CHAPTER ELEVEN

Administrative Discretion: Between Exercising Power and Conducting Dialogue

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I. Introduction

> The Commission may cancel any permit at its discretion.
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> *An Act Respecting Alcoholic Liquor*, R.S.Q. 1941, c. 255, s. 35

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.
>
> *Immigration Regulations*, 1978, SOR/78-172, as amended by SOR/93-44

These provisions were at the heart of two of the most famous decisions ever handed down by the Supreme Court of Canada on the subject of administrative law: *Roncarelli v. Duplessis*[1] and *Baker v. Canada (Minister for Citizenship and Immigration)*.[2] They are but two examples of thousands of similar provisions in legislative as well as regulatory instruments[3] that confer "discretionary powers" (or, as they were sometimes called, "administrative powers") on executive decision-makers. The aim of this chapter is to present the state of the law relating to the exercise and review of discretion in Canada and to highlight the challenges that discretion poses to the rule of law and to democracy.

Administrative discretion is not an easy concept to grasp. Generally speaking, it is associated with the power of an administrative authority to make a choice between various options: "The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries."[4] As such, discretion questions the view of the administrative state as a mere transmission belt between the legislature and the citizens, as the traditional articulation of the separation of powers used to depict it. According to this view, the executive simply "executes" the will of the legislature by putting into operation the projects developed by democratic representatives for their citizens. In practice, the margin of manoeuvre that is involved in making choices suggests that there is a space or distance between the expression of the will of Parliament on the one hand, and acts of the executive on the other, so that running the government exceeds "mere execution." Discretion is exercised in that space.

If discretion gives the administrative state leeway to make decisions or adopt norms, is the administrative state governed by the rule of law?[5] In other words, is discretion a legal phenomenon, exercised in a space controlled by legal principles and subjected to judicial oversight, or is it a political phenomenon, exercised in a legal void and subjected to political

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1 [1959] S.C.R. 121 [*Roncarelli*].

2 [1999] 2 S.C.R. 817 [*Baker*].

3 In 1975, Philip Anisman identified 14,885 powers of a discretionary nature in the Revised Statutes of Canada alone: see Philip Anisman, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada* (Ottawa: Law Reform Commission of Canada, 1975).

4 *Baker*, *supra* note 2 at para. 52.

5 For the rule of law, see Mary Liston, Chapter 2, Governments in Miniature: The Rule of Law in the Administrative State.

controls? Central issues on administrative discretion have precisely revolved around the question whether the space in which discretion is exercised is legally constrained or not. As we shall see, that question was first addressed through the perspective of a dichotomy between law and discretion: "quasi-judicial" decisions were based on law and therefore were legally constrained and controllable; "administrative" (or discretionary) decisions were based on policy and could not be so controlled. Over time, however, the influence of the law–discretion dichotomy was increasingly undermined, to a point where the distinction between decisions based on discretion and those based on law came to be seen as residing in the degree, not in the nature, of the constraints within which they are made.[6]

Section II of this chapter offers an overview of the role of discretion in the administrative state. It also briefly presents the positions of a number of influential academics on the question of discretion. Section III exposes the structure of the law relating to the exercise and review of discretion as it stood from *Roncarelli* to *Baker*. Section IV explores *Baker* and its implications for that part of administrative law and it also analyzes the impact of *Dunsmuir v. New Brunswick*[7] and the challenges that both decisions raise for administrative lawyers. In the conclusion, I raise the question of the relationship between discretion and democracy. I also suggest that a conception of discretion as "dialogue" might be a promising way to take up both the rule of law and the democratic challenges, although, as we shall see, it is a conception that remains vulnerable to judicial retreats.

II. The Role of Discretion and How It Was Viewed by Academics

A. The Role of Discretion in the Administrative State

Because discretion is part of the daily routine of many administrative decision-makers, understanding the role of that kind of power is a sensible starting point to any substantial analysis of the concept of discretion.

Discretion is essential to contemporary government: bringing the various legislative schemes that are put in place by Parliament down to the individual requires some measure of flexibility on the executive's part, either because Parliament cannot foresee every individual case that is likely to arise (and therefore chooses to let the executive decide in each case according to its own appreciation of the situation) or because it does not have the necessary expertise or knowledge to craft the norms that should apply in any given area of activity (and therefore chooses to let the executive adopt the norms).

