The *Charter* and Administrative Decision-Making

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A. Introduction

The *Charter* is now twenty-two years old. For much of that time, the extent and nature of its application to administrative decision-making was a matter of considerable conjecture. Certainly, the *Charter* had an almost immediate impact on some areas of Administrative Law most notably in the domains of convention refugees[1] and persons subject to various constraints on their physical liberty and particularly the incarcerated[2] and those on parole.[3] For those categories, section 7's guarantees of the "principles of fundamental justice" when the right to "life, liberty and security of the person" was at stake provided a range of procedural protections not necessarily guaranteed by the common law and, indeed, in the face of legislation both primary and subordinate. There was also an early body of case law about the extent to which section 7 and other provisions of the *Charter* limited the investigative capacities of certain administrative agencies.

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1 *Singh* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

2 See *e.g. Howard* v. *Stony Mountain Institution* (1985), 19 D.L.R. (4th) 502 (F.C.A.).

3 See *e.g. Gough* v. *National Parole Board* (1990), 45 Admin. L.R. 304 (F.C., T.D.), aff'd. (1991), 47 Admin. L.R. 226 (F.C.A.).

However, for many years, there were far more uncertainties than settled territory. The Supreme Court struggled to delineate authoritatively how far the *Charter* actually reached in its overall coverage and, in particular, the extent to which its ambit coincided with that of public law judicial review of administrative action. The scope of "life, liberty and security of the person" remained very much in a state of flux, a situation compounded by the fact that, in the foundation section 7 case of *Singh* v. *Canada (Minister of Employment & Immigration)*,[4] there was no clear majority of the judges in support of Wilson J.'s holding that that provision protected the procedural rights of convention refugee claimants. As well, the extent to which "fundamental justice" embraced substantive entitlements was barely explored. Here, of particular relevance to Administrative Law was the question of when fundamental justice in a substantive sense would require legislative specificity and a confining of discretion once section 7 rights (and, for that matter, other *Charter* rights and freedoms) were potentially at stake in administrative decision-making. Whether the procedural dimensions of "fundamental justice" were generally more protective than the common law of natural justice or procedural fairness was certainly a live issue before the courts but one that had by no means been fully played out in the case law. The same was true of the extent to which the courts should take governmental interests into account in delineating the contours of section 7 and, beyond that, in responding to section 1 justifications of section 7 violations. Another critical issue was the subject of much confusion: the extent to which tribunals and other statutory and prerogative decision-makers were allowed to, indeed possibly obliged to take the *Charter*'s substantive and procedural guarantees into account in exercising their powers.

In many of these domains, there was also a sense of great caution on the part of the Supreme Court in extending the benefits of the *Charter* to those embroiled in administrative processes. This was also manifest in the Court's refusal to read certain provisions of the *Charter* expansively at least in the sense of giving them considerable room to operate in an administrative law setting. Thus, quite early in the life of the *Charter*, the Court held that the criminal process protections provided by section 11 did not extend more broadly than the terrain

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[4] *Supra* note 2. Seven judges sat on *Singh*. However, Ritchie J. did not participate in the judgment. Wilson J. and two others decided the case on the basis of section 7 of the *Charter*. Beetz J. (for himself and two others) ruled that the legislation was invalid by reference to section 2(e) of the *Canadian Bill of Rights*.

indicated by a literal reading of the opening words: "charged with an offence".[5] This limited the section's protections to the domain of the criminal law, provincial offences legislation, and those very limited number of administrative tribunals which had constitutional authority to impose "truly penal consequences".[6] As well, in *Andrews* v. *Law Society of British Columbia*,[7] the Court had circumscribed the scope of section 15 by designating it as an anti-discrimination provision. Only those coming within the enumerated categories or analogous groups could claim the benefit of its protection. By this one stroke, section 15 lost its potential for dealing with inequalities in the administrative process (such as varying levels of access to procedural fairness and judicial review) save in the obviously limited number of situations in which those inequalities could be traced to one of the enumerated or analogous grounds.

In short, during the first ten to fifteen years of the *Charter*'s existence, its encounters with the administrative process were comparatively infrequent and, in their randomness, provided little opportunity for the evolution of a sustained, consistent and coherent body of jurisprudence. Moreover, the general tenor of the case law was very cautious and conservative in responding to invitations to give the *Charter* room for effective operation in administrative decision-making.

In this paper, I will consider the extent to which this restrained approach to the *Charter*'s application to Administrative Law has characterized the more recent jurisprudence of the Supreme Court of Canada in relation to the various central issues identified above.[8] On this,

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5 See *e.g. R.* v. *Wigglesworth*, [1987] 2 S.C.R. 541.

6 As exemplified by *Wigglesworth*, *ibid.*, involving R.C.M.P. discipline for major service offences where there was the possibility of incarceration for up to a year. However, *cf R.* v. *Shubley*, [1990] 1 S.C.R. 3 to the effect that section 11 did not apply to penitentiary discipline even where the possible consequences were solitary confinement and loss of remission. Section 7, not section 11 was the source of constitutionalized procedural protections in such cases. Prison discipline was held to be more concerned with maintaining order that providing redress for a wrong done to society *i.e.* it was not penal.

7 [1989] 1 S.C.R.143.

8 This will by no means exhaust all the areas of Administrative Law to which the *Charter* is relevant. I will not be discussing save in passing, *inter alia*, the application of the *Charter* to the search and seizure and compulsory attendance and production powers of tribunals, the ability of tribunals to provide *Charter* remedies, the procedural protections potentially provided in administrative processes by

my thesis will be that, by and large, those early signs were not misleading and that the approach has generally continued to be a restrained one across a range of swing issues. I will then move to reflect on why this has been the case and to consider whether it can be justified in terms of the underlying purposes and premises of the *Charter* and its structural imperatives. Here, my argument will be that there are sound reasons or justifications for a more expansive posture than the Court has adopted in this domain and that our Administrative Law is the poorer for its failure to do so.

B. General Application of the *Charter*

In late 1990, in a group of four judgments released on the same day and involving *Charter* challenges to the mandatory retirement policies of statutory bodies, the Supreme Court held that, while universities and hospital boards might generally be the subject of the principles of public law judicial review, they were not, at least as at that time statutorily configured in Ontario and British Columbia, governmental bodies. As a consequence, they were not subject directly to the dictates of the *Charter* in relation to most of their functions. According to the Court, section 32(1) of the *Charter* confined the scope of its direct reach to government and these bodies did not count because of the extent to which they operated independently of the provincial governments from which they derived most of their operating funds.[9]

This holding that the terrain of the *Charter* was governmental functions and that, for these purposes, government did not equate to the range of public bodies reached by the public law remedies of judicial review was undoubtedly a setback to those who held a preference for an expansive version of the *Charter*'s zone of operation. It is also important to recollect that the Court did not base its saw off point on any conception

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sections other than section 7, and the extent to which statutory discretions which affect *Charter* rights are subject to a "void for vagueness" challenge.

[9] *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 (Ontario universities); *Harrison* v. *University of British Columbia*, [1990] 3 S.C.R. 451 (a British Columbia university); *Stoffman* v. *Vancouver General Hospital*, [1990] 3 S.C.R. 483 (British Columbia hospitals), but *cf Douglas/Kwantlen Faculty Association* v. *Douglas College*, [1990] 3 S.C.R. 570 (British Columbia community colleges were caught in the net of the *Charter*.)

of public as opposed to private power or on statutory as opposed to non-statutory power. Rather, it was framed very much within a rubric that saw some species of public, statutory power as sufficiently removed from the day to day direction and control of central government as to not come within the sense of government that the Court attributed to that term in section 32(1) of the *Charter*.

That raised the question of what other public bodies might be excluded from the ambit of the *Charter*. Among the possible candidates were Law Societies and the other historically self-governing professions. Should their largely self-regulatory status and the lack of day to day government involvement in their affairs lead to the conclusion that in general their operations are not subject to *Charter* scrutiny notwithstanding the fact that they operate under a statutory umbrella?

In fact, the Supreme Court has in at least three cases simply assumed the application of the *Charter* to Law Societies without ever asking the question whether they are government within its understanding of section 32(1). In two of those cases, *Law Society of Upper Canada* v. *Skapinker*[10] and *Andrews* v. *Law Society of British Columbia*,[11] the validity of a statutory provision was in issue, so it is perhaps not surprising that the Court did not take up the issue of the status of Law Societies. After all, we must assume that the terms of legislation emanating from both the federal and provincial legislatures are subject to *Charter* scrutiny even if the activities of the bodies empowered or facilitated by that legislation are not. However, in the case of *Black* v. *Law Society of Alberta*,[12] the target of the *Charter* attack was a rule adopted by the Law Society acting under its general powers of governance. Here too, there is no whiff that there might be a threshold application problem.

Assuming that the Court was not acting *per incuriam* in applying the mobility protections of the *Charter* to a Law Society rule restricting partnerships with out of province lawyers or firms, what is it exactly that sorts Law Societies out from universities and hospital boards? Does the detail of modern professional regulatory statutes bespeak a much greater

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[10] [1984] 1 S.C.R. 357.

[11] *Supra* note 8.

[12] [1989] 1 S.C.R. 591.

sense of government domination through requirements and restrictions than exists in the other two cases? Is the legislation so directive and controlling that it really does not matter that these professional bodies still have a clear sense of themselves as largely self-governing and autonomous and that, on a day to day, year in, year out basis, they are left to function without direct government intervention in the ongoing administration of their affairs? Put bluntly, this renders line-drawing of the kind in which the Court engaged in the 1990 mandatory retirement cases a highly problematic exercise.

It is also significant that, in at least one of those cases, *McKinney* v. *University of Guelph*,[13] the Court conceded that the exclusion of universities from the reach of the *Charter* was not necessarily a total one. In some of their possible functions, universities might well be acting as government and subject to the *Charter*. The justice who penned that reservation on behalf of the Court was La Forest J and it was he who was to give it content in his last judgment before retirement: *Eldridge* v. *British Columbia (Attorney General)*.[14]

Eldridge in effect involved a revisiting of the status for *Charter* purposes of hospitals in British Columbia. On this occasion, the target was their failure to provide "translation" or sign language interpretation services for the hearing impaired requiring hospital treatment or care. The Court held that the hospitals had been charged with the implementation or the carrying out of a "specific governmental policy or programme",[15] that of providing necessary medical services without charge within the framework established by the province's *Hospital Insurance Act*. To the extent that this aspect of their activities came within the ambit of that programme, they were subject to the provisions of the *Charter*. In partial justification of this conclusion, La Forest J. expressed the view that to hold otherwise would mean that the legislature could settle upon a particular policy or objective and then, by delegating its implementation to a non-governmental body, avoid the protections provided by the *Charter*.[16]

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13 *Supra* note 10, at para. 42.

14 [1997] 3 S.C.R. 624.

15 *Ibid* at para. 43.

16 *Ibid* at para. 40.

Here, then, is an example of what the foundation case law had hinted at - a "non-governmental" body that was for the purposes under review actually acting as government or on behalf of the government. Indeed, what is significant about this holding is that the exception is probably larger than the rule at least in this context. The actual provision of services is presumably of much more significance for a hospital than its labour relations (the subject of *Stoffman*[17]).

How far this theory extends is, however, another question. Let me just raise two uncertainties. If this is how hospitals are viewed at least under a substantially public health system, does the analogy also extend to universities in the sense that the clientele of universities, the students are there because of a specific governmental programme, the provision of state-subsidized tertiary education? Can they also claim against universities the protection of the *Charter* even though the university is able to conduct its labour relations free from its demands? Secondly, how far down the road to privatization does a government have to go with respect to the provision of health care and perhaps tertiary education to convert the services being delivered into something other than a "specific governmental policy or programme"? Will a continuing government interest in the form of extensive regulatory overview still carry the day for the application of the *Charter*?

In this context, it is interesting that in *Eldridge*, La Forest J. also uses the expression "inherently governmental functions".[18] This suggests that there is an inner core of governmental functions that cannot be placed beyond the ambit of the *Charter* irrespective of how "privatized" they become. The usual example provided is that of private prisons or correctional facilities, but where else does this bite? Because the expression is used in *Eldridge*, is there an implication that health care is another example and what about various levels of education? In short, there is no doubt that *Eldridge* has expanded the potential area of the *Charter*'s application from what had generally been supposed to be the situation after *McKinney* and the other three 1990 judgments but the limits of the theory adopted in that case are by no means clear.

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[17] *Supra* note 10 (the British Columbia hospital case involving an attempt to directly challenge the hospital's mandatory retirement policy as violating section 15 of the *Charter*).

[18] *Supra* note 15, at para. 42.

