect that the official had erred legally in the test she set up for determining the child's bests interests.

While neither approach might be said to involve a reweighing of the various factors, both judgments clearly involve close attention to the way in which the officer purported to deal with the critical factor of the child's best interests. This was not something that was demanded of the Supreme Court by the facts in *Baker*. Here, as opposed to *Baker*, there was no sense in which the officer had been completely dismissive of the child's best interests. The problem lay in how those best interests were characterized as a matter of fact or of law. Seen in this way, the judgments raise the interesting question of whether they represent an appropriate compromise between the two different interpretations of *Baker*: on the one hand, the interpretation that all *Baker* mandates is that the interests of the child be taken into account, and, on the other, the reading of *Baker* that posits the Supreme Court as having opened up the exercise of discretion to overall unreasonableness review in which the judge asks whether the officer had achieved a reasonable balance in light of all of the competing factors.[57]

As for the underlying principles of the Canadian constitution, frequent evocation has not led to frequent success. In fact, the only notable occasion on which a court has invoked an underlying principle as the basis for intervention in a discretionary decision is *Lalonde v Ontario*

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[56] *Id.*, at para. 10 (Décary JA (Rothstein JA concurring)).

[57] In this regard, it is worthy of note that Evans JA in his concurring judgment (at para. 76) left for another day the question of whether the *Suresh/Legault* prohibition on assessing the weight attributed to a particular factor precluded, absent a nominate ground for intervention, overall unreasonableness review in the English sense of a result which was disproportionate. There is, of course, also the more general question of how both *Baker* and the *Suresh/Legault* prohibition on assessing weight relate to review for error of fact. In the domain of error of fact, does it too follow the standard of review produced by the pragmatic and functional approach or does it still stand apart subject in all cases (save where the statute makes it otherwise abundantly clear) to review only in the traditional instance of 'no evidence' or in cases where the findings of fact are patently unreasonable? This is an issue of peculiar significance for the Federal Court given that the *Federal Court Act*, RSC 1985, c.F-7 (as amended by SC 1990, c.8), s.18.1(4)(d) contains a codification of review for error of fact that looks a lot like a patent unreasonableness standard: 'based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it'.

(Commission de restructuration des services de santé).[58] There, in reviewing the exercise of a broad discretion, the Court held that the Commission had failed to take account of the fourth underlying principle from the *Secession Reference*, the protection of minorities. The Commission's order which involved a substantial change to and downgrading of the role of the Montfort Hospital in Ottawa, the City's only francophone hospital, had 'failed to give serious weight and consideration to the linguistic and cultural significance of Montfort to the survival of the Franco-Ontarian minority'.[59]

As well as the *Secession Reference*, the Ontario Court of Appeal relies on *Baker* to support its conclusions on this point. In that context, without ever ruling on what the appropriate standard of judicial review should be in this case, the Court expressed the view that

> ...where constitutional and quasi-constitutional rights or values are concerned, correctness or reasonableness will often be the appropriate standard.[60]

This was also a case which was decided on the basis of the failure, indeed refusal of the Commission 'to take into account or give any weight to Montfort's broader institutional role'.[61] The Court was therefore not called upon to address the question of whether, in a case such as this, the Court should have any concern with the weight accorded to constitutional or quasi-constitutional factors in the exercise of discretion. The use of the term 'serious weight and consideration' must therefore be read in that context and not as necessarily accepting the proposition that, when underlying constitutional principles are at play in the exercise of broad discretionary powers, the reviewing court's role extends to reassessing the weight given to such factors. Whether that should be the case and, indeed, whether the court's review should proceed on a correctness basis when constitutional values are at stake is a question to which I return in the concluding section of this chapter.

As perhaps might have been expected, questions about the role of international law in the exercise of statutory powers have arisen somewhat more frequently than ones involving the underlying principles. After all Canada has a constitution which includes a *Charter of Rights and Freedoms* in which many of the issues arising out of the underlying principles are dealt with directly or explicitly. While the constitution also incorporates aspects of international law (and particularly international human rights law), it is in no sense comprehensive in its coverage of international law nor, as *Baker* makes clear, are all of Canada's international obligations explicitly incorporated into domestic legislation.

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[58] (2001) 56 OR (3d) 505 (CA), aff'g. (1999) 48 OR (3d) 50 (Div Ct)

[59] *Id.*, at para. 187.

[60] *Id.*, at para. 186.

[61] *Ibid.*

Thus, in the wake of *Baker*, it was not surprising to see a majority of the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*[62] look to international sources as part of its justification for upholding a municipal by-law prohibiting the recreational use of pesticides. In interpreting the scope of the by-law making power, L'Heureux-Dubé J held that it was permissible for the Court to look at the 'precautionary principle' of sustainable development which she appeared to accept as part of customary international law. This helped inform the decision that a broad power to make by-laws included authority not only to regulate the use of pesticides but also to ban their use entirely for certain purposes.[63]

The use of international law was to surface yet again in *Suresh* to which I will now turn.

(b) *Suresh v Canada (Minister of Citizenship and Immigration)*

Suresh involved a revisiting of a number of the issues raised in *Baker* and coming within the scope of this chapter. It involved the exercise of a ministerial discretion to declare a landed immigrant or someone applying for landed immigrant status to be a 'danger to the security of Canada' and to deport that person even when that person's life or freedom would be threatened by a return to her or his homeland in the extreme form of a substantial risk of torture.

In terms of the first part of this process, the Court held that the Minister was not affecting *Charter* rights and freedoms in making the declaration. As a consequence, judicial review of that determination depended on straight administrative law principles. The Court then proceeded to engage in a pragmatic and functional analysis, the outcome of which was a finding that, despite the impact of such a determination on affected individuals and the subject specific nature of the factual inquiry, it should intervene only if the ministerial decision was patently unreasonable.

The Court also, by way of dealing with the uncertainties that had arisen as to the meaning of the judgment in *Baker*, made it abundantly clear that it was no part of the patent unreasonableness inquiry to reweigh the factors that went into the Minister's determination. The reviewing court was restricted to inquiring whether the declaration was made 'arbitrarily or in bad faith,... cannot be supported on the evidence, or [resulted from a failure] to consider the appropriate factors.'[64] At another point, this was expressed in terms of the court not intervening unless the Minister has 'made some error in principle in exercising its discretion or has exercised its discretion in a

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[62] [2001] 2 SCR 241.