1. Discretion to Decide Individual Cases

A great many statutory and regulatory provisions confer discretionary powers on administrative decision-makers, to be exercised in individual cases. The adoption of that kind of

6 G. Van Harten, D. Mullan & G. Heckman, *Administrative Law: Cases, Text, and Materials*, 6th ed. (Toronto: Emond Montgomery, 2010) at 954.

7 [2008] 1 S.C.R. 190 [*Dunsmuir*].

provision is justified by the fact that the legislator or regulating authority cannot imagine all the particular situations that are likely to arise under any given scheme, so it is impossible for them to formally conceive a comprehensive set of binding rules. Delegating discretion to decide in each case gives the decision-maker presented with concrete facts the ability to make a decision that is both adapted to that set of facts and also compatible with the legislative or regulatory scheme within which the decision-maker operates.

Baker is a good example of that kind of discretionary power.[8] In that case, the *Immigration Act*[9] required that applications for permanent residence be made outside Canada, before the arrival in Canada of the applicant. However, a regulatory provision adopted pursuant to the Act provided that the minister could exempt someone from the application of any statutory or regulatory provision, or otherwise facilitate his or her admission to Canada, if the minister was satisfied that compassionate and humanitarian reasons justified such an exemption or facilitation. When called on to decide under that provision, the minister was given the ability to take into account a variety of factual situations that, although not specifically mentioned in the statute, led to "exemption" or "facilitation." The *Roncarelli* case is another example: the Liquor Commission, the administrative authority responsible for the application of the *Alcoholic Liquor Act*,[10] was delegated the power to "cancel any [liquor] permit at its discretion." Here, the statute did not even provide any formal restriction on the discretionary power, an aspect that would be central to that case.[11]

2. Discretion to Adopt General Norms

An impressive number of statutory provisions expressly confer discretionary powers on administrative decision-makers to adopt binding rules of general application. These rules are often referred to as "regulations," but they may also be termed "bylaws," "orders," "tariffs," etc. The justification for delegating the discretionary power to adopt general norms is explored elsewhere in this book (see Andrew Green, Chapter 4, Regulations and Rule Making: The Dilemma of Delegation). Generally speaking, such a justification is twofold. First, it resides in the need for expertise, which members of Parliament do not always have, given the immense variety of fields that are subjected to state intervention. Specific ministries or administrative bodies are often better equipped for such a task. Second, it responds to the problem of time (which legislators do not have when it comes to articulating specific provisions in a number of contexts) and information (which is always incomplete and which results in the need for rule modification, which is most efficiently carried out through regulation rather than legislation): delegation of rule-making powers to the executive increases the efficiency and flexibility of legislative schemes.

The executive endowed with discretion also has implicit power to adopt non-binding rules, such as "directives," "guidelines," and "manuals." These non-binding instruments are

8 For the facts of *Baker*, see Grant Huscroft, Chapter 5, From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review.

9 R.S.C. 1985, c. I-2.

10 *An Act Respecting Alcoholic Liquor*, R.S.Q. 1941, c. 255.

11 A detailed analysis of this case will be found in section III, below.

increasingly referred to as "soft law."[12] Soft law may play various roles. For instance, when discretion to decide individual cases is delegated to an administrative authority that, in practice, confers its actual exercise on many front-line officers who act simultaneously,[13] directives or guidelines may establish non-binding rules intended for decision-makers, with a view to enhancing coherence and fairness in administrative decision making. In other instances, soft law is used to set policy orientations that are likely to determine the way in which a particular legislative or regulatory scheme will be applied (see Andrew Green, Chapter 4).

While it could be said that administrative discretion was a relatively minor phenomenon at the turn of the 20th century, the emergence and growth of the welfare state caused a dramatic expansion of that kind of power. As life became more complex and as citizens' demands for state intervention intensified, the government needed a variety of flexible tools and considerable leeway for action in order to give concrete expression to its projects. This translated into more parliamentary delegations of discretion to decide individual cases or to adopt general norms. Recent calls for a reduced role for the government did not significantly alter that trend. So to say that discretion is not only here, but that it is here to stay is pretty much uncontroversial.