Subsequently, the Supreme Court has done little to clarify this very problematic issue. However, the problem did surface in a rather surprising manner in *Blencoe* v. *British Columbia (Human Rights Commission)*.[19] There, the argument was advanced that, since the Human Rights Commission and the adjudicative Human Rights Tribunal were statutorily independent of government, they were not subject to the dictates of the *Charter*. In fact, that argument seemed to have no prospect of success given that the Court had already in *Slaight Communications Inc.* v. *Davidson*[20] applied the *Charter* to adjudicators under the *Canada Labour Code*. However, despite that, it was given considerable play in the judgment of Bastarache J. before he dismissed it at least in the case of the Commission.[21] Here, ultimately, *Eldridge* proved decisive in the sense that the Court saw the Commission as established to fulfill a specific governmental policy: the creation of an administrative structure to effectuate a governmental programme and, in particular, the establishment of an agency for the combatting of discrimination.

While this seems an inevitable conclusion, it is interesting to take account of what the Court said on the way to reaching that point. First, there is a statement to the effect that "[b]odies exercising statutory authority are bound by the *Charter* even though they may be independent of government".[22] Stated in such a bald form, that would seem to make the *Charter* applicable to all bodies that derive their power and authority from statute including universities and hospital boards in all their capacities including their labour relations. To allow *McKinney* and *Stoffman* to survive, there have to be qualifiers to this statement. This perhaps can be found in the next paragraph. "One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals".[23] At one level, that suggests a proposition that is presumably uncontroversial - that when a statutory authority is given that kind of authority, such as the power to enter private residences, and to compel the attendance of witnesses and

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19 [2000] 2 S.C.R. 307.

20 [1989] 1 S.C.R. 1038.

21 *Supra*, note 20, at paras. 32-40.

22 *Ibid* at para. 35.

23 *Ibid* at para. 36.

the production of documents, it must at least in relation to the exercise of those powers and perhaps generally in the carrying out of its mandate be subject to the dictates of the *Charter*. Moreover, to the extent that this is a feature of human rights commissions, it is sufficient to bring them within the ambit of the *Charter*.

However, if it is meant to suggest that a body cannot be government for the purposes of the *Charter* without possessing those powers, it may well be contrary to the holding in *Eldridge* since in that case there is no suggestion that the relevant hospitals had any statutory powers of compulsion. Bastarache J. then goes on to say that the Human Rights Commission was implementing a specific government policy or programme **and** had powers of compulsion.[24] Were both necessary conditions in this case or would one have been enough? Or, are they simply two of a range of possible indicators? Thereafter, the Court, in resisting the further argument that the Commission was not subject to the *Charter* because it had adjudicative characteristics, held that that feature could not stand in the face of the fact that the Commission was effectuating a government programme, this at least suggesting such an objective or function will always be a critical factor.[25]

For this latter conclusion, Bastarache J. relied at last[26] on *Slaight Communications Inc.* v. *Davidson*. This would suggest that the Court is eventually accepting the proposition that all aspects of the process are part of the relevant government project and subject to the *Charter*. However, the language of the judgment is throughout this discussion related solely to the Commission and not the Tribunal. Indeed, Bastarache J. commences his whole discussion of this issue by stating that it is only necessary to deal with it in relation to the Commission, and not the Tribunal.[27] While that might have technically been the case, it nonetheless raises doubts immediately as to why the Court did not simply resolve the extra question once and for all. Is there some reason to doubt the application of the *Charter* to adjudicative tribunals such as human rights tribunals and, if so, what is the source of those doubts? Is *Slaight*

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[24] *Ibid* at para. 37.

[25] *Ibid* at para. 38.

[26] *Ibid.*

[27] *Ibid* at para. 33.

Communications Inc. v. *Davidson* possibly wrong on its facts or are adjudicators under the *Canada Labour Code* different from human rights tribunals, and, if so, in what relevant respects?

I pose these questions and raise these doubts for the very simple reason of trying to demonstrate that the Court has had considerable difficulty in articulating a test or standard which is defensible both in logic and policy. I also want to suggest that it might be opportune to return to the premise on which the current jurisprudence is based - that, for *Charter* purposes, "government" is not synonymous with the reach of public law.

As La Forest J.'s judgment in *Eldridge* itself makes clear, modern government acts in a multitude of ways in effectuating its perceptions of what is needed in the public interest. Indeed, one of the big lessons of the whole privatization, deregulation, contracting out phenomenon of recent years is that of the capacities of government to innovate in both the delivery of programmes and, in particular, in its use of various blends of public and private linkages to achieve its purposes. Within such a context, it seems far more realistic to treat at least public universities and hospitals as presently constituted as for all purposes subject to the *Charter* rather than as largely public but partially private bodies with the line between the two capacities very difficult to draw at the margin and such bifurcation being undesirable at least where it can be avoided. Like the Law Societies, they each exist by reason of statutory authorization and, as opposed to the situations of corporations generally, that legislation is today (whatever the historical antecedents) far from primarily facilitative (in the case of hospitals and Law Societies) or stands within other legislative parameters (in the case of universities). In short, a liberal interpretation of the term "government" in the *Charter* should make it applicable on much more generous terms than at present.

Of course, to extend the reach of the *Charter* so that its application is equated with the reach of public law judicial review does not solve all difficulties. After all, in general public law, the line between public and private bodies and functions is often highly controversial.[28] However, I do want to suggest that it enables a more satisfactory set of questions to be asked about the nature of the relevant power either in terms of its original

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[28] See *e.g. Gould* v. *Yukon Guild of Pioneers*, [1996] 1 S.C.R. 571 and, more recently, *Ontario Harness Horse Association* v. *Ontario Racing Commission* (2002), 62 O.R. (3d) 44 (C.A.) for cases at the margin resolved in different ways.

source or modern reason for existence. It is also a dividing line that does not need to concede that, because all corporations owe their existence to some form of statutory licence, they must of necessity be subject in all things to the *Charter*. Unless one subscribes to the view that there is no border between the public and the private or, alternatively, that the *Charter* should be horizontal in its application (*i.e.* applicable directly to private relations[29]), the mere involvement of statute cannot be enough to sweep up an activity or enterprise within its zone of application. However, what centring the debate on the distinction between public and private does do is open up the possibility for a more sophisticated and open jurisprudence about the true nature of governmental power in all of its manifestations and for leaving behind this sense that, somehow or other, the lack of day to day central government direction or control is necessarily critical against the *Charter*'s application.

C. Section 7 as a Constitutional Guarantee of Procedural Fairness in the Administrative Process[30]

1. More than a Guarantee of Fair Criminal Procedure

If the *Charter* was to provide a constitutional guarantee of due process across a broad spectrum of Administrative Law, it had to be by way of section 7. The structure of section 11 simply did not permit using subsection (d) and its promise of a "fair and public hearing by an independent and impartial tribunal" as a wide-ranging source for such a protection. In this respect, the text did not lie and the Supreme Court was undoubtedly correct in its confining of section 11's application to the true criminal law or situations where administrative tribunals had authority to levy truly penal sanctions.

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29 While the *Charter* is not directly applicable to private relations, it is now well-accepted that its terms can influence the development of the common law. See *e.g. Hill* v. *The Church of Scientology*, [1995] 2 S.C.R. 1130. *Cf. Constitution of the Republic of South Africa*, Act 108 of 1996, s.8(2) providing for the horizontal application (*i.e.* to the private sector) of that Constitution.

30 For a fuller account of the extent to which not only section 7 but also other provisions of the *Charter* have had an impact on administrative procedures, see Christopher Bredt and Laura Pottie, "The *Charter* and Administrative Law: The Procedural Protections of Sections 7-14, a paper delivered on March 2, 2004 at an OBA Conference, The Constitution in Your Administrative Law Practice.

However, it was quite a stretch from this fair interpretation of section 11's reach to also brand section 7 as essentially a criminal law provision and a general prelude to the more specific guarantees of sections 8 to 14. While section 7 certainly has the capacity to provide other protections in the criminal process that are not specifically provided for in sections 8 to 14 (such as a constitutional proscription on absolute liability offences[31]), to see it, as Lamer C.J. was sometime inclined to do,[32] as primarily, if not exclusively part of a set of guarantees of a fair criminal process was to think too restrictively and not in accordance with the structure of this portion of the *Charter*.

The heading "Legal Rights" certainly did not provide even a hint that what followed was essentially a set of rights restricted to the criminal law setting. Moreover, leaving aside section 11 and its obviously restricted zone of operation, most, if not all of the other provisions in this part of the *Charter* have clear applications outside the strictly criminal law setting. Detention, one of the subjects of sections 9 and 10, is clearly not the preserve of the criminal law in Canada nor is treatment or punishment, the subject of section 12.[33] Of course, it might be argued (and this in many ways was Lamer C.J.'s real point) that what these sections indicated was that this part of the *Charter*, while not confined to the criminal law setting, was at least primarily concerned with criminal law processes or those analogous to criminal law processes. Within this setting, "life, liberty and security of the person" in section 7 should therefore be limited to state uses of physical restraint and jeopardy as a way of dealing with criminal, anti-social or other forms of aberrant behaviour. However, the weaknesses of that argument are exposed by the other provisions in the section of the *Charter* on legal rights. Many administrative tribunal structures which are removed from the criminal law setting possess powers within the ambit of search and seizure, the subject of section 8. Access to translation facilities, the subject of section

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31 As in *Reference re Section 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486.

32 See *e.g. R.B.* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

33 For a consideration of the reach of section 12 in an administrative process setting, see *Mussani* v. *College of Physicians and Surgeons of Ontario* (2003), 64 O.R. (3d) 641 (Div. Ct.) at paras. 121-163, holding that the licence revocation and fining powers of the College were not subject to section 12.

14, is in no way constrained by any reference to the criminal process nor are there any legitimate policy reasons that would confine the restriction of the critical words "any proceedings" to criminal or analogous processes. Even the section dealing with use of self-incriminating evidence has applications to many administrative tribunals where it may be important to afford that protection in order to effectuate the tribunal's essential purposes and mandate. In short, there is no warrant in the general structure and purposes of sections 8 to 14 for asserting that section 7 is necessarily restricted to criminal law or analogous settings and that "life, liberty and security of the person" are constrained accordingly.

Nonetheless, it was not at all surprising that the Supreme Court's initial encounters with section 7 in a non-criminal law setting involved issues of threats to physical life and freedom. These were obvious targets and this is reflected by the convention refugee foundational judgment of three members of the Court in *Singh* v. *Canada (Minister of Employment and Immigration)*[34]: section 7 reached the potential threats to the life, freedom and physical security of convention refugee claimants at the hands of the authorities in the countries from which they had come. Hard on the heels of this judgment came lower court recognition that certain forms of prison disciplinary action that involved loss of remission or transfer to more secure forms of incarceration also engaged section 7.[35]

However, it is worthy of note that the judgment of the three judges in *Singh*[36] also involved a generous interpretation of other aspects of the threshold to the application of section 7 at least to the extent that it held that the benefit of the provision extended to all persons physically present in Canada (such as non-resident aliens claiming convention refugee status) and that the threats to "life, liberty and security of the person" could be at the hand of a foreign power. To the extent that Canada was responsible for sending persons back to such a country who had "a genuine fear of persecution", Canada would be implicated in the potential violation of section 7. Finally, the triggering of section 7 did not depend on the inevitability of the state action causing a deprivation

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[34] *Supra* note 2.

[35] *Supra* note 3.

[36] Wilson J. (Dickson C.J. and Lamer J. concurring).

of "life, liberty and security of the person" but a sufficient chance of jeopardy to those rights.

Perhaps, it was considerations such as this that led the other three judges[37] to eschew reliance on section 7 and to use section 2(e) of the *Canadian Bill of Rights* to sustain the challenge to the validity of the legislation.[38] Indeed, subsequently in *Chiarelli* v. *Canada (Minister of Citizenship and Immigration)*,[39] the Court caste doubts on whether section 7 applied for the benefit of resident non-Canadians. Those doubts have now, however, been laid to rest in the cases acknowledging the application of section 7 to non-Canadian fugitives from American justice[40] and, more recently, to convention refugees whose right to remain was being withdrawn by executive action based on their alleged involvement in terrorism abroad and threats to the security of Canada.[41]

2. The Reach of "Life, Liberty and Security of the Person"

In all of the situations detailed above, the issue of jeopardy to "life, liberty and security of the person" was itself uncontroversial. Physical life, liberty and security were in peril. What were the opportunities for the application of section outside that domain? Wilson J.'s judgment in *Singh* contained some tantalising suggestions in its references to a version of "security of the person" which would embrace

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37 Beetz J. (Estey and McIntyre JJ. concurring). The seventh judge who sat on the case (Ritchie J.) took no part in the judgment.