[63] At paras. 30-32. As in *Baker*, the concurring judgment of LeBel J (supported by Iacobucci and Major JJ) vigorously protested the insinuation of international law: para. 48

[64] *Supra*, note 2 at para. 29.

capricious or vexatious manner.'[65] The Court then went on to state that:

> *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors.[66]

In other words, the role of the courts was to ensure that the relevant factors were weighed and no others but that the court had no business in inquiring further into the relative weight assigned to the various relevant factors or the balancing of them one against the other.

The Court then dealt with the standard of review applicable to the second part of the Minister's decision-making task: the discretion to deport someone who was a danger to the security of Canada even if deportation might involve a substantial risk of danger to life and liberty (including torture). Here, the refugee's section 7 *Charter* rights were engaged and, at this point, there was reason to believe that the Court would move to a correctness standard of review in recognition of previous authority that had suggested that, in determining constitutional questions, the decision-maker had to get it right.[67] However, the Court rejected the applicability of such an all-embracing theory to all aspects or stages of this decision affecting the refugee's *Charter* rights.

On the factual aspects of the inquiry as to whether Suresh faced a 'substantial risk of torture' on deportation, it involved issues 'largely outside the realm of expertise of reviewing courts'.[68] As such, this threshold determination was entitled to deference in the sense that the court could not reweigh the factors relied on by the Minister but only interfere if the determination was 'not supported by the evidence' or had resulted from a failure to consider the appropriate factors.[69]

In fact, there is some warrant for this conclusion in the case law. On occasion, in both division of

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[65] *Id.*, at para. 34, quoting the judgment of Iacobucci J in *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 577 at 607.

[66] *Id.*, at para. 37.

[67] Eg *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)* [1991] 2 SCR 5 at 17 where La Forest J, in the course of holding that the Board could consider constitutional (including *Charter*) questions, stated that 'it can expect no deference with respect to constitutional determinations'.

[68] *Id.*, at para. 39.

[69] *Ibid.*

powers cases and *Charter* cases,[70] the courts have accorded a degree of deference to the relevant authorities' determination of facts on which constitutional questions hinge.[71] However, what is problematic[72] about *Suresh* is in the Court's seeming extension of deference to the next stage in

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[70] Eg *Northern Telecom Ltd. v Communications Workers of Canada* [1980] 1 SCR 115.

[71] In the course of its judgment in *Suresh*, the Supreme Court makes frequent reference to the judgment of the House of Lords in *Secretary of State for the Home Department v Rehman* [2001] 3 WLR 877 (HL) including the judgment of Lord Hoffmann. In dealing with the issue of deference to executive judgment in the domain of national security, Lord Hoffmann (at para. 54) introduced the following qualification in the context of the provisions of the European Convention, the equivalent for these purposes of the *Charter*:

> Thirdly, an appeal to the Commission may turn upon issues which at no point lie within the exclusive province of the executive. A good example is the question....as to whether deporting someone would infringe his rights under article 3 of the Convention because there was a substantial risk that he would suffer torture or inhuman or degrading treatment. The European jurisprudence makes it clear that whether deportation is in the interests of national security is irrelevant to rights under section 3. If there is a danger of torture, the Government must find some other way of dealing with a threat to national security. Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a question, the executive enjoys no constitutional prerogative.

The Supreme Court neither cited nor made reference to this portion of Lord Hoffmann's judgment, one which speaks to both a total prohibition on deportation to torture and little or no deference to executive judgment as to the likelihood of that risk.

[72] Though probably not unique. Thus, in one of the early section 7 *Charter* challenges to an extradition order, *Canada v Schmidt* [1987] 1 SCR 500, LaForest J, delivering the judgment of the Court, stated (at 523) seemingly in relation to both executive appraisal of the requesting country's general system of criminal justice and its more particular salience to the precise factual situation before the Court:

> The courts have a duty to uphold the constitution. Nonetheless, this is an area where the executive is likely to be far better informed than the courts, and where the courts must be extremely circumspect so as to avoid interfering unduly in decisions involving the good faith and honour of this country in its relation with other states. In a word, judicial intervention must be limited to cases of real substance.

the decision-making process, the decision on whether to deport on the basis of the facts as found. Without any real consideration of whether this second stage involved the same considerations which suggested deference to the factual findings of the Minister, the Court simply asserted that on the actual decision to deport in the light of the facts, there is also an entitlement to deference:

> If the Minister has considered the correct factors, the courts should not reweigh them. Provided the [decision to deport under this provision] is not patently unreasonable - unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply appropriate procedures - it should be upheld. At the same time, the courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution.[73]

Without the last sentence, this seems to state unequivocally that, even in cases where the Minister has determined as a matter of fact that there is a 'substantial risk of torture', the courts are obliged to defer to the ministerial judgment that, as a danger to the security of Canada, the refugee should, nonetheless, be deported. In other words, the task of balancing between the refugee's *Charter* rights and the risks to Canada is primarily for the Minister and to be reviewed only if patently unreasonable. This seems to go a good way in the direction of abdicating responsibility for the protection of *Charter* rights in cases such as this.[74] As long as the Minister has taken the *Charter* rights into account seriously, the decision stands.

However, there is an ambiguity here. All the Court might be talking about in this context is the decision to deport in cases where the Minister has determined that as a matter of fact, there is **no risk** to *Charter* rights. Support for that interpretation comes from the last sentence quoted above and the Court's subsequent holding that 'barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice'[75] and that, in such cases, 'the

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[73] *Id.*, at para. 41.

[74] As suggested on a number of occasions at the conference, it is also difficult to reconcile this aspect of the judgment with the Court's reluctance in other contexts and most notably in *Cooper v Canada (Human Rights Commission)* [1996] 3 SCR 854 to concede to statutory authorities the jurisdiction or competence to even determine constitutional issues tentatively. See in particular A Macklin's chapter: 'The State of Law's Borders and the Law of State Borders'. What, however, this may suggest is a narrow interpretation of *Cooper* which restricts its *ratio* to cases in which the challenge is to the constitutional validity of the relevant legislative provisions as opposed to the question of how a valid provision must be exercised to accord with the *Charter*. Frankly, that would be no bad thing.

[75] *Id.*, at para. 76.

Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture'.[76] In the next paragraph, the Court then speaks of the state justifying the deportation either as part of a section 7 balancing process or under section 1.[77]

As these are constitutional requirements in terms of the last sentence of the quote, it could be argued that the entitlement to deference disappears when that is the judgment to be made. Rather than simply asking whether the Minister took the refugee's constitutional right into account, the Court should at least be able to ask whether the Minister has provided ample justification for deporting in the particular circumstances. In other words, the courts should have the last word in such cases over whether the facts demonstrate the 'extraordinary circumstances'[78] justifying this 'rare' exercise of discretion. To do any less would be to abdicate judicial responsibility for the upholding of constitutional rights. It is therefore to be hoped that subsequent courts see this as a faithful reading of this aspect of the judgment in *Suresh*.

The relevance of *Suresh* to the impact of *Baker* does not, however, stop there. In two other respects at least, *Suresh* has ramifications for future applications of *Baker* and, in each instance, it is a reading or application of *Baker* which favours deference.

First, the Court accepts that a prohibition on deportation to torture is almost certainly an emerging peremptory norm of international law.[79] Moreover, it also accepts that the Convention Against Torture, which Canada has ratified, is the predominant international treaty to which Canada is a party and that it and the emerging peremptory norm of international law reject deportation to torture even where national security interests are at stake.[80] However, that did not necessarily mean that the 'principles of fundamental justice' demand a complete ban on deportation to torture. The Convention and international law only 'inform',[81] not settle the content of the principles of fundamental justice. Thereafter, in three paragraphs,[82] the Court held that the principles of fundamental justice as informed by the treaty and the emerging norm did not require an absolute prohibition but only that the power to deport be exercised sparingly. Why that is so is justified only by the broadest of references to national security concerns. Though there is subsequently mention of a possible section 1 justification of such an action, the general

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[76] *Id.*, at para. 77.

[77] *Id.*, at para. 78.

[78] *Id.*, at para. 76.

[79] *Id.*, at para. 65.

[80] *Id.*, at para. 75.

[81] *Id.*, at para. 46.

[82] *Id.*, at para. 76-78.

principle that there is not an outright prohibition is rooted in section 7 and not in any sense of the government having to provide a detailed justification of the necessity for the qualified application of the Treaty and the peremptory norm.

What does this say about *Baker* and the questions that it leaves open about the use of unincorporated treaties specifically as well as more general principles of international law as reflected in peremptory norms and customary international law? First, it affirms the relevance of international law in both the assessment of the constitutional validity of statutes and the exercise of discretion under those statutes. However, even where *Charter* rights and freedoms are at stake, a treaty is not determinative but only influential or an important factor in giving effect to the constitutional right. There is also the very alarming suggestion that the same holds true for peremptory norms of international law. While never definitively ruling that a prohibition on deportation to torture was a peremptory norm of international law, the Court nevertheless, despite its reservation on this point, worded the balance of its judgment on this whole issue as though it were.[83]

The other aspects of *Suresh* that have relevance to *Baker* emerge from the procedural portion of the judgment. Here, the Court stated that the five factors[84] identified in *Baker* as relevant to the determination of the content of the duty of procedural fairness applied in the domain of section 7 of the *Charter* and the demands of the principles of fundamental justice in its procedural sense. This did not mean that the common law and the *Charter* had merged for these purposes but that the higher level constitutional norms were to be evaluated by reference to the same considerations as governed at common law but with the overlay that a constitutionally protected right was at stake. That seems appropriate as a general principle. However, what it does do is insinuate into the inquiry two countervailing factors from the *Baker* list. The first is the fifth

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[83] See also in this regard, the split judgment of the Ontario Court of Appeal in *Ahani v Canada (Attorney General)* (2002) 58 OR (3d) 107. This was the follow up to the companion case to *Suresh*, which Ahani lost. The question that then arose was whether the Court should enjoin the government from deporting Ahani until such time as his communication to the United Nations Human Rights Committee under the Optional Protocol to the Covenant on Civil and Political Rights had been dealt with. While Canada was a signatory to the Optional Protocol, it had never been specifically incorporated into domestic law. Relying primarily on this consideration and the fact that the states parties had never agreed to give effect domestically to the Committee's final views nor to postpone enforcement of its domestic laws pending the completion of that process, the majority denied relief. This was over a very strong dissent by Rosenberg JA. Thereafter, the Supreme Court of Canada denied leave to appeal although in a highly unusual, if not unique move, L'Heureux-Dubé J indicated dissent (though without giving reasons) from the position of the other two judges on the leave to appeal panel: [2002] SCCA No. 62 (QL). For criticism of the majority decisions, see A Macklin's chapter, *supra*, note 74. See also J Brunnée and SJ Toope's chapter, *supra*, note 30.

[84] *Id.*, at paras. 114-15.

Baker factor requiring in certain circumstances deference to agency choice of procedures. And the second is the consideration that is given to state interests in evaluating the nature of the decision that has to be made, or the first *Baker* factor. A more concrete aspect is given to this by the reservation entered later in the judgment on this issue that the refugee's access to the contrary material as a component of fundamental justice may have to give way to

> ...privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential security documents.[85]

In short, while the judgment is otherwise reasonably generous in its according of procedural protections to persons in Suresh's situation,[86] what the Court is accepting is a certain level of deference to procedural choices even when *Charter* rights are at stake. It is also indicating that the balancing of competing state interests in less than full disclosure should take place in the determination of the scope of the principles of fundamental justice and not as part of a section 1 justification where the state bears the primary onus. It does, of course, have to be acknowledged that there are precedents supporting this taking account of state interests in the delineation of the content of the principles of fundamental justice within section 7 leaving little work for section 1 to do or room to be applied when there has been a violation of the principles of fundamental justice. However, there is also a strong argument that, to the extent that the procedures afforded are less than ideal for providing notice and an adequate opportunity to respond, the state should have to justify them by reference to section 1 particularly when the justifications are ones based on arguments such as national security and other state reasons for the suppression of relevant information.[87]

In summary, *Suresh* makes it clear that even where *Charter* rights are at stake, deference will at least on occasion play a considerable role in the delineation of both substantive and procedural rights. Moreover, the fact that the Court affirms the relevance of deference even in *Charter* cases suggests that it must be taken as having for the most part endorsed the more restrictive, pro-deference interpretations of *Baker*. This is particularly the case in the disputed territory of review of the exercises of broad discretion and the extent to which the reviewing court can engage in

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[85] *Id.*, at para. 122.