What is controversial, however, is the nature of the legal regime that applies to that kind of power. To understand the evolution of that legal regime, presented in sections III and IV, it is useful to refer to the perspective and vision of academic commentators because they provide an analytical tool that helps us better understand and contrast the various trends in legal thinking about discretion.

B. Discretion and Academics

Academic debates on discretion are roughly divided between authors who associate discretion with arbitrariness and those who view discretion as an instrument that allows the welfare state to reach its legitimate objectives.

In 1885, A.V. Dicey published *An Introduction to the Study of the Law of the Constitution*,[14] in which he set out his conception of the rule of law (on the rule of law, see Mary Liston, Chapter 2, Governments in Miniature: The Rule of Law in the Administrative State). In what he describes as the first "meaning" of this concept, he affirms that citizens living in a state governed by the rule of law can be subjected to state punishment only if they have breached *the law*. Dicey contrasts *law* with *discretion*, which he associates with arbitrary power:

> [The rule of law means] the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and *excludes the existence* of arbitrariness, or prerogative, or even *of wide discretionary authority on the part of the government*. Englishmen are ruled by the

[12] See Andrew Green, Chapter 4, Regulations and Rule Making: The Dilemma of Delegation.

[13] For instance, in *Baker*, the discretion delegated to the minister was actually exercised by many immigration officers (by virtue of a specific provision in the statute conferring powers on the minister).

[14] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. by E.C.S. Wade (London: Macmillan, 1959) (first edition published in 1885).

> law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.[15]

In his view, "wherever there is discretion there is room for arbitrariness, and … in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects."[16]

Dicey agreed that the executive might need discretionary powers in exceptional circumstances—times of trouble, war, invasion, and the like. In such cases, executive discretion was acceptable because Parliament needed to adopt a statute to authorize the delegation and also because citizens could ultimately resort to the courts, which would ensure that statutory language was construed in light of common-law principles developed over time that protected the liberty of the subject. However, Dicey fiercely condemned the kind of legislative delegations of discretion that became commonplace in the welfare state. In his opinion, those delegations were problematic for two reasons. On the one hand, statutes delegating discretion were systematically framed to deprive courts of their supervisory power.[17] On the other hand, the discretionary matters that the executive was called on to decide were substantively extralegal: they dealt with "public business," which, in Dicey's view, courts were unsuited to decide. In other words, although judges were trained to answer questions of law (for example, "Was the right to freedom of expression violated by the executive?"), they were unable to settle "public business" (for example, "Does the public interest require the delivery of a permit in that part of the city?").

Dicey thus sharply contrasted law with discretion. In his view, decisions of the executive based on law (that is, quasi-judicial decisions) could be properly controlled by courts, but decisions based on discretion could not, because they dealt with public business and were therefore made in a "lawless void."

In the late 1920s, in *The New Despotism*,[18] Lord Hewart followed Dicey in condemning what he perceived as the propensity of the executive to manipulate Parliament in order to be freed from judicial control. He too denounced the legislative techniques that placed "a large and increasing field of departmental authority and activity *beyond the reach of the ordinary law*"[19] and made those decision-makers a law unto themselves.[20] Some time after Lord Hewart's outburst, F.A. Von Hayek added his voice to those who expressed the view that discretion was contrary to the rule of law. In his *Road to Serfdom*,[21] he described the rule of law as a set of principles whose ideal is the prevention of arbitrary government. He formed the view that discretion, with its absence of rules announced beforehand, prevented

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15 *Ibid.* at 202 (emphasis added).

16 *Ibid.* at 188.

17 A technique that was often used to attain that objective consisted in articulating parliamentary delegations of discretion in language that sought to give discretionary decisions the force of statutes.

18 Lord Hewart, *The New Despotism* (London: Ernest Benn, 1929).

19 *Ibid.* at 11 (emphasis added).

20 *Ibid.* at 14.