38 Section 2(e) provides a *quasi*-constitutional guarantee of a "fair hearing in accordance with the principles of fundamental justice" whenever a statutory body is engaged in the "determination of rights and obligations". It applied here because the process involved determining whether the Singhs had a statutory "right" to remain in Canada by virtue of being convention refugees.

39 [1992] 1 S.C.R. 711.

40 See *e.g. Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Canada* v. *Schmidt*, [1987] 1 S.C.R. 500. See also *U.S.* v. *Burns*, [2001] 1 S.C.R. 83, involving the extradition of Canadian fugitives from American justice.

41 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R 3. See also *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72.

"not only the protection of one's physical integrity, but the provision of the necessaries for its support."[42]

In fact, even now, there is no clear answer to the Wilson question with the Supreme Court in effect postponing it for another day in its 2003 judgment in *Gosselin* v. *Québec (Procureur général)*,[43] in which (*inter alia*), an argument was made that there was a section 7 claim to constitutionally guaranteed state-provided subsistence level allowances. However, even before that, battle was waged between two wings of the

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[42] *Supra* note 2, at pp. 206-07 (quoting from the Law Reform Commission Working Paper No. 26, Medical Treatment and the Criminal Law (1980) at 6).

[43] [2002] 4 S.C.R. 429. This was a class action challenging the validity of the Quebec welfare benefits regulation pertaining to the eligibility of persons under 30. It was claimed, *inter alia*, that the provisions of the regulation, in so far as they provided a level of welfare for certain beneficiaries under 30 that was below the poverty line, violated those beneficiaries' right to "life, liberty and security of the person". On this issue, five judges (McLachlin C.J. (Gonthier, Iacobucci, Major and Binnie JJ. concurring)) held that the factual record did not provide sufficient support for the existence of a rights violation. In so holding, the majority judges were not willing to accept that section 7 had no application outside of the domain of the administration of justice and also left open the question of whether section 7 might in other circumstances place positive obligations on the state of the kind asserted here. However, this case did not provide a sufficient basis for such an extension in the reach of section 7. Bastarache J., dissenting for other reasons, would in fact have confined the reach of section 7 to situations involving the administration of justice. LeBel J. (while also dissenting for other reasons) largely endorsed the majority's ruling on section 7 and stated that he too was unwilling to rule out the application of section 7 outside of the domain of the administration of justice. Arbour J., also dissenting, held (L'Heureux-Dubé J. concurring on this point) that the regulation indeed violated section 7 and could not be justified under section 1. In short, the questions raised in the paper about the scope of section 7 have been left unresolved though the fact that the majority was unwilling to see a violation on the facts and the cautious manner in which they spoke of the possibility of section 7 applying outside of the domain of the administration of justice and in a way which placed positive obligations on the state suggests that it will take a very dramatic set of facts to convince the Court (as presently constituted) to make such a ruling. However, there is a strong possibility that the Court will be presented with that opportunity in an appeal from the judgment of the British Columbia Court of Appeal in *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*(2002), 220 D.L.R. 411 (B.C.C.A.), in which the Court ruled that the government had violated section 7 in not providing effective treatment for autism in the form of early intensive behavioural intervention. Leave to appeal was granted on May 15, 2003: [2002] S.C.C.A. No. 590. The appeal has yet to be inscribed for hearing.

Court.[44] On one side were the justices who saw potential in section 7 for the protection of various forms of social right based on conceptions of "dignity, self-worth and emotional well-being" particularly as components of "security of the person".[45] On the other, were those who were much more comfortable with section 7 as essentially a section providing a role for the court to play as the "guardian of the administration of the justice system";[46] the domain of criminal justice including corrections and also situations where administrative tribunals or agencies of government restrict liberties "in the guise of regulation, but use punitive measures in the cases of non-compliance".[47]

That dialectic produced a number of outcomes. Not only did section 7 not protect property rights (perhaps the one thing that was clear from the drafting history) but also it did not reach the right to work or purely economic rights.[48] In contrast, freedom and security of the person as concepts which embraced personal autonomy, dignity, and the ability to make choices did surface on occasions as an element in section 7 providing a justification for judicial striking down of legislation. Examples obviously include *R.* v. *Morgentaler*[49] to the extent that members of the Court regarded therapeutic abortion committees as agencies which interfered with the liberty and security of the person of women seeking abortions. Much more recently, perhaps the two most

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[44] The principal protagonists were Lamer J. (subsequently C.J.) (supporting a view of section 7 which saw it as primarily, if not exclusively confined to the operation of the criminal justice system) and La Forest J.(who took a rather more expansive view of its ambit of operation). For a good example of the differing views of the members of the Court, see *R.B.* v. *Children's Aid Society of Metropolitan Toronto*, *supra*, note 33.

[45] The words of Lamer J. (speaking for himself) in *Reference re Ss. 193 and 195.1(1)(c) of the Criminal Code*, [19990] 1 S.C.R. 1123 (referred to throughout as the *Prostitution Reference*) at para. 59.

[46] *Ibid* at para. 57.

[47] *Ibid.*

[48] *Ibid* at paras. 56-59 and *Reference re Public Service Employees Relations Act*, [1987] 1 S.C.R. 313. See even more recently *Siemens* v. *Manitoba (Attorney General)* [2003] 1 S.C.R. 6, at paras. 45-46, reaffirming that section 7 did not protect the right to run a video lottery terminal business, a "purely economic interest".

[49] [1988] 1 S.C.R. 30.

prominent judgments are those of La Forest J. concurring in *Godbout* v. *Longueuil (City)*[50] and surprisingly an about to retire Lamer C.J. in *New Brunswick (Minister of Health and Community Services)* v. *J.(G.).*[51]

In *Godbout*, in a judgment that was subsequently to receive the endorsement of a majority of the Supreme Court of Canada, La Forest J. condemned as violating section 7 a municipal by-law which required city employees to live within the boundaries of the city. It deprived the employees of "liberty" in the sense of an ability to make highly personal and fundamental life style choices. This certainly hints at a broad conception of liberty and, indeed, might also amount to an endorsement of a judgment such as *Wilson* v. *Medical Services Commissions of British Columbia*[52] where the British Columbia Court of Appeal had found a statutory regime imposing geographic limits on where certain doctors could practise as too great an intrusion on their "liberty". There is still, however, the *Prostitution Reference* where Lamer C.J. rejected an argument that there was a difference for the purposes of section 7's coverage between a bare right to work and the right to practise a profession; in his view neither came within liberty or security of the person.[53]

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50 [1997] 3 S.C.R. 844. The majority of the Court ruled in favour of the employee on the basis of a provision in the *Quebec Charter of Human Rights and Freedoms*, R.S.Q. 1977, c.C-12 (re-enacted S.Q. 1982, c. 61, s. 16).

51 [1999] 3 S.C.R. 46.

52 (1988), 53 D.L.R. (4th) 171 (B.C.C.A.).

53 *Supra* note 46. It is also significant that the Court in *Siemens*, *supra*, note 49, was not prepared to classify the operation of a video lottery terminal business as other than a "pure economic interest". It did not involve a "fundamental life choice". Of course, that may not necessarily mean that *Wilson* has no authority. Practising one of the honourable professions might still be seen as having a "fundamental life choice" aspect to it even though prostitution and living on the proceeds of gambling do not. However, that is not the way lower courts have been interpreting the overall effect of Supreme Court authority: see *Mussani* v. *College of Physicians and Surgeons of Ontario*, *supra*, note 54; *Waldman* v. *British Columbia (Medical Services Commission)* (1997), 150 D.L.R. (4th) 405 (B.C.S.C.), aff'd (though not on this point) (1999), 177 D.L.R. (4th) 321 (B.C.C.A.); *British Columbia Teachers' Federation* v. *Vancouver School District, No. 39* (2003), 224 D.L.R. (4th) 63 (B.C.C.A.) (seemingly approving the first instance judgment in *Waldman*); and *Health Services and Support - Facilities Subsection Bargaining Assn.* v. *British Columbia* (2003), 19 B.C.L.R. (4th) 37 (S.C.). Indeed, the thrust of the British Columbia authorities is that *Wilson* has now been implicitly overruled as a

It was, however, Lamer C.J. himself who in *J.(G.)* accepted a conception of "security of the person" that seemed to have far-reaching implications. This case involved an application by the government to extend an order giving the state custody of children. The mother claimed that these proceedings involved her section 7 rights and that she was entitled to have a guarantee of representation by counsel to the extent of the state having to provide her with a lawyer in some way or other. According to the majority,[54] section 7 was engaged when governmental processes had sufficient potential for a serious and profound effect on a person's psychological integrity. This would be a deprivation of "security of the person". In the particular instance, given the extent of stigmatization involved in branding someone unfit to be a mother and the gross intrusion of such proceedings into the private and intimate spheres of family and personal life, that test had been met. Indeed, for the concurring judges, the intrusion of the state also reduced or removed the mother's capacity to make fundamental choices about the care and bringing up of her children.[55] This deprived her of "liberty".

Read together these two judgments certainly suggested a far greater reach to "life, liberty and security of the person" than encompassed by a conception of their protections as confined pretty much to restraints on physical liberty and security of the person and operating within the "administration of the system of justice". Both involved broader concepts of liberty and security of the person and *Godbout* was not a case involving the administration of the system of justice. *J.(G.)* also raised squarely the issue of the extent to which these broad conceptions of

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consequence of the subsequent Supreme Court of Canada authorities, including not just the judgments discussed in the text but also the very brief and cryptic judgment in *Walker* v. *Prince Edward Island*, [1995] 2 S.C.R. 407. The latter is also cited in *Mussani* (at para. 65) as authority for the proposition that section 7's right to liberty "does not encompass a constitutional right to practice one's profession". However, *cf. Veale* v. *Law Society of Alberta* (2001), 100 Alta. L.R. (3d) 100 (Q.B.) (appeal dismissed as moot (2002), 7 Alta. L.R. (4th) 201 (C.A.)), in which the Court, while accepting that the practise of a profession as such did not engage section 7, it could associated with the existence of vested rights. In that instance, the retrospective increase in the requirements for admission to the Law Society of Alberta for those with United Kingdom law degrees was held to engage and violate section 7 as an unjustified interference with vested rights of sufficient significance.

[54] Lamer C.J. (Gonthier, Cory, McLachlin, Major and Binnie JJ. concurring).

[55] L'Heureux-Dubé J. (Gonthier and McLachlin JJ. concurring).

liberty and security of the person might implicate a wide range of administrative tribunals dealing with issues such as occupational and professional licensing, allegations of discrimination, and indeed various forms of income and housing support agencies. Did they too trade sufficiently in the expanded version of "liberty and security of the person" to be caught?

That question was to receive a partial though somewhat confusing answer in *Blencoe* v. *British Columbia (Human Rights Commission)*[56] involving allegations of excessive delay in the processing of a human rights complaint against a high profile figure, a former MLA and member of Cabinet. At one level, the argument was that the mere subjection of someone to the "indignity" of human rights proceedings on the basis of an allegation of discrimination was sufficient to trigger section 7. (Up to that point, this was an issue on which appeal courts across the country had differed.[57]). Beyond that, it was asserted that, even if section 7 did not apply generally to such proceedings, the threshold could be crossed at least in relation to some exercises of this coercive state power.

The majority of the Supreme Court specifically rejected the first argument and thereby eliminated the possibility of more widespread application of section 7 to the domain of administrative tribunals. Speaking in the context of "security of the person", Bastarache J. (for the majority) stated:

If the purpose of the impugned proceedings is to provide a vehicle or act as an arbiter for redressing private rights, some amount of stress and stigma to proceedings must be accepted. This will also be the case when dealing with the regulation of a business, profession or other activity. A civil suit involving fraud, defamation or the tort of sexual battery will also be "stigmatizing".[58]

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56 *Supra* note 20.

57 Section 7 applies: *Blencoe* v. *Canada (Human Rights Commission)* (1998), 49 B.C.L.R. (3d) 216 (C.A.); *Saskatchewan Human Rights Commission* v. *Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); section does not apply: *Nisbett* v. *Manitoba (Human Rights Commission)* (1993), 101 D.L.R. (4th) 744 (Man. C.A.); *Canadian Airlines International Ltd.* v. *Canada (Canadian Human Rights Commission),* [1996] 1 F.C. 638 (C.A.).

58 *Supra* note 20, at para. 96.

In short, allegations of discrimination contrary to a human rights code did not carry with them the same impact on "security of the person" as a mother's subjection to custody proceedings and, for these purposes, apparently, it did not matter how serious the allegations of discrimination were or that they might (as in *Blencoe* itself) involve conduct which was also criminal (sexual harassment in the form of sexual assault). It is, however, of some significance that Bastarache J. does not include in his list of inferentially excluded tribunals those involved in the assessment of basic income needs.