[86] There might be concern as to the requirement that the refugee establish a *prima facie* case of risk of torture before being eligible for the kind of hearing prescribed by the Court. See para. 127. The hearing contemplated is, as in *Baker*, a written one and that too raises problems particularly as issues of credibility are likely to be far more often critical in this kind of case.

[87] See E Goodman, 'Social Interest Justifications', a paper prepared for credit in the course in Advanced Constitutional Law at the Faculty of Law Queen's University, Winter Term 2002 and the winner of the 2002 Department of Justice/Canadian Bar Association Essay Contest marking the 20th Anniversary of the *Charter* [on file].

reweighing. However, as the prior discussion of *Baker* suggests and the decision of the Federal Court of Appeal in *Hawthorne* makes clear, the point at which a court moves from appropriate determination of whether a relevant consideration or factor was taken into account to inappropriate weighing is by no means a bright line distinction. There are also grave questions raised about the extent to which any abnegation of weighing relevant factors as part of judicial review should carry over to situations where constitutional rights are in question. I will return to this theme in the last section of this chapter.

(c) Deference More Generally

Since *Baker*, there have been a number of instances in which the Supreme Court has applied the 'pragmatic and functional' approach and reached what on the surface seem to be the appropriate conclusions about the standard of review: patent unreasonableness in the case of expert tribunals determination of questions of law or mixed law and fact which match their expertise and where there is no right of appeal but rather a privative clause,[88] and unreasonableness where the situation is the same but there is a right of appeal and no or a partial privative clause.[89] To the extent that *Baker* is a case in which the same kind of analysis was deployed in the case of a broad discretionary power, there might seem to be a unity of purpose and approach here. Deference based on a pragmatic and functional analysis also characterizes the Court's judgment in *Suresh*. However, there are now serious signs that the Court's application of the pragmatic and functional approach is losing all claim to coherence with *Suresh* being a major but not the only contributor to that phenomenon.

On a number of occasions, the Court has gone to a correctness standard of review in the context of various forms of statutory appeal from administrative tribunals and, on at least one occasion, in the context of a judicial review application. The hardest of this group of judgments to justify is *Canada (Deputy Minister of National Revenue) v Mattel Canada Inc.*[90] There, the Court treated

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[88] *Ivanhoe Inc. v UFCW, Local 500* [2001] 2 SCR 565 and *Sept-Îles (City) v Quebec (Labour Court)* [2001] 2 SCR 670, both involving labour tribunals and the former in effect reversing *U.E.S., Local* 298 *v Bibeault* [1988] 2 SCR 1048, in which the Court had applied a correctness standard to the very issue that was at stake in *Ivanhoe*. There had been changes to the legislation in the meantime so as to now justify the most deferential standard. All of this was, however, without threat to the general approach to standard of review enunciated in *Bibeault* and in which Beetz J. used the discourse of 'pragmatic and functional' for the first time.

[89] *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)* [2001] 2 SCR 132 (in the context of a statutory appeal from the Ontario Securities Commission) and *Macdonell v Quebec (Commission d'accès à l'information)*, 2002 SCC 71 (involving an appeal from the Quebec Access to Information Commissioner).

[90] [2001] 2 SCR 100.

the determination of the meaning of the term 'sale [of goods] for export to Canada' as involving a question 'intrinsic to commercial law'[91] as opposed to one engaging the expertise of the Canadian International Trade Tribunal. It is, however, difficult to appreciate how, given the context, this constituted a question of general commercial law and one on which the reviewing court was as, if not more expert than the tribunal. What was at stake was the identification of the point at which there was a 'sale' for customs duty, not general commercial law purposes. This seems intrinsically a customs duty question dependent on the purposes and intricacies of that statute and the particular group of statutory provisions. Nonetheless, the Court also described the relevant questions as 'pure questions of law that require the application of principles of statutory interpretation.'[92] If this suggests that pure questions of statutory interpretation attract correctness review, it is fraught with danger for the whole enterprise of deference to statutorily designated decision-makers when determining legal questions at the core of their jurisdiction. However, given that this proposition was linked to the Court's classification of the nature of the particular question, that was probably not the intention.

On the other hand, particularly in the context of statutory rights of appeal, there is a growing body of case law to the effect that if the interpretation of a statutory term is one that will produce a ruling of general application, the standard is that of correctness.[93] That too invites correctness intervention not by reference to the expertise of the tribunal and the relationship between that expertise and the particular question but in terms of the significance of the question to the overall

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[91] *Id.*, at para. 33.

[92] *Ibid.*

[93] See especially the judgment of Evans JA in *Canada (Commissioner of Competition) v Superior Propane Inc* [2001] 3 FC 185 (CA) at paras. 42-46, relying on a statement by Iacobucci J in *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at para. 45. See also his judgment for the Court in *SOCAN v Canadian Association of Internet Providers* (2002) 215 DLR (4th) 118 (FCA), where the context was judicial review rather than statutory appeal. He also relies upon *Housen v Nikolaisen*, 2002 SCC 33, a case that is assuming an increasing presence in judicial review and statutory appeals despite the fact that it involved the appellate standard of review of trial judge findings in a negligence action. In a lengthy analysis of the nature of questions of mixed law and fact, the Court held that any questions of legal principle 'readily extricable' (para. 33) from the process of applying the law to the facts were subject to correctness review. However, that does not transfer automatically to the judicial review and statutory appeal context. In both cases, there is still the question of whether the extricated question of law is one intended primarily for the statutory authority or the reviewing court. This point emerges most clearly from the judgment of Bastarache J in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, *supra*, note 32 at para. 37, where, after referring to Iacobucci J's statement in *Southam* about the determination of questions of law which will be of general application, then makes it clear that this is but one and not a decisive factor in the pragmatic and functional analysis: para. 37.

operation of the statutory scheme. To do that may well be to overreach.

This willingness to intervene on a correctness basis in commercial matters of a highly technical kind where *Charter* rights and freedoms are not at stake stands in rather stark contrast to the levels of deference revealed in *Suresh*. Indeed, the contrast is even more dramatic when one looks at the recent Supreme Court case law involving other aspects of immigration legislation and also another prominent case in which *Charter* rights and freedoms were implicated in tribunal decision-making.