21 F.A. Von Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) at 80ff.

citizens from knowing how the state will use its coercive powers and was therefore contrary to the rule of law.[22]

As a reply to those who conceived and denounced discretion as arbitrariness, supporters of the welfare state perceived discretion as an instrument of welfare. W.A. Robson, in contrast to Dicey, strongly supported state intervention and the setting up of administrative authorities. He did not view discretion as intrinsically arbitrary. For him, the legitimacy of the administrative state depended on administrative tribunals "exhibiting a … judicial frame of mind,"[23] or a "spirit of justice":[24] when endowed with discretion, they would hear the controversies with an open mind, further only authorized purposes, and avoid being influenced by extraneous considerations.[25]

Robson agreed, however, that while the creation of administrative tribunals proved necessary in order to escape from the rigidities of the processes and methods of the law (either through the possibility to consider imponderables or through the exercise of discretion), these tribunals had to remain under appropriate legal control.[26] In Robson's opinion, ordinary courts had failed to demonstrate their ability to appropriately control administrative tribunals and authorities. On the one hand, they had developed a dual approach to judicial control that was based on what he viewed as a disputable distinction between "law" and "discretion" (courts claimed they could control the former, not the latter). On the other hand, he thought courts were unfit to deal with the realities of administrative authorities. As a substitute, he favoured the creation of a specialized court of law that, freed from the framework of an unworkable distinction between law and discretion and attentive to the particularities of the administrative state, could exercise control over all the activities of the executive.

Following Robson, W.I. Jennings expressed the view that Dicey's constitutional theory was ill-founded, so that contending that discretion was contrary to the rule of law was pointless. Jennings did not, however, argue that discretionary powers should go uncontrolled. Like Robson, he supported the creation of an administrative court, which he thought could be a specialized division of the High Court. He thought that this would circumvent the prejudices that ordinary courts had traditionally expressed against the government of the welfare state.[27] In a similar vein, J. Willis was highly critical of the judicial approach to administrative law, which he thought expressed clear hostility toward the administrative state. He was equally unsupportive of a conceptual approach, which in his view involved either a categorization of functions to be shared between the judiciary and the executive, or the adoption of Dicey's theory of the rule of law. Rather, Willis favoured what he termed a "functional" approach to administrative law,[28] one that focuses on the questions of "who is best fitted to

22 *Ibid.* at 80.

23 W.A. Robson, *Justice and Administrative Law: A Study of the British Constitution*, 3d ed. (London: Stevens & Sons, 1951) at 38.

24 *Ibid.* at 418.

25 *Ibid.* at 408-9, 610.

26 *Ibid.* at 408.

27 W.I. Jennings, *The Law and the Constitution*, 5th ed. (London: University of London, 1959) at 55.

28 J. Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 U.T.L.J. 53.

exercise discretion" and "who is best fitted to control that exercise." Overall, however, and notwithstanding harsh criticism, Dicey's thinking exercised a profound and enduring influence on the way in which courts conceived of their supervisory role in the administrative state. Indeed, the law–discretion dichotomy structured the law of judicial review in various ways until *Baker*, and recent judicial decisions suggest that, even as of today, it has not entirely disappeared from the legal landscape. It is to the description of this complex evolution that we now turn.

III. Discretion from Roncarelli to Baker

Until the decision of the Supreme Court in *Baker*, the traditional approach to judicial supervision of administrative exercises of discretion operated under specific heads or grounds of review, usually grouped under the expression "abuse of discretion." This framework thus differed from that used for the review of administrative interpretations of the law, which proceeded as described by Audrey Macklin and Sheila Wildeman in Chapters 9, Standard of Review: Back to the Future?, and 10, Pas de Deux: Deference and Non-Deference in Action, respectively. This section presents the various grounds of review under the traditional approach to the judicial control of discretion, but it also analyzes the importance of *Roncarelli* on this part of administrative law and it sketches the elements that led to the fundamental change of approach elaborated in section IV.

Roncarelli is usually viewed as the pivotal chapter of the story of judicial review of discretion in Canada.[29] This decision is remarkable in many aspects, but for our purposes, it is instructive for two reasons. On the one hand, it clearly affirms that, even at the highest levels of executive action, discretion is limited by legal principles, although, as we shall see, the nature of those principles was debated. On the other hand, the set of majority and minority opinions respectively articulate two visions of discretion between which courts have been oscillating for decades. A close analysis of *Roncarelli* is therefore inescapable.

Frank Roncarelli owned a high-class, prosperous restaurant in Montreal. He sued the premier of Quebec, Maurice Duplessis, for damage caused by the cancellation of his liquor licence. A majority of judges gave judgment for Roncarelli, in light of two fundamental factual findings. First, even though the licence had been formally cancelled by the Quebec Liquor Commission, the latter had acted on Duplessis's orders. Second, the authorities had been motivated by a desire to curb what they perceived to be seditious activities of the Jehovah's Witnesses and to punish Roncarelli. A member of that sect, Roncarelli acted as a bailsman for close to 400 of his fellow members, who were arrested for illegally distributing pamphlets. Duplessis considered that in so using the money he earned with his liquor licence, Roncarelli was making an illegitimate use of a privilege that was granted to him by the province.