The Court did, however, clearly accept that, in exceptional circumstances, section 7 could be engaged by the way in which proceedings were conducted albeit that generally the tribunal did not come within the reach of section 7. Thus, the Court was willing to entertain the possibility that excessive delay in the processing of a human rights complaint could give rise to a deprivation of "security of the person" at the suit of the respondent.[59] However, Blencoe had not crossed that threshold. Without going into all the details, it suffices to say that this concession is one that will apply only in the most extraordinary of situations. I say this because, as the minority judgment so graphically details, the delays in this case were long and their impact on Blencoe's career and personal life extremely damaging.[60] Indeed, aside from situations of even longer delay, the only kind of case that comes all that easily to mind is that of wilful or bad faith delay by the tribunal that is calculated to prolong "the agony" for the respondent or "abuse of process delay"[61] as opposed to delay which affects the ability to present one's case.

In his elaboration of these conclusions, Bastarache J. dealt with the scope of both "liberty" and "security of the person". In the case of "liberty", he confirmed the approach of judgments such as that of La Forest J. in *Godbout* and the minority in *J.(G.)* to the effect that "liberty"

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59 *Ibid* at para. 98.

60 *Ibid* at paras. 163-170. For example, he resigned from Cabinet, did not stand for re-election, felt forced to stop coaching his child's hockey team and moved to Ontario because he was unemployable in British Columbia. However, not all of this was attributable to the delay in the conduct of the proceedings but almost certainly exacerbated by it.

61 Accepted in *Blencoe* as a basis for seeking relief in the administrative process as well the criminal court setting.

went beyond physical constraints and applied to "state compulsions or prohibitions [that] affect important and fundamental life choices".[62] However, that did not mean that "liberty" was engaged whenever the state placed restrictions on "any or all decisions that individuals might make in conducting their affairs".[63] The zone of coverage was limited to the fundamentally or inherently personal; those intrusions which implicate basic choices going to the core of what it means to enjoy individual dignity and autonomy. That did not embrace economic liberties nor was liberty engaged simply because someone was required to account for himself or herself under a statutory regime such as a human rights code.

As for security of the person, subjection to human rights commission processes did not in and of itself have the "serious and profound effect"[64] on psychological integrity nor was it a domain involving an "individual interest of fundamental importance".[65] Here too, interference with essential life choices was the principal consideration and the usual stresses and stigma associated with most tribunal proceedings and civil actions did not go that far.

What is also significant about the conclusions reached in *Blencoe* is that seemingly the mere fact that a tribunal has coercive powers of the type referred to by Lamer J. (as he then was) in the *Prostitution Reference* will not be sufficient to bring that tribunal generally within the reach of section 7. Rather, the protections of "fundamental justice" will be triggered only to the extent that the tribunal is exercising a specific coercive power. Thus, powers to order the production of documents and the attendance of witnesses may need to be legislatively structured and used in practice in a way that comports with the principles of fundamental justice. However, that does not mean that such tribunals or their empowering statutes are in other respects subject to the dictates of fundamental justice.

In the *Prostitution Reference*,[66] Lamer J. expressed the opinion that to conceive of liberty and security of the person "in terms of

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62 *Supra* note 22 at para. 49 and elaborated in paras. 50-54.

63 *Ibid* at para. 51 (quoting from La Forest J. in *Godbout*, *supra*, note 51, at para. 61).

64 *Ibid* at para. 81.

65 *Ibid* at para. 82.

66 *Supra* note 46, at para. 59.

attributes such as dignity, self-worth and emotional well-being" would lead to a situation in which section 7's reach would be all-inclusive in the sense of swallowing up all the other rights specifically protected by the *Charter*. Bastarache J. also seemed aware of this "danger" in *Blencoe* in his insistence that dignity, protection from stigma and the preservation of one's reputation were not free-standing constitutional rights but underlying values that assisted in delineating the meaning of specific provisions in the *Charter*[67] and, in the context of *Blencoe* itself, determining whether there had been sufficient harm to psychological integrity to cross the *Morgentaler* and *J.(G.)* thresholds.

This does, however, raise at least two questions. Would a broader conception of the scope of "life, liberty and security of the person" have necessarily led to the realization of either or both of the most commonly expressed fears: that section 7 would become the predominant *Charter* provision and that this would represent a triumph for those fighting rearguard actions against the exclusion of economic and property rights from section 7? Secondly, is it appropriate to have the application of section 7 depend in large measure on what happens to appeal to the Court in any particular context as a fundamental life choice or as government action which has "a serious and profound effect" on psychological integrity? (And, what really sorts the latter out from the excluded category of "the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action"?[68]) Are these readily applied standards to which more concrete reference points can be attached confidently?

I would also like to suggest that the response to the latter question must be influenced at least in part by what in many instances will constitute the objective of the challenge: the securing against both statutory authorities and legislative enactment the procedural protections embodied in the concept of fundamental justice. Given the pervasive influence of common law procedural fairness or natural justice, is it to give a rights-bearing provision too liberal a reading to elevate those procedural entitlements across a broad range of government action and decision-making and make them presumptively immune from legislative abrogation?

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[67] *Supra* note 20, at paras. 74-80.

[68] *J.(G.)*, *supra* note 52, at para. 59 (*per* Lamer C.J.).

One response is, of course, that the impact of this will be rampant over-judicialisation of the administrative process. Here, exhibit number one is always *Singh* v. *Canadian (Minister of Employment and Immigration)*[69] which critics hold entirely responsible for a cumbersome and very expensive convention refugee determination process. Yet, it is as well to recall that even there Wilson J. made it abundantly clear that section 7 does not mean an unvarying standard of procedural obligations for all decision-makers caught within its web. Thus, an oral or in-person hearing is not an invariable requirement of the principles of fundamental justice.[70] This theme is one that remains evident in the subsequent case law (discussed below) in which the Court has developed the content of what fundamental justice requires in any particular situation. Secondly, despite Wilson J.'s reservations expressed there and elsewhere,[71] the state is allowed to advance section 1 justifications of compromises of the principles of fundamental justice. Indeed, the courts (including the Supreme Court) frequently factor in state interests in the initial consideration of whether particular procedures violate the principles of fundamental justice. The state often does not have to wait until section 1. Given this degree of flexibility in the content of the principles of fundamental justice, the concerns about over-judicialisation may well be overrated.

There is also much to be said for a more expansive reading of section 7 and "life, liberty and security of the person" from a positive perspective. Nowadays, administrative tribunals deal with many of the issues that are most critical to Canadians in their day to day lives. Given that, it is questionable whether the entitlement to procedural guarantees should depend upon a ranking of the importance of those issues on the basis of whether they come within the range of the "ordinary stresses and anxieties [experienced by] a person of reasonable sensibility"[72]or transcend that and enter the domain of the truly serious and profound. Rather, it may be more reflective of a community sense of liberty and security of the person to assess the matter from the perspective of the

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69 *Supra* note 2.

70 *Ibid* at 213.

71 *Ibid* at 218, and see also *Reference re Section 94(2) of Motor Vehicle Act (British Columbia)*, *supra* note 32 at 518.

72 *Supra* note 69.

reasonable expectation of procedural fairness held by those whose rights and interests are being adjudicated.

Thus, in the human rights domain, involuntary subjection to the investigative and adjudicative processes of that realm will most assuredly in the case of respondents induce a keen sense of state coercion and a not unnatural expectation that at least there will be a guarantee of procedural decency that legislatures cannot override. Indeed, equally as important are the expectations of complainants. If the state creates a right to vindication and redress in the event of discrimination, the promise of that right is diminished dramatically if the complainant is deprived of an adequate opportunity to put forward her or his case. Certainly, this is not state coercion save in the sense that this is the exclusive, state-designated avenue for having such a claim adjudicated. However, where the state recognizes that freedom from discrimination is a right, it is assuredly concerned about the security of person of victims and to treat section 7's right to fundamental justice as not constitutionally assured is to diminish substantially the promise of that right.

What may, however, have been influencing the Court in its rather parsimonious recognition of the scope of "life, liberty and security of the person" is the fact that it is also held that "fundamental justice" has a substantive content.[73] This may well have generated a reluctance to interpret "life, liberty and security of the person" broadly. To concede these wide coverage may perforce mean the recognition of a broad range of substantive fundamental justice claims or, perhaps more accurately, the imposition on the courts of a great deal of substantive fundamental justice work, work which will embroil the courts in frequent assessment of section 1 justifications. In this way, the "political" role of the courts will increase still further.

Given this, it is not at all surprising that the Court in effect ducked the issue in *Gosselin* - a clear example of a substantive claim. If "security of the person" involves an entitlement to subsistence level welfare, that will generate not only procedural claims in the sense that the grant and removal of such benefits must be attended by a fair procedure but also a

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[73] As, for example, in *Godbout*, *supra* note 51 (the right to choose one's place of residence). See also *U.S.* v. *Burns*, *supra* note 41 (extradition to possible execution) and *Suresh*, *supra* note 42 (deportation to possible torture). Whether it includes a right to privacy was left open by the Court in *Ruby* v. *Canada (Solicitor General)*, [2002] 4 S.C.R. 3, at para. 33.

guarantee that those in need actually receive adequate support unless there are section 1 reasons for derogating from total or universal coverage. That the Court would have difficulty in forcing the state to actually spend money of that magnitude is obvious. Should, however, the difficulty in deciding such cases and potentially having to place limitations on rights to substantive fundamental justice lead the Court to restrict the scope of "life, liberty and security of the person", thereby depriving affected persons of not only a substantive claim but also a generally much more easily accommodated procedural claim? I would suggest that pragmatism of that kind is not appropriate and that a liberal interpretation of the reach of the *Charter* demands that the courts do not shy away from such tough issues by crafting over-reaching exclusions to the coverage of the various rights and freedoms.

Indeed, this has become an even more pressing concern in the wake of the Supreme Court of Canada's judgment in *Ocean Port Hotel Ltd.* v. *British Columbia (General Manager, Liquor Control & Licensing Branch)*.[74] There, the Court rejected the possibility of a challenge to the statutory lack of independence of a liquor licensing tribunal based not on section 7 of the *Charter* but on the Preamble to the *Constitution Act, 1867* and unwritten principles of constitutional law. What had proved an adequate basis on which to provide an assurance of independence for provincially appointed judges[75] did not work in the case of administrative tribunals. If this judgment has, therefore, closed off[76] any possibility of an alternative constitutional route to the principles of fundamental justice or something approximating them, a liberal posture towards the reach of

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[74] [2001] 2 S.C.R. 781.

[75] In *Reference re Remuneration of Judges of Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

[76] There is a question as to whether the Supreme Court was speaking generally in that case or simply in relation to a licensing scheme that existed within a departmental framework: see David J. Mullan, "*Ocean Port Hotel* and Statutory Compromises of Tribunal Independence" (2002), 9 Canadian Labour & Employment Law Journal 191. It is not clear whether the Court resolved this question one way or the other in *Bell Canada* v. *Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884. See Mary C. O'Donoghue, "The Supreme Court Sees it Differently — Diminished Requirements for Independence in *Bell* and *Ell*", a paper delivered on March 2, 2004 at the OBA Conference, The Constitution in Your Administrative Law Practice, at pp. 8-11.

section 7 becomes even more imperative if procedural values are to be protected against inappropriate legislative incursions.

3. The Content of Procedural Fundamental Justice

As foreshadowed already, "the principles of fundamental justice" in their procedural setting do not involve a single set of immutable, highly judicial procedures. Variation is tolerated readily.

Though the legislation has now changed, a good example is provided by the extradition cases of *Kindler* v. *Canada (Minister of Justice)*[77] and *Idziak* v. *Canada (Minister of Justice)*.[78] Among the issues in each was whether the Minister of Justice had infringed the principles of fundamental justice in the context of making an order surrendering someone to another country at the conclusion of an extradition hearing before an extradition judge. While accepting that section 7 applied to both stages of the process, the Court was of the view that the content of the procedural entitlements from the Minister was affected considerably by the fact that a full hearing had already taken place before the extradition judge. Given that and the more "political"[79] role played by the Minister is exercising her or his discretion, the Minister was not obliged to hold another oral or in-person hearing or to provide the subject of the hearing with access to a memorandum of law prepared for her or his benefit by a departmental lawyer at least in situations where it contained no new information.