Pushpanathan v Canada (Minister of Citizenship and Immigration)[94] has been the critical judgment in much of recent Supreme Court standard of review assessments. There, as noted already, Bastarache J (delivering the judgment of the Court) was not prepared to concede to the Immigration and Refugee Board any deference in determining whether a convention refugee claimant had engaged in activities contrary to the principles and purposes of the United Nations. Albeit that this question arose in the context of a provision in the *Immigration Act* creating an exception to the normal right of convention refugees to remain in Canada, a provision itself derived from the Convention Refugee Treaty, its determination involved questions of general international law not within the expected area of expertise of members of the Refugee Division of the Board.

The very same day as *Suresh* and its companion case of *Ahani*[95] were released, the Court also rendered judgment in another linked pair of immigration cases, *Chieu v Canada (Minister of Citizenship and Immigration)*[96] and *Al Sagban v Canada (Minister of Citizenship and Immigration)*.[97] In each of these, the issue was whether the Immigration Appeal Division of the Immigration and Refugee Board was allowed to take into account foreign hardship in determining whether to order the removal of permanent residents from Canada for cause. The *Charter* does not feature in the judgments and the language of the empowering provision ('having regard to all of the circumstances of the case') suggested a legislative conferral of considerable latitude on the designated decision-makers. Nevertheless, the Court decided the issue as to the permissibility of taking this consideration into account on a correctness basis and went so far as to classify it as a 'true' jurisdictional question, a creature thought by many to have become extinct. Significantly, the Court also treated as an important factor in the 'pragmatic and functional' analysis the fact that the issue involved 'the rights of individuals vis-à-vis the state'.

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94 *Supra*, note 32.

95 *Ahani v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2.

96 2002 SCC 3.

97 2002 SCC 4.

This 'weighs in favour of a less deferential standard of review'.[98]

My final point of reference is *Trinity Western University v British Columbia College of Teachers*.[99] Here, the Court applied a standard of correctness to the College's determination of whether Trinity Western University was engaged in discriminatory practices of a kind that should result in the denial of the University's application to have full responsibility for a teacher education programme. Those opposing registration pointed to the position of the University on same sex sexual relationships. The University asserted in part its right to freedom of religion and conscience. On this issue of accommodating competing *Charter* rights, the Court held:

> More importantly, the Council is not particularly well equipped to determine the scope of freedom of religion and conscience and to weigh those rights against the right to equality in the context of a pluralistic society. The public dimension of religious freedom and the right to determine one's moral conduct have been recognized long before the advent of the *Charter*...and have been considered to be legal issues. The accommodation of beliefs is a legal question....[100]

Indeed, the Court rejected reliance on the dissenting judgment of Rowles JA in the British Columbia Court of Appeal. She had segmented the decision-making process into two categories - on the one hand, the determination of whether the Council of the College of Teachers had jurisdiction to take discriminatory practices into account and the existence of discriminatory practices generally, and, on the other, the effects of the discriminatory practices generally and whether as a result registration would be contrary to the public interest. She classified the first as questions of law subject to correctness review and the second as questions of fact on which the standard should be unreasonableness.[101] The Court rejected this, holding that even the issues of 'fact' had 'very little to do, if anything, with the particular expertise of the members of the' College.[102]

In what state does all of this leave the issue of the standard of review? Despite protestations by the courts to the contrary, there clearly seems to be a weakening of the policy of deference in a number of areas. In the field of pure questions of law and the discernment of legal principles to be applied to particular facts, the courts are increasingly inclined to see themselves as having as much or greater expertise than the designated decision-maker and willing to classify questions as

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[98] *Supra*, note 96 at para. 26.

[99] [2001] 1 SCR 722.

[100] *Id.*, at para. 19.

[101] As recounted at para. 16 of the Supreme Court's judgment.

[102] *Id.*, at para. 18.

ones of general law subject to correctness review. In most instances, particularly where commercial interests in complex legislative regimes are at stake, this reassertion of judicial imperialism is to be regretted. Indeed, some (such as Sprague) would argue that the willingness of the Court to intervene on other than a patent unreasonableness basis even in the case of broad discretionary determinations which have a serious effect on individual rights is equally pernicious. Whether it be questions of law as in *Pushpanathan*, *Chieu* and *Al Sagban* or exercises of discretion as in *Baker*, they would contend that deference should be the order of the day even, for example, when one's status to remain in Canada is at stake. Legislative choice of tribunal or conferral of extensive discretion should still matter in these domains and the courts should be reluctant to assert correctness or merits unreasonableness review by classifying the matters in issue as being within the domain of expertise of the courts.

Undoubtedly, this is contentious territory and, indeed, one's position may depend on another form of pragmatism, that of whether the reviewing court's or administrative authority's interpretations and exercises of discretion provide the better reading of legislative text and purpose. After all, there is no particular point in having a high degree of judicial interventionism in human rights tribunal adjudications when the tribunals are more in tune with the underlying purposes of the relevant legislation than the reviewing or appellate court. However, even accepting that the case for interventionism or less deference has not been made out in these contentious areas does not make *Suresh* anything other than a serious anomaly even in a domain characterized by a considerable degree of unpredictability. It is to that issue that I will now turn.

IV Conclusions

On what principles do and should the Courts accord deference to statutory and prerogative decision-making? The answer most commonly provided is that of respect for legislative choice of instruments for the performance of certain tasks. That answer, predicated as it is on traditional notions of parliamentary sovereignty, concedes to the legislature the right or entitlement to put certain issues beyond the ken of the regular courts.[103] In terms of the pragmatic and functional analysis, it is reflected in the factors that focus the reviewing court's attention on the overall purposes of the legislation and more specific indicia of legislative intention such as privative clauses and the conferral of discretionary powers in broad or unstructured terms.

The issue can also be framed around issues of institutional competence. There are certain domains where the courts do not possess the expertise or the facilities to engage in a reassessment of matters already evaluated by a tribunal or a member of the executive branch. This is most obviously the case in the instance of politics and policy choice but, as reflected in the standard of review jurisprudence, can also be so in the more narrow confines of giving meaning to terms governing the operation of specialized administrative regimes and assessing

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[103] For a rejection of this as the starting point for justifications of deference, see M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"', *supra*, note 20.

facts that bear upon that exercise. Indeed, an open-ended or *de novo* re-evaluation of many questions would severely tax the institutional resources of the courts. Here, under the pragmatic and functional approach, the most relevant consideration is the expected competence of the designated decision-maker in relation to the specific issue or issues and the court's own expertise matched against that of the designated decision-maker.