For Rand J., not only did Duplessis lack any legal basis for acting in the circumstances of the case, but so did the commission, notwithstanding the wording of the relevant statutory

[29] See also the discussion of *Roncarelli* in Mary Liston, Chapter 2, Governments in Miniature: The Rule of Law in the Administrative State, and the special issue of the *McGill Law Journal*, dedicated to the 50th anniversary of the decision: (2010) 55 McGill L.J. 375-741.

provision, which stipulated that the commission could "cancel any permit at its discretion."[30] In his view, even in the case of formal delegations of apparently unfettered discretion, there were always implied limits to its exercise.

Rand J. emphasized that Roncarelli had not done anything wrong and was merely acting as a private, honourable citizen: having a religion, earning his living, and exercising his right to act as bailsman. In addition, the authorities had cancelled the licence in order to "halt the activities of the Witnesses, to punish the appellant … and to warn others."[31] Hence, "the de facto power of the Executive over its appointees at will to such a statutory public function [had been] exercised deliberately and intentionally to destroy the vital business interests of a citizen."[32] In Rand J.'s view, however, the commission was a "public service"[33] that had to "serve"[34] the purpose of the statute and that owed a "public statutory duty" toward Roncarelli.[35] This was particularly important because the occupations and businesses that were regulated (the administration and sale of alcohol) "would be free and legitimate"[36] absent restriction in legislation. This was "steadily becoming of concern to citizens generally"[37] because an increasing number of activities became subject to statutory limitations, such as requirements of permits. For Rand J., "[i]n public regulation of this sort there is no such thing as absolute and untrammelled 'discretion,'"[38] even when the formal statutory language indicates otherwise.

Rand J. also insisted that the regulatory framework and, more specifically, the requirement of a permit had important consequences for permit holders: "[a]s its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it."[39] This necessarily influenced the way in which the cancellation of a permit could be carried out. When action was "dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty,"[40] administration was not made "according to law,"[41] and this was susceptible to result in the disintegration of the rule of law.[42] The following excerpt clearly encapsulates Rand J.'s approach to discretion:

30 *Alcoholic Liquor Act*, *supra* note 10, s. 35, quoted in *Roncarelli*, *supra* note 1 at 139.

31 *Roncarelli*, *ibid.* at 133.

32 *Ibid.* at 137.

33 *Ibid.* at 139.

34 *Ibid.* at 140.

35 *Ibid.* at 141.

36 *Ibid.* at 140.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.* at 142.

41 *Ibid.*

42 *Ibid.*

> Here, the act done was in relation to a public administration affecting the *rights of a citizen to enjoy a public privilege*, and a *duty implied by the statute toward the victim was violated*. The existing permit was an interest for which the appellant was entitled to *protection against any unauthorized interference*, and the illegal destruction of which gave rise to a remedy for the damages suffered.[43]

In sum, for Rand J., discretion could not be viewed as a pure exercise of power, as an instrument in the hands of a decision-maker enabling him or her to make any decision he or she sees fit. For discretion to be legally exercised, it had to pursue legitimate purposes and take into account the situation of the individual affected by the decision.

By contrast, in his dissenting opinion, Cartwright J. took the perspective of the decision-maker as the starting point of his analysis. He formed the view that no actionable wrong had been committed through the cancellation of Roncarelli's licence. The authorities had honestly entertained the opinion that Roncarelli did not deserve to enjoy this privilege because he supported members of a group who attempted to disrupt public order, and courts could not "inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit."[44] The specific language of the statute did not contain any guidance as to the "circumstances under which [the commission could] cancel a permit":[45] the commission, therefore, had unfettered discretion to so determine. Cartwright J. insisted that the decision to cancel the licence was an administrative, as opposed to a quasi-judicial decision, which prevented courts from intervening in the decision of the commission:

> A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by "law"; … .
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> In contrast, non-judicial tribunals of the type called "administrative" have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency. …
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> A judicial tribunal looks for some law to guide it; an "administrative" tribunal, within its province, is a law unto itself.[46]

For Cartwright J., then, the decision-maker endowed with a broadly worded delegation of discretionary power could not be the subject of control by the courts as long as he or she acted within the limits explicitly set forth in the statute. Where no formal limits were prescribed and the delegating statute conferred entire discretion on the decision-maker, the latter was "a law unto itself."