Dehghani v. *Canada (Minister of Employment and Immigration)*[80] provides an example of the converse. Assuming that persons seeking admission to Canada at a port of entry are entitled to the benefit of section 7, the Court held that fundamental justice does not require access to counsel if they are subject to a secondary examination by an immigration officer. An unfavourable outcome to a secondary examination does not finally determine the matter and there are fuller hearing opportunities available to those who contest that outcome.

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77 *Supra* note 41.

78 [1992] 3 S.C.R. 631.

79 This being the characterization used by Cory J. in *Idziak*: *ibid* at 658.

80 [1991] 1 S.C.R. 1053.

This judicial acceptance of a variable standard in the context of the traditional *audi alteram partem* rules also holds true in the domains of bias and lack of independence. Thus, in the decision of the Quebec Court of Appeal in *Alex Couture Inc.* v. *Canada (Attorney General)*,[81] the Court accepted in a section 11(d) case that the standards of adjudicative independence required of the members of the Competition Tribunal were not as rigorous as those that apply to superior court judges. Five year terms of office were fine as were less rigid guarantees of financial security or independence. In this context, the Court relied upon the earlier Supreme Court of Canada decision in *R.* v. *Valente*[82] where it had accepted that impartiality and independence were not immutable, unwavering standards once again in a section 11(d) setting, this time involving the terms of office of provincial court judges. More recently, the Court again reiterated this in a case involving the guarantees of independence and impartiality in the *Quebec Charter of Human Rights and Freedoms*.[83] This was in *2747-3147 Québec Inc.* v. *Québec (Régie des permis d'alcool*)[84] and it concerned the Quebec liquor licensing regime and the adjudicative arm of that regime in particular. Given that, there is reason to believe that the Court would hold that similar room for flexibility exists in cases involving allegations of bias or lack of independence on the part of decision-makers subject to section 7 of the *Charter*.

Early in 2002, the Supreme Court of Canada underscored the variable nature of the procedural elements of the principles of fundamental justice in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*.[85] One of the issues here were the fundamental justice procedural entitlements of a person about to be deported who was resisting that deportation order on the basis that this would mean a return to torture. In assessing the procedural obligation that section 7 imposed on

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81 (1991), 83 D.L.R. (4th) 577 (Qué. C.A.).

82 [1985] 2 S.C.R. 673.

83 Section 23 (applicable to tribunals obliged to act judicially by virtue of section 56(1)).

84 [1996] 3 S.C.R. 919.

85 *Supra* note 42.

the Minister in such a case, the Court made it abundantly clear that the inquiry is a context-sensitive one:

> In elaborating what is required by way of procedural protection under s.7 of the *Charter*, we wish to emphasize that our proposals should be applied in a manner sensitive to the context of specific factual situations.[86]

The Court then went on[87] to subject the decision-making process in question to examination by reference to the five factors identified as relevant in the leading common law procedural fairness case of *Baker* v. *Canada (Minister of Citizenship and Immigration)*.[88] In this respect, the Court did, however, emphasise that the common law did not determine but only assisted in the delineation of what section 7 demanded.[89] In other words, the fact that a *Charter* right was implicated had to also be taken into account as an added factor on the applicant's side of the ledger.

That there was a ledger is, however, clear from the analysis that the Court then conducted. Included in the *Baker* factors is the importance of the right affected and, in this constitutional setting, the Court did not shy away from accepting that within section 7, there was a hierarchy in terms of the various forms of decision-making coming within the reach of "life, liberty and security of the person":

> The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements fundamental justice under s.7 of the *Charter*.[90]

The Court also accepted[91] for *Charter* purposes what was a novel element in the *Baker* analysis: a degree of deference to or consideration for agency procedural choice where Parliament had delegated

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86 *Ibid* at para. 113.

87 *Ibid* at paras. 115-121.

88 [1999] 2 S.C.R. 817.

89 *Supra* note 42 at para. 114.

90 *Ibid* at para. 118.

91 *Ibid* at para. 120.

considerable discretion as to the form of procedures to the Minister or other official or, indeed, where any decision-maker might by field experience be expected to have developed an expertise as to what were appropriate procedures.[92]

Against this background, the Court's holding on what was actually required again underscored the statement by Wilson J. in *Singh* that an oral or in-person hearing is not always necessary:

> If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue [personally] responsive written reasons.[93]

However, given that the Minister had not even done that, there had been a failure to adhere to the principles of fundamental justice.

I have no trouble with the general concept of varying standards of procedural fundamental justice or for those variations to depend at least in part on the **extent** to which the decision impacts on the right to "life, liberty and security of the person". Indeed, I would advocate that the recognition of that room for flexibility provides a strong reason for being more generous in what counts as included within the terms "life, liberty and security of the person". However, where I begin to have problems is

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[92] It is, however, significant that in *Baker*, L'Heureux-Dubé J. simply referred to this as one of the factors to be taken into account in establishing an appropriate level of procedural entitlements. She at no point suggested that this factor might also a component in a standard of review analysis for procedural questions leading to the possible application of standards of unreasonableness or patent unreasonableness (as opposed to correctness review) for procedural questions or issues. Subsequently, in *C.U.P.E.* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 509, Binnie J. (for the majority) (though without reference to either *Baker* or *Suresh*) at para. 101, stated explicitly that the "pragmatic and functional analysis" associated with the ascertaining of the appropriate standard of review, had no place in the domain of procedural questions: "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions". This would seem to make clear that "deference" in the arena of procedural questions, whether arising at common law or under the *Charter* has to be understood in a rather different and more qualified manner than is the case in relation to substantive questions at common law.

[93] *Ibid* at para. 127.

with the according of deference to ministerial choice of procedures in cases such as this.

According deference to those choices in the sense of deferring to Ministerial or official judgment about what is appropriate contains elements of a partial movement away from the previously accepted position that correctness was the standard of review to be applied to *Charter* questions in general[94] and the content of procedural fundamental justice in particular. Moreover, what is clear is that the deference to be paid is not just to choices made on the basis of what is an appropriate way of exposing to proofs and arguments the matters that have to be evaluated in making the relevant decision. Rather, this notion of deference also extends to Ministerial judgments as to compromises that can be made in recognition of government interests in providing the affected person with less than procedural fairness would normally demand. Thus, in the context of the section 7 analysis, the Court goes on to concede to the government the right to withhold relevant information for "privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents".[95]

This raises the tricky issue of how much balancing of state and individual interests should take place in delineating the contours of the "principles of fundamental justice" and what considerations should be put off until any section 1 justification. Earlier,[96] I advocated that the kind of balancing that should be permissible within section 7 itself and the teasing out of what the "principles of fundamental justice require" is that which assesses what compromises are acceptable in terms of the essential purposes of procedural protections (getting at the truth) having regard to the nature of the inquiry to be conducted and the extent of the impact of the decision on the right affected. A process can often be perfectly adequate in those terms without an in-person hearing or representation of

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94 See *e.g. Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17. However, for an example of the Court asserting the right of the executive to deference in the context of the substance of a decision affecting section 7 rights, see *Canada* v. *Schmidt*, *supra* note 41 at para. 49. See also on substantive issues, *Suresh*, *ibid* at para. 39. I discuss this issue at much greater length below and in "Deference from *Baker* to *Suresh* and Beyond" in David Dyzenhaus (ed.), The Unity of Public Law (Oxford: Hart Publishing, 2004) 21.

95 *Supra* note 42 at para. 122.

96 In "The Impact of the *Charter* on Administrative Procedure", s*upra* note 1 at 53-60.

those affected by counsel. However, the moment the justifications for derogating from a hearing entitlement are based on cost or the danger to government interests of the whole truth coming out, my view was and is that the inquiry should be moved to the territory of section 1 justifications where the government bears the burden of establishing that the derogation is demonstrably justified as acceptable for a free and democratic society.

However, I am forced to concede that that has not by any stretch been the invariable pattern in section 7 cases. Thus, in *Chiarelli* v. *Canada (Minister of Justice)*,[97] the Court, reversing in part a Federal Court of Appeal judgment,[98] took the state's interests into account in reducing the ambit of procedural protections demanded by the principles of fundamental justice in hearings before the Security Intelligence Review Committee. Those, as in *Suresh*, were interests in suppressing material because of the state's

> ...considerable interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources.[99]

Indeed, in adopting this position, Sopinka J. made reference to a more general statement by La Forest J. in *Thomson Newspapers Ltd.* v. *Canada (Director of Investigation and Research)*[100] to the effect that the interests of the state always have to balanced against those of the individual in assessing what fundamental justice requires.

Much more recently, the same approach was adopted in *Ruby* v. *Canada (Solicitor General).*[101] On the assumption that government possession of information about an individual affected a section 7 right to

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97 *Supra* note 40.

98 (1990), 42 Admin. L.R. 189 (F.C.A.).

99 *Supra* note 42, at 744. On the principal substantive issue in *Suresh*, deportation to torture of those who are threat to national security, the Court spoke in terms of balancing taking place either as part of the section 7 analysis or in the context of a section 1 justification: *supra* note 42 at para. 78.

100 [1990] 1 S.C.R. 425, at p. 539 (delivering a judgment which constituted part of the majority).

101 *Supra* note 74 at paras. 39-44, with *Baker*, *Chiarelli*, and *Thomson Newspapers*, *inter alia*, again providing the principal authorities.

privacy as part of "life, liberty and security of the person", the Court considered whether a feature of the procedures whereby that individual could dispute a refusal of access to that information constituted a denial of fundamental justice. In particular, the Court upheld, on the basis of a balancing process that took place within section 7 and without reference to section 1, the provision in the Act allowing the government to make *ex parte* submissions to the judge reviewing the denial of access where that denial was founded on national security considerations or on the basis that it had been obtained in confidence from a foreign government or international organization. In so doing, the Court accepted that the principles of fundamental justice could, at least on occasion, tolerate derogation from the true core of procedural fairness: the opportunity to know the opposing case in order to provide evidence and make arguments against it.[102] At the very least, it is both ironic and paradoxical that the core of procedural fairness can be compromised in the name of fundamental justice!

In a 2002 study of all section 7 cases decided by the Supreme Court to that point,[103] Elissa Goodman found that this was now the dominant approach irrespective of whether the context was Administrative Law or Criminal Law and irrespective of whether the claim was a procedural or a substantive one. The Court regularly takes state interests into account as a part of an internal section 7 balancing process and does not reserve such considerations to section 1. She also advocates a reversal in that trend on the basis that the current approach is too rights-limiting and too easy on the government. I concur. The very existence and terms of section 1 make such a change in approach structurally compelling.

4. Section 1 Justifications of Procedural Violations of Section 7

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[102] *Ibid* at para. 40. (It should be noted that the applicant confined his attack to the *ex parte* submissions provision only and did not contest the provisions authorizing the non-revelation of certain information.)

[103] Elissa Goodman, "Section 7 of the *Charter* and Social Interest Justifications", a paper prepared for credit in the course in Advanced Constitutional Law at the Faculty of Law Queen's University in the Winter Term of 2002 and the winner of the Department of Justice/Canadian Bar Association 2002 Essay Contest marking the 20th Anniversary of the *Charter*.

On at least one occasion,[104] Wilson J suggested that there might never be room for a section 1 justification of a section 7 violation. How could a violation of the principles of fundamental justice ever be justified in a free and democratic society? Notwithstanding that, even Wilson J. came to accept that section 1 defences could be raised though,[105] in *Singh*, she was certainly of the view that expense and inconvenience (a "utilitarian consideration") did not count.[106] What did count, according to the Court in the *British Columbia Motor Vehicle Act Reference*, were "exceptional conditions, such as natural disasters, the outbreak of war, epidemic and the like".[107]

Whether the current Court believes that the circumstances should be so circumscribed is not all that clear. However, in *Suresh*, the Court did refer to Lamer J.'s judgment in the *Motor Vehicle Reference* and stated that Suresh's alleged fund raising efforts on behalf of a terrorist organization did not "rise to the level of [those] exceptional circumstances".[108] That aside, the Court asserted more generally that valid objectives were not enough to justify a limitation on Suresh's procedural rights and that the government had failed to show that the relevant limitations were connected to the objective and proportional.[109]

How and in what circumstances the government might, beyond the extreme circumstances detailed by Lamer J., successfully advance a section 1 defence to a section 7 violation remains largely unexplored territory in the Supreme Court of Canada. In fifty-three section 7 cases identified by Elissa Goodman and decided by the Court up to the beginning of April 2002, there is not one in which a majority of the Supreme Court of Canada found justification of a violation.[110] In a sense, one might argue that the actual results (if not the theory) have vindicated

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104 In the *British Columbia Motor Vehicle Reference*, *supra* note 32.

105 See *e.g.* dissenting judgment in the *Prostitution Reference*, *supra* note 46.

106 *Supra* note 2 at pp. 218-19 and, subsequently, in *R.* v. *Morgentaler*, *supra* note 50.