These conceptions are ones that have by and large served Canadian judicial review law well since the late 1970s when the Supreme Court reversed an era of excessive interventionism in the affairs of expert administrative tribunals, a interventionism that critics characterized as in many instances stemming from a covert hostility to the growth of the administrative state and the implementation of various government social reforms. The adoption of the pragmatic and functional approach to discerning the appropriate scope for judicial review of mainly tribunal decision-making gave many administrative tribunals the credit they deserved for their intimate knowledge of the regimes with which they worked regularly and at the same time represented a degree of judicial self-awareness of the limits of curial expertise. Indeed, there is room for concern to the extent that, as argued above, there has been some weakening of this posture of deference in the name of competence over issues of statutory interpretation or matters having precedential value for the future workings of a particular tribunal.

In extending the 'pragmatic and functional' method of analysis to discretionary decision-making (and in a limited way to the review of procedural rules and rulings), *Baker* recognized that issues of the appropriate scope of judicial intervention were not confined to adjudicative-style tribunals interpreting their constitutive statute.[104] Similar tensions arose in the review of discretionary decision-making by the executive branch and public officials generally. Also, in the domain of complex administrative schemes, courts did not have a complete monopoly on wisdom as to the detailed components of a procedurally fair process.

As opposed, however, to the case of judicial review of adjudicative-style tribunals, *Baker*'s extension of the pragmatic and functional approach did not mean one way traffic in the direction of less intensive review. Its impact in fact has cut both ways. As exemplified by *Baker* itself as well as numerous of its progeny, previous conceptions of very restricted review of the discretionary power of Cabinet, Ministers and high government officials have been modified in the operation of a test that focusses rather less than total attention on the character of the decision-maker and rather more attention on the nature of the interest that is at stake and whether discretion was exercised on the basis of facts peculiar to the applicant. In contrast, there were

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[104] Note, however, the doubts expressed by LeBel J in *Chamberlain v Surrey School District No. 36*, *supra*, note 7 at paras. 188-205, as to whether there always is an appropriate fit between the 'pragmatic and functional' approach and the review of discretionary powers. More generally, see TRS Allan's chapter, 'Common Law Reason and the Limits of Judicial Deference' where he makes a claim that broad discretion when being applied in the context of application to individuals as opposed to the formulation of policies should attract little or no judicial deference. For Allan, this is the very area where the courts are needed.

areas of discretionary power where the courts were previously quite willing to intrude without embarrassment. Municipal decision-making was a prime example and, within that category, the judgment of the majority in *Shell Canada v Vancouver (City)*[105] provides a graphic illustration of judicial unwillingness to allow municipalities slack in their conception of what were appropriate municipal purposes under broad legislative grants of power. In emphasising that deference required that courts respect the judgment of statutory authorities as to what were proper purposes in the case of unstructured statutory discretions, *Baker* was also ushering in an era of greater respect for the capacities of municipalities and, indeed, administrative tribunals exercising broad discretion as part of their mandate.

However, there are certainly domains where the claims of the decision-maker to deference based on legislative choice and comparative institutional competence and practical advantage run out. Under accepted Canadian constitutional law principles, they run out when the statutory decision-maker is dealing with questions as to the scope of its jurisdiction or behaves in such a way as to lose or exceed its jurisdiction. That limitation is explained most commonly in constitutional terms. Sections 96 to 100 of the *Constitution Act, 1867* entitle the superior courts to constitutionally guaranteed jurisdiction to engage in judicial review for jurisdictional error, a capacity that cannot be removed legislatively.[106] It is also a limitation that can in many instances be justified by reference to legislative intention - in setting up the administrative scheme, the legislature had certain limits in mind and, as an inference from this, the courts exist for the purpose of ensuring that legislative limits are respected. It also has pragmatic justifications - the delineation of the outer limits of power should not depend on the self-interested evaluations of those who stand to benefit from a particular outcome to the determination of that issue.

Others, such as Dyzenhaus,[107] would deploy a version of the rule of law as an underlying principle of Canadian constitutional law as a basis for placing normative constraints on the exercise of statutory power, constraints that transcend normal conceptions of parliamentary sovereignty and the positivist approach that it imposes on thinking about the limits of judicial review. It is also the case that the whole project of underlying constitutional principles depends ultimately as much, if not more on the normative recognition of fundamental or transcendent values as it does on a reading of Canadian and British constitutional history and the supposed promise of the preamble to the *Constitution Act, 1867*.

The limits of that theory are the subject of much contemporary debate. Nonetheless, one does not have to travel down that road very far, if at all to start taking issue with important parts of the judgment of the Supreme Court of Canada in *Suresh*.

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105 *Supra*, note 14.

106 *Crevier v Quebec (A.G.)* [1981] 2 SCR 220.

107 See *inter alia*, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security', forthcoming.

In *Baker*, the Court never reached the issue of whether the compassionate and humanitarian discretion either generally or in relation to Baker's specific case engaged any *Charter* right and, more particularly, section 7. However, even without that dimension, the Court was prepared to balance executive demands for deference and legislative indicators of that intention with a conception of Baker's entitlement to due consideration and respect from the law. That exercise produced, in my view, a legitimate compromise in which the Court accepted a reasonableness standard of review instead of the standard generally applied to ministerial exercises of broad discretionary powers.

The extent of that compromise, in the sense of how the unreasonableness standard actually applies, has been a matter of considerable debate. That is a debate on which, for reasons of both text and principle, I tend to take a conservative position in the sense of not seeing *Baker* as authorizing a complete reevaluation of the overall decision on a reasonableness basis or a straight reweighing by the reviewing court of all the various factors relevant to the exercise of the discretion. To go that far in relation to the discretion at issue in *Baker* (even within the framework of a statutory regime which requires leave to seek judicial review and then to appeal to the Federal Court of Appeal) would simply be to invite, admittedly within a framework of reasonableness rather than correctness review, a revisiting of every exercise of this frequently sought discretion. Absent a broad statutory right of appeal, I hesitate to see this on a pragmatic and functional analysis as an appropriate role for the Federal Court.