Two observations must be made at this point. On the one hand, Rand J.'s opinion in *Roncarelli* generally stands for the proposition that discretion is limited or constrained by legal principles. However, as we alluded to at the beginning of this section, different interpretations of the nature of those principles have been suggested. One interpretation of Rand J.'s opinion is that the legal regime applicable to executive exercises of discretion lies in the

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43 *Ibid.* at 143 (emphasis added).

44 *Ibid.* at 164.

45 *Ibid.* at 167.

46 *Ibid.* (emphasis added), quoting *Ashby et al.*, [1934] O.R. 421 at 428, 3 D.L.R. 565, 62 C.C.C. 132 (C.A.).

text of the delegating statute, read in the light of a number of principles "underlying" that text. Those principles are usually associated with interpretive presumptions aimed at identifying the intention of Parliament. A second interpretation suggests that those principles are "unwritten" principles that are a constitutive part of the legal regime of discretion and that their identification does not depend on the written text of the delegating statute but rather lies in the fundamental values of our legal order.[47] The first interpretation largely dominated administrative law in the years that followed *Roncarelli*. Two reasons might explain why. First, it was more easily reconcilable with the orthodox conception of law, positivism, which postulates that only valid positive rules, as opposed to "unwritten" principles reflective of values, are binding on judges.[48] Second, the interpretation was also compatible with the *ultra vires* rule that generally governed the law of judicial review of executive action, according to which courts would strike down excesses of jurisdiction or abuses of power, where jurisdiction or power were understood as those delegated by statute.

On the other hand, Rand J.'s and Cartwright J.'s respective opinions reveal diametrically opposed views of discretion. Rand J. focused on the perspective of the individual, suggesting a bottom-up approach to that kind of power: he insisted on the necessity to take into account the purpose of the statutory framework involved, but also to keep in mind that the exercise of public power requires being attentive to the individual affected by a decision, even when (and perhaps, especially when) wide discretion is conferred on public decision-makers. By contrast, Cartwright J. emphasized the need for public authorities to be free from legal control absent statutory indications suggesting otherwise, revealing a top-down approach to discretion. The first perspective points to the need to respect individual freedom; the second seeks to protect the public decision-maker's margin of manoeuvre. For decades, courts have been oscillating between these two different conceptions of discretion.

With *Roncarelli* as a background, we can now expose more specifically the heads or grounds of review in the traditional approach to the judicial control of discretion. Those grounds express the idea that courts will only police the legality of discretionary decisions and that, absent "abuse of discretion," they will not intrude into their merits.

A. Unauthorized Object or Purpose, Irrelevant Considerations

A number of judicial pronouncements have established that decision-makers must exercise discretion in conformity with the purposes authorized by the delegating statute. Likewise, they have held that discretion cannot be exercised on the basis, or in the light of, "irrelevant" considerations, or in failing to take into account relevant considerations. The two situations often overlap. In the first case, courts must identify the object authorized by the statute and then determine whether that object or purpose has been followed or not. Similarly, in the second case, the question whether a consideration is relevant or not is usually answered with reference to the object of the statute. These grounds of review are by far the most frequently invoked. A few examples illustrate that kind of case.

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47 For a discussion of the distinction between "underlying" and "unwritten," see D. Dyzenhaus, "The Deep Structure of Roncarelli v. Duplessis" (2004) 53 U.N.B.L.J. 111.

48 *Ibid.*

In *Roncarelli*, the majority decided that the cancellation of Roncarelli's permit had been made with a view to punishing him for his religious affiliation and his action as bailsman and that this justified invalidating the decision to cancel. In *Smith & Rhuland Ltd. v. The Queen*,[49] the Supreme Court held that an administrative authority (in that case a labour board) entrusted with the discretionary power to certify a union as a bargaining unit could not exercise its power to refuse certification on the basis that the secretary-treasurer of the union had communist allegiance. More recently, in *Shell Canada Products Ltd. v. Vancouver (City)*,[50] the city of Vancouver had voted a resolution expressing its intention not to do business with Shell until that company withdrew from South Africa, then under the apartheid regime. A narrow majority formed the view that the object of the resolution was to join an international movement of boycott in order to exert pressure on the company to retreat from South Africa. As such, it did not pursue "municipal purposes," which limited the powers of the city to its territory.