107 *Supra* note 32 at p. 518 (*per* Lamer J. (as he then was)).

108 *Supra* note 42 at para. 128.

109 *Ibid.*

110 *Supra* note 97 at p. 102 of typed text.

Wilson J.'s initial instincts. However, that statistic may be just as easily explained by the fact that the Court has chosen regularly to engage in balancing within the framework of section 7 itself. Change that pattern and postpone balancing to section 1 and the picture will surely change. Goodman concedes as much and I again agree with her. Countervailing state interests should on occasion count given the commitment of section 1 but it is far better that they count there than earlier in the definition of the scope of the right and the extent of the protection within section 7.

D. The *Charter* and the Problem of Unstructured Statutory Discretions

One of the more troubling issues arising in *Charter* litigation involving administrative processes involves statutory discretions that will or have the potential to affect *Charter* rights and freedoms. Basically, the claim generally advanced by those challenging the validity of such provisions is that, where there is a serious risk that the discretion could be exercised in such a way as to violate *Charter* rights and freedoms, the legislative branch has a special obligation to structure and confine discretion so as to ensure the protection of those *Charter* rights and freedoms or at the very least to minimize or reduce significantly the risk of their violation. In section 7 terms, a failure to be sufficiently specific would be a denial of the principles of fundamental justice when the right to life, liberty and security of the person was at stake. However, the argument or the principle extends beyond that to embrace the possibility of invalidity in situations where other rights and freedoms were at stake. Thus, unstructured discretion could render a statutory provision unconstitutional by reference to section 3 if it allowed for the possibility of removing the right to vote.

From time to time, this argument has been attractive to the courts. In the early years of the *Charter* (and, indeed, even today), the prime examples of this kind of approach were *R. v. Morgentaler*[111] and *Wilson* v. *Medical Services Commission of British Columbia*,[112] already discussed in other contexts in this paper. In each, as well as finding the legislative schemes procedurally deficient, the courts condemned the lack of

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[111] *Supra* note 50.

[112] *Supra* note 53.

legislated standards for determining whether a woman should be permitted to have an abortion and whether a doctor would be provided with a practitioner number with or without the requirement that he or she practise at a particular location.

However, this kind of argument did not always prevail as evidenced by the judgment of the Supreme Court in *R.* v. *Jones*,[113] a freedom of religion challenge, in which the Court refused to strike down a legislative provision conferring discretion on whether to give permission to parents to school their children at home. La Forest J. (for the majority), in a judgment that emphasised the importance of administrative discretion in any modern statutory scheme, held that the term "efficient" (as the principal criterion for the exercise of the discretion) provided the relevant ministerial official with sufficient guidance. Any challenge based on a denial of freedom of religion would therefore have to be based not on the invalidity of the discretion-creating provision but on an individual exercise of that power.

It is, however, possible to reconcile the approach in *Morgentaler* and *Wilson* with that in *Jones* and some other subsequent authority. In the former, the very subject matter of the discretion was the *Charter*-protected right. In contrast, the discretions in some of the other relevant cases were of a different species. While, on occasion, *Charter* rights and freedoms might be at stake in their exercise, this was by no means a component of every exercise of the relevant provision. Thus, in *Jones*, the decision whether or not to allow parents to home school their children did not always implicate, as it happened to there, a claim based on freedom of religion. In like vein, as in the case of *Slaight Communications Inc.* v. *Davidson*,[114] the remedial capacities of adjudicators under the *Canada Labour Code*[115] did not always involve potential infringements of the respondent's section 2(b) freedom of expression as in the case of an order to provide a particular form of reference to a dismissed employee and to answer no other questions about him. In both of these instances, the individual decision or order was a legitimate target but not the empowering legislation.

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[113] [1996] 2 S.C.R. 284.

[114] *Supra* note 23.

[115] R.S.C. 1970, c.L-1, s.61.5(9)(c).

More generally, the contention is that where the legislation trades explicitly in *Charter* rights and freedoms, there should more readily be a constitutional expectation of legislative specificity and confining of discretion. On the other hand, this is not a problem merely because a legislatively conferred discretion might in **some** of its exercises have an impact on *Charter* rights and freedoms.

Indeed, some justification for this argument came with the judgment of La Forest J. in *Eldridge* v. *British Columbia (Attorney General)*.[116] There, the remedy the Court crafted was not a declaration that the relevant discretions possessed by the Hospital and the Medical Services Commission were invalid as a violation of section 15 of the *Charter*. Rather, the Court declared the particular exercises of those discretions to deny sign language translation facilities to the hearing impaired were invalid. In so ruling, La Forest J. stated:

> Some grants of discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize that result.... In such cases, it will generally be the statute, not its application, that attracts *Charter* scrutiny.... In the present case, however, the discretion accorded to the Medical Services Commission to determine whether the service qualifies as a benefit does not necessarily or typically threaten the equality rights set out in section 15(1) of the *Charter*.[117]

If this had remained the Court's last word on the matter, all would probably have been well. However, the Court was to return to this issue in controversial and divided fashion in *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*.[118] At issue here were the systematic practices of customs officials in dealing with gay and lesbian literature being imported into Canada. By the inappropriate use of the powers given

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[116] *Supra* note 15.

[117] *Ibid* at para.30, citing the early influential article by June M. Ross, "Applying the *Charter* to Discretionary Authority" (1991), 29 Alta. L. Rev. 382.

[118] [2000] 2 S.C.R. 1120.

to them by the *Customs Act*[119] to prohibit the importation of material into Canada by deeming it obscene in terms of the *Criminal Code* definition, those officials had consistently violated the section 2(b) rights of the importing bookstore. On this, the majority[120] and minority[121] agreed. Where they did not agree was on whether this was a reason for striking down the legislative regime as insufficiently protective in a process sense of the rights of importers. In the words of Iacobucci J. for the minority, were there "sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights"?[122]

The majority were firmly of the view that this was not necessary.[123] In so holding, Binnie J., for the majority, expressed the opinion that Parliament in a case such as this was entitled to leave the necessary machinery and guidelines to be put in place by regulation and administrative directive and the fact that that had not been done satisfactorily was not sufficient reason to now mandate Parliament to do this work itself.[124] For these purposes, it appeared not to matter to the majority that the relevant discretion in this case was one that in all of its exercises potentially affected a *Charter* freedom. As long as the legislation could be construed as capable of being applied in a manner consistent with the *Charter*, it was immune from attack.[125] The primary precedent for this conclusion was the Court's decision in *R.* v. *Beare*,[126] where it rejected an attack on the unstructured discretion conferred on the police by the *Criminal Code* to fingerprint suspects. Indeed, this judgment

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119 R.S.C. 1985, c.1 (2nd Supp.), s. 58, a power exercised in this instance by reference to the *Customs Tariff*, R.S.C. 1985, c.41 (3rd Supp.) (as amended by S.C. 1987, c.49), s.114 and Sched. VII, Item 9956.

120 Binnie J. (McLachlin C.J., L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. concurring).

121 Iacobucci J. (Arbour and LeBel JJ. concurring).

122 *Supra* note 119 at para. 204.

123 *Ibid* at paras. 133-139.

124 *Ibid* at para. 135.

125 *Ibid* at para. 133.

126 [1988] 2 S.C.R. 389.

is difficult, if not impossible to jibe with the theory developed above or, for that matter, La Forest J.'s judgment in *Eldridge* though, paradoxically, La Forest J. delivered the judgment of the Court in *Beare*.

The minority disagreed sharply with this approach and conclusion:

> In the face of an extensive record of unconstitutional application, it is not enough merely to provide a structure that could be applied in a constitutional manner. This is particularly the case where fundamental *Charter* rights, such as the right to free expression, are at stake. The legislation itself must provide an adequate process to ensure that *Charter* rights are respected when the legislation is applied at the administrative level.[127]

This, according to the minority, was an approach that was more in accordance with the Court's *Charter* jurisprudence in this domain, though interestingly Iacobucci J. did not deal with the challenge of *Beare*.[128]

While this is not quite the same kind of case as *Morgentaler* or *Wilson* in the sense that there was here a legislated standard that is used and treated as constitutionally adequate in its *Criminal Code* setting, nonetheless, the fundamental issue is basically the same.[129] Given that customs officers are not judges and not subject to the same procedural constraints as judges, is it to be expected that a standard that works relatively well in the structured environment of the *Criminal Code* will necessarily work at all satisfactorily in a customs regime? No, says the minority, and the proof of that lies in the pudding. Particularly in light of

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[127] *Supra* note 119 at para. 204.

[128] For a very recent application of the Iacobucci J. line of analysis to the Ontario Film Review Board and the statutory requirement of prior approval for all films and videos to be shown in theatres or at home, see the judgment of Juriansz J. (as he then was) in *R.* v. *Glad Day Bookshops Inc.*, [2004] O.J. No. 1766 (S.C.J.) (Q.L.). As part of his section 1 critical minimal impairment analysis, Juriansz J. emphasised the extent to which the wording of the relevant provision allowed for over-broad censorship. In the face of that and his assessment of legislative intention, he refused to be swayed by arguments based on the current practices of the Board and declared the provision invalid, albeit postponing the operation of the declaration of invalidity for twelve months.

[129] *Suresh*, *supra* note 42, provides the most recent example of a section 7 void for vagueness challenge. There, the Court held that the terms "danger to the security of Canada" and "terrorism" were not unconstitutionally vague.

the history of unconstitutional enforcement, the legislature must rectify the structural defects and ensure that front line customs officers and others within the system are provided with more direction as to what the *Criminal Code* standards require.

To me, this seems much more like an approach that is consistent with the protection of *Charter* rights and freedoms. Giving the bookstore a declaration that it had been treated inconsistently with the *Charter* and throwing it back on the mercy of the same skeletal framework that has functioned so poorly in the past with no guarantee of future improvement is scant consolation for success in a case that was so long in the fighting.

Even leaving aside the issue of whether this was the correct outcome on the particular facts, the other disturbing aspect of the majority's overall approach is that it underscores the inability of the Supreme Court to act consistently in this domain and to espouse a principled approach. For the present, it remains a case of trying to successfully predict which of two inconsistent lines of authority will prevail in the next case.

E. Exercises of Statutory Discretions Affecting *Charter* Rights and Freedoms

Where challenges to the validity of legislative provisions creating statutory discretions fail or where they are not feasible in light of the relevant jurisprudence, the fall back position will often be an attack on the actual exercise of the relevant discretion. In some instances, the inquiry will be a relatively straightforward one. All the reviewing court will be called upon to resolve is whether the exercise of power did indeed amount to a violation of the applicant's *Charter* rights or freedoms and, if advanced by the government, whether there is a section 1 justification for that violation.

Here, the leading authorities remain the judgments of the Supreme Court of Canada in *Slaight Communications Inc.* v. *Davidson*[130] and *Ross* v. *New Brunswick School District No. 15*.[131] Both involved challenges based on alleged violations of section 2(b) ("freedom of thought, belief, opinion and expression").

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[130] [1989] 1 S.C.R. 1038.

[131] [1996] 1 S.C.R. 825.

In *Slaight*, an adjudicator under the *Canada Labour Code*, in fashioning a remedy for an unfair dismissal, required the former employer to provide a particular form of reference and to refrain from any other form of communication with prospective employees of the unfairly dismissed worker. The majority of the Court held that both these orders violated the employer's section 2(b) rights and then proceeded to determine that both could be justified by reference to section 1.

For present purposes, there are two particularly salient points about this judgment. First, the fact that section 1 was applied to justify an exercise of discretion speaks to the content of the term "such reasonable limits **prescribed by law**" in section 1. It does not mean that, where a statutory discretion is exercised in such a way as to violate a *Charter* right or freedom, section 1's application depends on whether the empowering provision explicitly authorizes the limiting of rights. The open-ended or unqualified nature of the discretion itself will suffice to meet the threshold of "prescribed by law". Secondly, Dickson C.J., for the majority and disagreeing with Lamer J., expressed the view that, where the exercise of a discretion in violation of *Charter* rights and freedoms passed muster under section 1, that should, save in the rarest of cases, be the end of the matter; there would be no room thereafter for an argument that the decision under attack was nonetheless patently unreasonable. Thereafter, in *Ross*, La Forest J., delivering the judgment of the Court, reiterated this proposition as a general rule. If the government can justify the exercise of discretion by reference to section 1, it should not have to then meet any further challenge based on administrative law conceptions of unreasonableness.