In large measure, that conservative reading of *Baker* has been accepted by the Court in *Suresh* and applied there in much the same manner. Why should I take objection to that? My principal problem with the Court's application of this version of the *Baker* principles is that it pays far too little regard to the fact that an explicit constitutional guarantee was at stake and acknowledged to be at stake.

That should not necessarily lead to a *de novo* or correctness reevaluation of all the facts on which the relevant conclusions have been drawn and, in particular, the facts surrounding whether Suresh was a danger to the security of Canada and whether he was at serious risk of torture in the event of a return to Sri Lanka. However, that said or conceded, the application of a patent unreasonableness standard of review to the factual aspects of both of these decisions is surely not appropriate when important constitutional rights are at stake. At the very least, the reviewing court should be attentive to the executive's evidentiary justification of both of the relevant conclusions and inquire whether there is a reasonable foundation in the evidence advanced for the factual conclusions that have been reached. Indeed, particularly when information is being suppressed from the applicant in the name of national security, there is a strong argument that the government should have to justify its factual conclusions on the basis of providing the court with information as to the reliability of its sources of information and information-gathering techniques.[108]

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[108] For a good illustration of this in operation, see the dissenting judgment of Desjardins JA in *Gallant v Canada (Deputy Commissioner, Correctional Services)* [1989] 3 FC

Indeed, the Court misconceives its role as constitutional adjudicator right at the outset of its analysis when it characterizes the first question, that of whether Suresh was a danger to the security of Canada, as not part of the constitutional matrix. On its very own terms, the Court goes on to accept that the principles of fundamental justice in this instance require a balancing of the extent to which Suresh is such a danger against the prospects for his subjection to torture. It also attempts to characterize this aspect of the decision as almost completely contingent on the facts and devoid of issues of legal principle thus avoiding any possible argument that the Minster misconceived the legal dimensions of 'national security' or the factors which go into such a determination.

There is also a problem with the Court's automatic application of its interpretation of *Baker* to the judicial assessment of the relevance of factors in the determination of an issue which did engage section 7 - the question of whether Suresh faced a substantial threat of torture. The Court never justifies applying the same deferential standard that it associated with *Baker* save once again by reference to the high factual content of that determination, facts that were beyond the Court's realm of expertise. Why that is so except in the sense of it being a potentially complicated inquiry is never made clear and there is certainly no discussion of why it should be the same in the domain of constitutional adjudication as it was in *Baker*.

Beyond that, the Court has left uncertain whether its general prescription of patent unreasonableness review for this kind of ministerial discretion includes the situation in which the Minister, having determined that there is a substantial risk of torture, is then balancing that against national security interests. If that turns out to be the case, then the Court has imposed a more deferential standard of review in a situation where *Charter* rights are at stake than in the case of *Baker* and all in the name of the Minister's authority over national security issues. This comes close to an abdication of its responsibility for ensuring the protection of constitutionally guaranteed rights.

Indeed, in even allowing that the 'principles of fundamental justice' permit such a balancing exercise, the Court has flown in the face of Canada's international obligations in a situation where parliamentary intention as reflected sometimes in a deliberate decision not to incorporate should count for little, if anything. Where *Charter* rights are at stake, legislative inaction whether deliberate or not is irrelevant. Rather, it is the weight that international law principles carry with them (whether or not specifically incorporated into domestic law) which should be the critical determinant in the discerning of the normative content of the 'principles of fundamental justice'.

Of course, Suresh did actually obtain judicial review albeit on procedural fairness grounds.[109]

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329 (CA).

[109] In contrast, the Court found in the parallel case of *Ahani* that, despite the fact that the procedures followed did not accord precisely with the edict in *Suresh*, there had been sufficient compliance with the procedural requirements of the principles of fundamental justice:

However, in delineating the content of fundamental justice, the Court makes it clear that state interests form part of the evaluation of the extent to which fundamental justice permits derogations from an effective opportunity for the target of the proposed action to know and meet the case. Aside from the fact that the Court does little to justify particular derogations, such as the absence of an entitlement to an in-person hearing when credibility may well be critical, there remains the question as to why this whole question should not take place within a section 1 justification. It is also a corollary of this that the opportunities for substantive review are further weakened in that the reservation on access to security information means that the Court will have less than a full record on which to confidently conduct its judicial review of the exercise of discretion. Moreover, this is unlikely to be rectified in the course of whatever right exists to discovery on the subsequent judicial review application, particularly given the executive privilege provisions in the *Canada Evidence Act*.[110]

What is also problematic is the extent of the inconsistency between the Court's approach in this case and its stance in other more recent standard of review case law. Thus, in the immigration cases, *Chieu* and *Al Sagban*, decided the same day and not predicated on *Charter* rights, the Court elevates a question of the relevance of a particular factor to a jurisdictional question attracting correctness review. It also suggests that claims to deference in a purely administrative law setting diminish when the state and an individual are protagonists. Then, in the *Charter* setting of *Trinity Western University*, the Court refuses the invitation to embrace a limited amount of deference by segmenting the decision-making process into questions of law, mixed law and fact and fact. That was not appropriate where the College was attempting to balance potentially competing *Charter* rights and freedoms, a task at which it had no claim to expertise.

Applying this case law to *Suresh*, we see the state acting as the protagonist against an individual in a matter involving not just administrative law interests but also *Charter* rights. For the reasons identified above, segmenting the decision-making process into questions of law and fact with the heavier component by far that of fact was never appropriately justified in *Suresh* and, on the surface, just as problematic and inappropriate as it was in *Trinity Western University*. Finally, while the courts have always treated questions of national security as especially within the expert

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supra, note 95 at paras. 25-26.

[110] RSC 1985, c.C-5, ss 37-39. National security is a specific category of protected information. Where an objection is made, it is determined under section 38 for the most part by way of *ex parte* hearing *in camera*. Also, if the information is certified as constituting 'a confidence of the Queen's Privy Council for Canada', disclosure must be refused under section 39. The constitutionality of this provision was recently sustained in *Babcock v Canada*, 2002 SCC 57, though with the Court conceding some scope for judicial review when the information for which the protection was claimed did not on its face fit within the relevant category or where the person seeking disclosure was able to establish that the Clerk to the Privy Council had improperly exercised her or his discretion in issuing the certificate, presumably (though this is not said) by reference to a patent unreasonableness standard.

domain of the highest level of the federal executive, the lessons of history are that virtual abnegation of judicial review authority in this domain has both hidden and provided an encouragement to excessive use of powers of detention, confiscation and deportation. To afford deference in the expectation the executive will be attentive to and good at balancing *Charter* rights and interests against the pressures generated not only within Canada but also by certain sectors of the international community is not realistic. It also runs the danger of making the assertion of *Charter* rights in this domain effectively non-justiciable.