B. Bad Faith

As we saw above in *Roncarelli*, Duplessis was found to have used his discretion to cancel a liquor licence with a view to punishing the licence holder for supporting the cause of members of a religious movement that was overtly hostile to the Catholic Church. This prompted Rand J. to say that "'[d]iscretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."[51] Although Rand J. referred to bad faith, Duplessis's behaviour was also said to be incompatible with the object of the statute and also based on improper considerations.

In *Landreville v. Town of Boucherville*,[52] the city was found to have used its power to expropriate, not for a legitimate purpose, but with a view to prevent a resident from operating his quarry. While Beetz J. admitted that "the burden of proof is a heavy one when it involves establishing the commission of an 'abuse of power equivalent to fraud' and 'resulting in a flagrant injustice,'"[53] he formed the view that both the official documents of the city and the circumstances of the case established bad faith.

C. Acting Under Dictation or Influence

Courts presume that when Parliament chooses to delegate discretion to a particular decision-maker, only the latter can actually exercise it. Therefore, any indication that one acted under the dictation or influence of another person suggests that the exercise of authority was not empowered by Parliament. In *Roncarelli*, the decision-maker was found to

49 [1953] 2 S.C.R. 95.

50 [1994] 1 S.C.R. 231.

51 *Roncarelli*, *supra* note 1 at 140.

52 [1978] 2 S.C.R. 801.

53 *Ibid.* at 809.

have exercised his power under the dictation of Duplessis, which was not permitted by the delegating statute that conferred the power to decide on the Liquor Commission.

D. Wrongful Delegation of Powers

The preceding reasoning is also invoked in a slightly different way. Courts assume that discretion is bestowed on executive decision-makers on the basis of their expertise or particular situation in the administrative machinery, so that an administrative authority must exercise discretion itself without delegating that responsibility to another (except when simple matters of execution are involved, in which case delegation is possible because then the exercise of the power does not require any particular ability or expertise). Hence, in *Vic Restaurant Inc. v. Montreal (City)*,[54] the city of Montreal had adopted a bylaw that made the delivery of permits conditional on the authorization of a number of directors of service, including the chief of police. This was found to be an illegal subdelegation of the power to make a decision, because the bylaw did not provide precise norms on which the chief of police could rely, de facto conferring on him the power to make those norms.

E. Fettering of Discretion

Decision-makers cannot decide in advance how they will exercise their discretion. They must consider the particulars of each situation and make a decision on the merits of each case. Otherwise, they transform the nature of the power that was delegated to them. This kind of situation is most likely to arise in contexts where directives or guidelines are used to structure the exercise of discretion, as we alluded to in section II. If directives or guidelines are applied in a way that prevents the decision-maker from using his or her margin of manoeuvre in each case, he or she then transforms the discretionary power into a non-discretionary one. The legality of using those directives thus requires decision-makers to actually exercise discretion and to depart from the guidelines when cases demand it.

Likewise, the no-fettering rule justifies important aspects of the doctrine of legitimate expectations (see Grant Huscroft, Chapter 5, From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review). Under this doctrine, a decision-maker who makes declarations, promises, or engagements may create a legitimate expectation that they will be respected or honoured. Yet, Canadian courts have refused to hold decision-makers to their promises or conducts, partly on the basis that this would fetter their discretion. Only procedural rights can be obtained when a decision-maker purports to go back on a promise.

F. Unreasonableness

On some occasions, courts invoked the notion of "unreasonableness" to reinforce an argument already made on the basis of one of the specific grounds of review just mentioned. But as a separate ground of review, unreasonableness was rarely invoked because, in contrast to the notion of reasonableness associated with the control of decisions based on law (see

[54] [1959] S.C.R. 58.