However, these two judgments do not resolve all issues of principle and methodology that arise in the context of challenges to particular exercises of discretion on the basis of the *Charter*. The whole concept of discretion involves choice and, where *Charter* rights and freedoms are engaged, that exercise of choice will frequently involve determining what kind of weight and respect (if any) to give to the *Charter* rights and freedoms that are implicated in the exercise of power. When it thereafter comes to reviewing the outcome of that exercise of discretionary power, the reviewing Court will be faced frequently with one or possibly both of the following dilemmas, already familiar from the procedural aspects of "fundamental justice" for section 7 purposes: 1. To what extent is the right or freedom itself legitimately delimited by those elements in the weighing process that would restrict the right or freedom's area of operation, and to what extent does consideration of those

countervailing factors have to be postponed to section 1 analysis? 2. To what extent either as part of discerning whether there has been a reviewable violation of the right or freedom or in conducting a section 1 analysis is there room for deference to the discretionary authority's exercise of power? Neither of these considerations entered the picture in either *Slaight Communications* or *Ross*. First, in terms of the rights and freedoms in the *Charter*, the section 2(b) freedoms are among the most unqualified or absolute; the freedom is characterized very broadly with all balancing or countervailing considerations left to section 1. Secondly, notions of deference were simply not part of the arguments in either case whether in terms of defining the scope of the freedom or balancing it against other factors under section 1.

Since then, however, these questions have begun to assume greater visibility.[132] A good illustration is provided by the very recent judgment of the Supreme Court in *Pinet* v. *St. Thomas Psychiatric Hospital*.[133] The challenge involved primarily the interpretation of a provision in the *Criminal Code* with respect to persons found not guilty of an offence by reason of insanity. Under that provision, the Review Board was required to make a disposition that, in light of all the relevant considerations, was the "least onerous and least restrictive to the accused".[134] In this and a companion case,[135] the critical question was whether this provision applied to any judgment about the level of facility to which a detained accused should be assigned, or was restricted to the prior choice among three alternatives: an absolute discharge, a conditional discharge, or detention in a hospital subject to conditions.

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[132] There is also a growing literature on this topic. See Geneviève Cartier, "The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion" in David Dyzenhaus (ed.), The Unity of Public Law (Oxford: Hart Publishing, 2004) at p. 61; Lorne M. Sossin, "Reconciling Constitutional Law with Administrative Reality: The *Charter* and the Dilemmas of Discretion", a paper delivered on March 2, 2004 at the OBA Conference, The Constitution in Your Administrative Law Practice; and David A. Wright, "Evaluating Policy-Based Decisions for *Charter* Compliance", *ibid.*

[133] 2004 SCC 21.

[134] *Criminal Code*, R.S.C. 1985, c. C-46, s. 672.54.

[135] *Penetanguishene Mental Health Centre* v. *Ontario (Attorney General)*, 2004 SCC 20.

In *Pinet*, the Review Board had adopted the latter interpretation. Adopting a correctness standard, the Supreme Court held that this was an error of law and that the legislative requirement of doing that which was "least onerous and least restrictive to the accused" applied to decisions as to the type of hospital setting to which to assign and in which to retain the accused.[136] Indeed, as a consequence of this finding, the Court also ruled that the regime was not subject to a section 7 challenge. The qualification on the discretionary powers of the Board created a standard that complied with the principles of fundamental justice.[137]

However, the Court then went on to consider its role in relation to any determination by the Review Board on whether to approve assignment to a more secure form of facility. In cases where the Review Board got the law correct, the standard of review to be applied to the Board's exercise of its disposition power was that of reasonableness. Even though this was an issue involving the accused's liberty interest under section 7, Review Boards had expertise and "their views of how best to manage the risks posed by a particular NCR accused should not be interfered with so long as the conditions of detention lie within a range of reasonable judgment".[138] Later, Binnie J. (for the Court) also expressed this need for deference in the following form:

> The job of the appellate court is not to reweigh the evidence, nor to substitute our views for those of the review Board. We accept the findings of the Review Board with regard to the appellant and other relevant circumstances.[139]

What this indicates very clearly is that, even in the initial process of discerning whether the government has violated someone's rights and freedoms (as opposed to whether there is a section 1 justification for any such violation), the reviewing Court is required to be deferential to expert administrative assessments of the relevant facts and indeed to the weighing of countervailing factors (such as public safety, as in *Pinet*) against the *Charter* right or freedom in question. As opposed to questions

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136 *Supra* note 134 at para. 1, applying *Penetanguishene Mental Health Centre, ibid*..

137 *Ibid* at para. 57.

138 *Ibid* at para. 22.

139 *Ibid* at para. 27.

of law, on other critical elements in the decision-making process, the standard of review is far from one of correctness.

Nonetheless, it may not be as straightforward as this. Binnie J., prior to identifying the standard of review and emphasising the need for deference in the fact determination and weighing processes, had also made the following statement:

> However, within the outer boundaries defined by public safety, the liberty interest of an NCR accused should be a **major preoccupation** of the Review Board when, taking into consideration public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society, it makes its disposition order [emphasis added].[140]

In this particular instance, the holding of the Court was that "none of these considerations was weighed in the balance against the appellant's liberty interest".[141] That made judicial intervention easy. In the words of New Zealand case law, there had been a complete failure to have regard to a mandatory relevant consideration.[142] However, the previous extract from Binnie J.'s judgment does suggest an even more intrusive standard of review. Despite the Court's subsequent abnegation of any judicial reweighing of the relevant factors, Binnie J. does seem to be asserting not only that the *Charter* right of the affected individual has to be taken into account but also that the administrative decision-maker must attribute to it a considerable amount of weight in the sense of it being a major preoccupation. Read literally, that does involve at least the Court scrutinizing how much value the decision-maker placed on *Charter* rights and freedoms as opposed to countervailing values. While complicating the inquiry, it is, in my view, nonetheless, the least that should be done when *Charter* rights and freedoms are at stake.

Indeed, where the *Charter* rights and freedoms at stake are more serious, I would advocate that the courts' scrutiny of the exercise of discretionary decision-making powers go further than this and even

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140 *Ibid* at para. 19.

141 *Ibid* at para. 56.

142 See the judgment of Cooke P. (as he then was) in *Ashby* v. *Minister of Immigration*, [1981] 1 N.Z.L.R. 222.

require correctness review or at the very least careful scrutiny of the factual determinations of the decision-maker. On occasion, that should also involve postponing the evaluation of any countervailing justifications to the section 1 stage where the government has the primary burden albeit that, at times in section 1 analyses, deference does intrude.

Thus, I have argued in another paper[143] that the Supreme Court was apparently too dismissive of the applicant's *Charter* rights in *Suresh* v. *Canada (Minister of Citizenship and Immigration)*[144] when it adopted a similar methodology of deferential review in relation to a deportation order which might have the effect of returning the deportee to torture or even death in his home land. In such situations of possibly extreme violations of *Charter* rights and freedoms, the reviewing court should, in my view, be quite aggressive in putting the government to the test. This is particularly so in cases where, as in *Suresh*, other forms of accountability are lacking, the process is not totally open or transparent, and there are very strong countervailing factors which will have a tendency to make those wielding broad executive power less heedful of *Charter* rights and freedoms.

The case law is replete with statements to the effect that on *Charter* questions, the standard of review is that of correctness. However, as David Stratas has demonstrated,[145] that is clearly the case only in situations of pure questions of law. In the domain of mixed questions of fact and law or law/fact application, there are a number of examples of courts exhibiting some degree of deference to administrative decision-makers. As the recent jurisprudence of the Supreme Court amply demonstrates, that is especially so in the case of the exercises of discretionary power where the decision-maker is required to not only ascertain facts but also weigh various considerations (including *Charter* rights and freedoms) in determining how to act. What still remains to be worked out, however, is the precise extent of deference in such instances

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143 "Deference from *Baker* to *Suresh* and Beyond: Interpreting the Conflicting Signals" in David Dyzenhaus (ed.), The Unity of Public Law, *supra* note 95, at pp. 41-47.

144 *Supra* note 42.

145 See David Stratas, "Constitutional Remedies in Administrative Proceedings: Supervision, Striking Sections, Policing Discretions, Standards of Review and Prospects for the Future" at pp. 6-10, a paper delivered on March 2, 2004, at the OBA Conference The Constitution in Your Administrative Law Practice.

and whether it is the same irrespective of the character of the decision-maker and the nature of the threat to *Charter* rights and freedoms that is at stake. As with the procedural dimensions of section 7, there are also serious questions of when in the review of the exercise of discretionary powers affecting *Charter* rights and freedoms, courts should evaluate the government's countervailing claims as part of a section 1 analysis as opposed to the context of determining whether there has even been a violation of the relevant right or freedom.

Despite the fact that the *Charter* is well into its third decade, the courts have barely scratched the surface in the domain of review of discretionary decision-making powers affecting *Charter* rights and freedoms. Not only is there much work still to be done but a lot of the hope or promise of the *Charter* may well rest in the courts providing a methodology or set of principles that values appropriately the importance of *Charter* rights and freedoms in such exercises of governmental authority.

F. The Jurisdiction of Statutory and Prerogative Authorities to Deal with *Charter* Issues

Until very recently, the capacity of administrative tribunals and other forms of statutory and prerogative decision-makers to deal with *Charter* issues was in a state of considerable confusion particularly in situations where the challenge in issue was to the validity of the decision-maker's constitutive legislation.

In the leading case of *Cooper* v. *Canada (Human Rights Commission)*,[146] the Supreme Court had held that administrative agencies and tribunals (and perforce other forms of statutory official) had no automatic entitlement to respond to *Charter* challenges to the validity of legislation that arose in the course of matters coming before them. Thus, in that context, the Canadian Human Rights Commission had no jurisdiction or authority to consider whether its empowering Act, the *Canadian Human Rights Act*[147] was under-inclusive by reference to section 15 of the *Charter* in its protection of discrimination on the basis of age.

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146 [1996] 3 S.C.R. 854.

147 R.S.C. 1985, c.H-6, s.15(c).

Only if the statutory authority's empowering legislation explicitly or by necessary implication conferred that power could a statutory authority deal with such questions. In order to determine whether such authority existed by way of necessary implication, it was incumbent on the reviewing court to conduct a pragmatic and functional analysis of the agency and its jurisdiction. In this respect, the Canadian Human Rights Commission, in the absence of explicit authorization, fell short. The Act gave it no explicit authority to consider general questions of law. It was primarily a body that was involved in the reception, processing and screening of complaints. It was not an adjudicative body. This also meant that it was not set up in such a way as to be able to deal effectively with such issues and that its members would likely not possess the requisite expertise. Indeed, to impose this jurisdiction on the Commission might well impede its ability to otherwise discharge its mandate. It would become too preoccupied with complex *Charter* issues at the expense of dealing efficiently with its ordinary caseload. The *Charter* issue could therefore not be dealt with by the agency itself. Rather, those affected were forced to commence an action for a declaration in the regular courts to test the issue of constitutional validity.[148] As McLachlin J. (as she then was) stated pointedly in dissent,[149] the consequences of this holding were not only that many statutory decision-makers were excused from taking account of the *Charter* in their day to day work but also that those affected were forced out of the fora that they might be able to afford in making such a challenge into one which they could not: an action in a superior court.

Of course, to the extent that the challenge in this case was to the under-inclusiveness of legislation, there may be much to be said for the majority's position that the Commission is ill-suited to the making of such determinations and that explicit authority is particularly needed when the constitutional challenge requires the agency to pick up the legislator's pen and add words to the statute or excise unconstitutional exclusions. It is far different when an importer asks a customs official to take account of the *Charter*'s protection of freedom of expression when exercising a

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[148] Whether a declining of the complaint could also have produced an entitlement to seek judicial review on the basis that the statutory regime was flawed is an interesting question. In this respect, compare *Tétrault-Gadoury* v. *Canada (Employment & Immigration Commission)*, [1991] 2 S.C.R. 22 with *R.* v. *Hoeppner* (1999), 134 Man. R. (2d) 163 (C.A.).

[149] *Supra* note 147 at para. 70 (L'Heureux-Dubé J. concurring).

discretion as to whether to exclude and confiscate goods being imported into Canada. Indeed, Binnie J. concedes as much when he asserts in *Little Sisters* that it is part of the duty of administrative officials to exercise their statutory discretions in accordance with the *Charter*.[150] Implicit in this is the capacity to listen and respond to representations that the *Charter* requires that they allow in a particular piece of literature. Similarly, administrative tribunals are generally able to respond to arguments that section 7 of the *Charter* requires them to make discretionary procedural choices that respect the affected person's right to the principles of fundamental justice. And, in fact, La Forest J. acknowledges as much, if not more in *Cooper* when he seems to concede to administrative tribunals the capacity in proceedings otherwise properly before them to consider *Charter* challenges to their remedial regime or *Constitution Act* division of powers attacks on their jurisdiction.[151]

Now, however, much has seemingly altered with the 2003 judgment of the Supreme Court of Canada in *Nova Scotia (Workers' Compensation Board)* v. *Martin*.[152] While *Cooper* might survive on its facts,[153] there has been a clear change in both philosophy and methodology on the part of the Court to the issue of whether statutory authorities have jurisdiction to deal with *Charter* issues in general and challenges to the under-inclusiveness of their constitutive legislation in particular.[154]

In this instance, the concern was with whether the Nova Scotia Workers' Compensation Appeals Tribunal (and also the Workers' Compensation Board) had authority to determine whether the exclusion of

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150 *Supra* note 119 at para. 133.