To all of this, the pragmatist might simply react with the response that it is I who am being unrealistic in a post-September 11 world where national security concerns trump all. While Canadian law does not have a political questions doctrine at least where constitutional (including *Charter*) questions are in issue,[111] the Court should at least be entitled to deploy a close surrogate when national security interests are at stake, that surrogate being considerable deference to executive judgment. However, that is not what the constitution and the *Charter* say. In the case of the *Charter*, the trump should only apply in the event of legislative override or a properly founded section 1 justification.

More generally though, *Suresh* raises questions as to the way in which *Charter* rights will be dealt with when they are at stake in other high level executive decision-making. The history of Canadian law in this domain, *Baker* notwithstanding, exhibits and continues to exhibit a high level of deference to Cabinet, ministerial and other senior executive prerogatives.[112] For that to survive intact or by reference to a patent unreasonableness standard of review when *Charter* rights are in issue would be inexcusable. In short, at the very least it is to be hoped that the *Suresh* application of a highly deferential standard of review to decisions which involve *Charter* rights will at least be confined to the special category of case in which national security interests are clearly or obviously implicated

I do acknowledge that we now function in an era where there is frequent reassertion of the notion that administrative law itself is a branch of constitutional law and/or that there should be cross-fertilization in both directions as between these two components of our public law.[113] I also accept that this invites the criticism that the argument that I have just made puts far too much emphasis on the distinction between cases in which *Charter* or other 'true' constitutional rights are in issue and those where the interests at stake are justiciable only by reference to

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111 *Operation Dismantle Inc v The Queen* [1985] 1 SCR 441.

112 *Supra*, note 10 at 313.

113 See in particular G Cartier's chapter, 'The *Baker* Effect: A New Interface Between the *Charter* and Administrative Law - The Case of Discretion'. See also TRS Allan's chapter, *supra*, note 104 and M Hunt, 'Sovereignty's Blight', *supra*, note 20, in which the argument for a theory of deference conceived of in terms of 'justification' is rooted firmly in a conception of administrative law as part of constitutional law.

administrative law principles.

However, even accepting that there is merit in the contention that there should not a wide gulf in the scope of judicial review on constitutional and non-constitutional grounds does not in any way affect my criticism of *Suresh*. Lessening the gulf may be one thing; it is another to go to the extreme of being more deferential in *Suresh*, a constitutional case than in *Baker*, a case where the Court found it unnecessary to reach the *Charter* arguments. That does not lessen the gulf. It reverses the entire order of things. Moreover, as indicated above, I do not accept that that reversal can be justified in the name of the pragmatic and functional approach. Even accepting that national security considerations weigh heavily in normal standard of review or deference calculus does not give them priority in that calculus over explicit constitutional rights particularly in a domain where the government does have the ability to justify its actions and decisions and trump the constitutional right in appropriate circumstances by reference to section 1 of the *Charter*. Indeed, I would make the same assertion even against an argument that the maintenance of national security is yet another underlying principle of the Canadian constitution.[114]

More generally, I would respond to the criticism that the argument makes too much of the difference between constitutional rights and other administrative law interests by suggesting that, as *Baker* itself indicates, there is presently a continuum of sorts. The nature of the interests at stake in *Baker* took the standard of review away from patent unreasonableness, the standard normally applicable to broadly-framed executive discretions, to that of straight unreasonableness. Convert the interests at stake in *Baker* to *Charter* rights and the standard becomes either that of overall correctness or correctness in relation to the critical elements of the decision.

Indeed, there may be more shades than that. As contended above, it may be a fair reading of *Baker* to allow for more intense scrutiny of the exercise of broad discretions when their exercise involves underlying constitutional principles or considerations emanating from a substantive conception of the rule of law (such as ratified but unimplemented treaties and the general principles of international law) and the fundamental values of Canadian society. If so, the line between constitutional and administrative law review becomes even less pronounced. This sense of a continuum also emerges in the constitutional domain at least to the extent that there is legitimacy in at least some level of deference to the factual findings of decision-makers when constitutional rights are at stake.

Despite the uncertainties surrounding *Baker* and what precisely it is saying about the conduct of review of the exercise of an administrative discretion under an unreasonableness standard, that part of the Court's judgment has made an important contribution to the overall coherence of Canadian judicial review law. In holding that the pragmatic and functional approach to delineating the standard of review is applicable across the entire spectrum of statutory and

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[114] In so doing, I am aware of the fact that in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, the Supreme Court held that underlying principles of parliamentary privilege could trump a *Charter* right.

prerogative decision-making, it has given Canadian judicial review law a unity in the domain of substantive review that it did not have previously. It is also understandable why, in such a clear case of an unreasonable failure to take a critical factor into account, the Court did not develop a detailed template for how unreasonableness review is to be conducted within the framework of broad discretionary powers.

However, it is equally understandable that the matters left unresolved by the judgment have led lower courts to disagree as to the extent to which the kind of unreasonableness review asserted in *Baker* allows for the reweighing of factors relevant to the exercise of discretion. In that context, *Suresh*'s holding that *Baker* did not authorize a reweighing of the various factors may seem a welcome clarification. However, it too suffers from a lack of detailed attention to the complexity of the issue. Moreover, its apparent use of the pragmatic and functional approach to justify a highly deferential approach to review of most, if not all aspects of a process in which *Charter* rights were at stake seems to be perversion of the whole thrust of *Baker* and its willingness to allow for unreasonableness as opposed to patent unreasonableness review of a broad ministerial discretion in a case involving highly valued individual interests. More generally, *Suresh* points to the great difficulties that common law courts have always had in dealing with rights-based claims in times of crisis or in the face of executive assertions of national security. It is to be hoped that there will be sufficient recognition of that highly contextual factor to dilute *Suresh*'s impact on the further necessary clarification and evolution of the law governing the principles of review of discretionary decision-making in the wake of *Baker*.

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