151 *Supra* note 147 at para. 64.

152 [2003] 2 S.C.R. 504.

153 I say this because it is not totally clear that a body such as the Canadian Human Rights Commission which performs, *inter alia*, investigative, mediative, and gate-keeping functions would, under the *Martin* factors, qualify as having implied jurisdiction to deal with questions of law and, even if so, would survive questioning of any presumptive jurisdiction that arose by reason of that.

154 For other analysis, see Mahmud Jamal, "Administrative Tribunals and the Constitution: The Supreme Court's Decision in *Nova Scotia (Workers' Compensation Board)* v. *Martin*", a paper delivered on March 2, 2004 at the OBA Conference, The Constitution in Your Administrative Law Practice.

a particular category of disability (chronic pain syndrome) from full or regular coverage under the province's workers' compensation scheme violated section 15 of the *Charter*. Reversing the judgment of the Nova Scotia Court of Appeal,[155] which had relied heavily on *Cooper*, the unanimous Court determined that both tribunals had authority to deal with the *Charter* challenge in question.

In what was basically an adoption of the approach adopted by the minority in *Cooper*, Gonthier J., for the Court, set the scene for the evaluation of the issue by emphasising a number of considerations.[156] First, he pointed to the fundamental nature of the Constitution including the *Charter* and the importance of adhering to its dictates. While this did not necessarily mean that "every government official has to consider and decide for herself the constitutional validity of every provision she is called upon to apply",[157] where such officials had the power to consider questions of law, they would normally be expected to deal with such issues. Secondly, it was important that Canadians should generally have the ability to raise issues of constitutional validity "in the most accessible forum available".[158] In most cases, this would be before an administrative tribunal rather than the courts. Thirdly, the courts' own subsequent understanding of and ability to deal with constitutional questions would often profit from the compilation of a full factual record by an administrative tribunal and the deployment of that tribunal's area of expertise in a tentative ruling on the constitutional issue in question. Fourthly, in what to a certain extent is a contradiction of the second and third considerations, he cautioned against the insinuation of practical obstacles to tribunal adjudication of *Charter* and other constitutional issues as a counterweight in the discerning of legislative intention whenever a tribunal had jurisdiction to deal with questions of law.[159]

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[155] (2000), 192 D.L.R. (4th) 611 (N.S.C.A.).

[156] *Supra* note 147 at paras. 27-32.

[157] *Ibid* at para. 28.

[158] *Ibid* at para. 29.

[159] In *Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, delivered the same day as *Martin*, the Supreme Court also deployed this same philosophy in determining that the Forest Appeals Commission had jurisdiction in dealing with a charge of cutting timber without a licence to deal with a defence based on aboriginal rights.

All of these factors were ones that very much pointed in the direction of frequent tribunal jurisdiction to deal with all manner of *Charter* and other constitutional issues and this was reenforced further by the more detailed methodology that the Court specified for the discerning of whether that jurisdiction existed.[160] Where a tribunal or other form of statutory authority was given explicit authority to consider questions of law, that creates a strong presumption that it has the authority to deal with *Charter* and other constitutional questions. That aside, a court could imply authority to deal with such questions by "looking at the statute as a whole"[161] presumably against the background of the general philosophy identified earlier in the judgment. Among the relevant factors were considerations such as the overall nature of the statutory mandate and whether the capacity to deal with *Charter* and other constitutional issues was necessary for the effective exercise of that mandate with practical considerations relevant but losing any weight if implied authority was otherwise clear and where to not have authority to decide such questions "would impair its capacity to fulfill its implied mandate". Similarly, whether the decision-maker acted in an adjudicative capacity was relevant but by no means decisive.[162]

Once a decision-maker either explicitly or by implication has presumptive authority to deal with *Charter* and other constitutional issues, the onus switches to those contesting that jurisdiction to rebut the presumption, something that is feasible only in the case of an explicit withdrawal of authority or where there is a "clear implication to the same effect, arising from the statute itself rather than from external considerations".[163] For these purposes, the Court also emphasised, disagreeing explicitly with *Cooper*, that the courts should no longer attempt to base their analysis on a distinction between "general" and "limited" questions of law.[164] A power to decide any question of law pertaining to the relevant provision or provisions should presumptively

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160 *Supra* note 153 at paras. 33-48 (and summarized in para. 48).

161 *Ibid* at para. 41.

162 *Ibid.*

163 *Ibid* at para. 42.

164 *Ibid* at para. 45.

bring with it the authority to deal with constitutional including *Charter* questions.

When applied to the circumstances of *Martin*, this analysis led the Court very clearly to the conclusion that both tribunals had jurisdiction to entertain the section 15 challenge to the exclusion from full coverage. More generally, the outcome in this case and the process by which it was reached obviously bespeaks an intention on the part of the Supreme Court that more decision-makers be seen as having the authority to deal with *Charter* and constitutional questions generally. However, while the threshold has been lowered, and almost certainly lowered considerably, there is still nonetheless a line-drawing exercise in which courts will have to engage. While the capacity to decide such issues is no longer the exclusive prerogative of adjudicative tribunals, in what situations will executive or administrative officials who do not act "adjudicatively" have the capacity to deal with such issues? How precisely is the work of implying whether there is a presumptive capacity to deal with constitutional issues to be carried out and, thereafter, what will tend to be the badges of a rebuttal of that presumption? In concrete terms, the Court does not provide too many clues other than suggesting that *Cooper* might still be correct on its facts[165] and also identifying the following:

> For instance, an express conferral of jurisdiction to another administrative body to consider *Charter* issues or certain complex questions of law deemed too difficult or time-consuming for the initial decision-maker, along with a procedure allowing such issues to be efficiently directed to such body, could give rise to a clear implication that the initial decision maker was not intended to decide constitutional questions.[166]

The latter seems obvious but how much short of that will suffice or are the indicators meant to be that extreme? I also wonder about the methodology of first ascertaining whether the authority is impliedly present in the empowering legislation and then asking whether by

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[165] *Ibid* at para. 47.

[166] *Ibid* at para. 42.

implication from other aspects of the legislation the presumption of implied authority has been rebutted. That seems a little too artificial. Rather, it would seem much simpler to ask whether by reference to the Act as a whole and all relevant considerations implied authority exists with any close cases resolved in favour of jurisdiction.

Three subsidiary points also deserve emphasis. First, the Court reiterates a point made initially in one of the foundational cases in this domain, *Cuddy Chicks Ltd.* v. *Ontario (Labour Relations Board)*[167]: Where the authority exists, it must be exercised as a matter of duty.[168] The decision-maker, save I suppose where there is a case stated jurisdiction or some other contrary provision, has no discretion to decline to deal with the question. Indeed, the Court left open the question whether in some situations there might be a constitutional problem where an Act placed

> ...procedural barriers in the way of claimants seeking to assert their rights in a timely and effective manner, for instance by removing *Charter* jurisdiction from a tribunal without providing an alternative administrative route for *Charter* claims.[169]

This suggests, notwithstanding the Court's prior reference to the explicit legislative withdrawal of authority to deal with *Charter* questions, that there might well be constitutional problems with such provisions. Thus, it is to be anticipated that at some point there will be challenges to the validity of those Ontario enactments denying some administrative tribunals the capacity to deal with constitutional challenges to legislation, both primary and subordinate.[170]

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[167] *Supra* note 95 at 18 (*per* La Forest J.).

[168] *Ibid* at para. 63.

[169] *Ibid* at para. 44.

[170] See subsections 6(2) — (4) of the *Ministry of Health Appeal and Review Boards Act, 1998*, S.O. 1998, c. 18, Sched. H, (as amended by the *Government Efficiency Act*, S.O. 2002, c.18, Sched. I, section 16) removing that capacity from the Health Services Appeal and Review Board, and section 67(2) of the *Ontario Works Act, 1997*, S.O. 1997, c.25, Sched. A., to the same effect in reference to the Social Benefits Tribunal, an enactment which was presumably a response to the judgment of the Ontario Court of Justice (General Division) in *Falkiner* v. *Ontario (Ministry of Community and Social Services* (1996), 140 D.L.R. (4th) 115, to the effect that such tribunals had jurisdiction to deal with *Charter* challenges to the constitutionality of

Secondly, the Court also reiterated from earlier authority that any administrative tribunal or other form of decision-maker ruling on *Charter* issues (including I assume its jurisdiction to deal with such issues) would be subject to a review on a correctness basis.[171] However, it is now abundantly clear that that statement has to be qualified significantly in the sense identified in the previous section of this paper. Outside of pure questions of law, deference does have a role to play in judicial review of administrative decision-making implicating the *Charter*.

Third, the judgment in *Martin* leaves untouched the question of the relationship between determinations that a tribunal or other statutory decision-maker has authority to deal with *Charter* questions and its status to provide *Charter* remedies as a "court of competent jurisdiction" under section 24. In other words, does *Cooper* have any impact on judgments such as that in *Mooring* v. *Canada (National Parole Board)*[172] in which the Court ruled that the National Parole Board is not a "court of competent jurisdiction" for the purposes of excluding illegally obtained evidence under section 24(2) of the *Charter*? Are there still different standards at play in the determination of whether a tribunal can award *Charter* remedies under section 24 as opposed to considering *Charter* questions in terms of *Martin*?[173]

G. Conclusions

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their constitutive legislation, and, indeed, should do so when raised in matters coming before them. For an assertion that such provisions are indeed unconstitutional, see Mahmud Jamal, *supra*, note 155, at p. 8, relying on Peter W. Hogg, 2 *Constitutional Law of Canada* (Toronto: Carswell), loose-leaf, at p. 37-33.

171 *Ibid* at paras. 31 and 65.

172 [1996] 1 S.C.R. 95.

173 Contrast *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929, where the Court sustained the right of a labour arbitrator as a "court of competent jurisdiction" to award damages under section 24(1) for violations of *Charter* rights. See Mahmud Jamal, *supra* note 155 at pp. 11-15, and Peter W. Hogg, "Remedial Power of Administrative Tribunals", a paper delivered at Osgoode Hall Law School's Annual Constitutional Cases Conference, April 2, 2004 and revised for publication in the Supreme Court Law Review (forthcoming) at pp. 6-8.

This has in no sense been a comprehensive evaluation of the impact of the *Canadian Charter of Rights and Freedoms* on Administrative Law. However, I have selected for consideration what to me seem to have been some of the most critical issues in terms of the Charter's application to the administrative process. Within those categories, what is apparent is that, by and large, the Supreme Court has not been kind to those who were optimistic about the prospects for the *Charter* operating as a mechanism for improving the quality of administrative justice in Canada. In a number of situations, given the choice between an expansive application of the *Charter* to the administrative process and a restrictive one, the Court has chosen the latter. In virtually every case, that has been unfortunate albeit in varying degrees. Also, with the *Charter* now over twenty years old, one begins to fear that some of these limitations have come to be almost writ in stone.

What is required to change the current tendencies is nothing short of judicial reevaluation of the centrality of administrative tribunals and agencies in the dispensation of justice and the vindication of the rights of Canadians. From that perspective, it becomes that much easier to sustain the application and use of the *Charter* as ways of both controlling and empowering the administrative process and testing the validity of the legislative regimes establishing that process.

Section 33(1) of the South African Constitution[174] provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair". In 1982, there was certainly no sense in which such a general constitutionalized guarantee of just administrative action should be enshrined specifically in our *Charter of Rights and Freedoms*. Nonetheless, the Preamble to the *Charter* does specifically proclaim that Canada is "founded upon principles that recognize...the rule of law". Given that recognition and the centrality of the various organs of the state in providing the protections demanded by the rule of law, there should be reason to hope that our courts would be generous in their conception of the extent to which the various specific rights and freedoms of the *Charter* apply to Administrative Law. To this point, that has seldom occurred. Let us hope that this does become a challenge for the Supreme Court in the second twenty years of the *Charter*'s existence as a central feature of our constitutional arrangements.

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[174] *Supra* note 30.