Audrey Macklin, Chapter 9, and Sheila Wildeman, Chapter 10), the notion of unreasonableness expressed in the context of discretion was usually understood in the *Wednesbury*[55] sense of "something so absurd that no sensible person could ever dream that it lay within the powers of the authority."[56] That definition was later reformulated by the House of Lords as "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[57] The conditions required to make a case of unreasonable exercise of discretion were therefore very demanding and rarely established before the courts.

Among those grounds, by far the most frequently invoked was the first, which also presented important difficulties in its application. Indeed, identifying the purpose that a given power must pursue, or the considerations that are relevant to its exercise, involved interpreting the delegating statute. Given the controversies surrounding the very conception of discretion and the nature of the principles limiting its exercise, as highlighted in *Roncarelli*, judicial decisions were not always easy to reconcile in a coherent whole. This was illustrated by the periodic resurfacing of the "law unto itself" approach to discretion in the years that followed *Roncarelli* and by the tendency of courts to oscillate between the majority and minority approaches expressed in that decision.[58] For example, in *Thorne's Hardware Ltd. v. The Queen*,[59] the Supreme Court expressed the view that "the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, [but] it would take an egregious case to warrant such action"[60] and that "[d]ecisions made by the Governor in Council in matters of public convenience and [necessity] are final and not reviewable in legal proceedings."[61]

By and large, the approach to judicial control of discretion just described maintained the law–discretion dichotomy in that it expressed a form of control that differed from that which applied to decisions based on law. Recall that at the time, the latter were approached along the lines of the doctrines of "preliminary or collateral questions" and "asking the wrong question" (see Audrey Macklin, Chapter 9) thereby authorizing intrusive judicial control on the substance. By contrast, the various grounds of review (enumerated above) illustrate that discretionary decisions were approached from a perspective that sought to preserve the freedom of the decision-makers to decide on the substance and to limit judicial intervention to policing the surrounding legal limits within which such freedom was exercised.

The law–discretion dichotomy persisted even with the emergence of the politics of deference inaugurated in *C.U.P.E. v. N.B. Liquor Corporation.*[62] As we saw from preceding chapters,

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55 Named after the famous dictum by Lord Greene in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223.

56 *Ibid.* at 229.

57 *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 at 410 (H.L.).

58 See D.J. Mullan, "Judicial Deference to Executive Decision-Making: Evolving Concepts of Responsibility" (1993) 13 Queen's L.J. 137.

59 [1983] 1 S.C.R. 106 [*Thorne's*]. See Andrew Green's discussion of *Thorne's* in Chapter 4, Regulations and Rule Making: The Dilemma of Delegation.

60 *Ibid.* at 111.

61 *Ibid.*

62 [1979] 2 S.C.R. 227 [*CUPE*].

the Supreme Court mandated courts to adopt an attitude of deference toward administrative determinations of law, suggesting that the latter had to be protected from systematic judicial control (see Audrey Macklin, Chapter 9, and Sheila Wildeman, Chapter 10). What came to be termed a "pragmatic and functional approach"—now the "standard of review analysis"—was used to determine the degree of deference applicable in each case. At first glance, this seemed to narrow the gap between the judicial approach to discretion and its approach to law, because courts were invited to restrain their interventions in both cases. But different reasons justified these apparently similar results.

The hands-off approach to administrative interpretations of non-jurisdictional questions of law was justified by the idea that law interpretation was not the monopoly of the courts and that, in many cases, expert, administrative agencies were just as qualified as courts, and sometimes better qualified, to interpret a statutory provision. This stance moved away from the general understanding of the separation of powers, because it implied that it was legitimate for the executive to exercise powers of a judicial nature. By contrast, the hands-off approach to discretion was precisely dictated by the necessity to maintain the judiciary in a position that was compatible with a formal view of the separation of powers. Because discretion required choices that could be based on political or policy considerations, subjecting discretion to substantive legal scrutiny was viewed as putting courts on the slippery slope of politics. Therefore, the heads of review limited the potential for intrusion into the substance of those decisions and maintained the judiciary in a position that was compatible with a formal view of the separation of powers.

Thus, in the field of discretion, the justification for restraint was not based on judicial "deference," the recognition of a legitimate role for the executive in law interpretation, but on judicial "abstinence,"[63] the necessity to keep the judiciary away from decisions that were viewed as being outside the realm of the law. Although both review approaches recognized that "unreasonable" decisions mandated intervention, the nature of the latter differed. In cases of discretion, unreasonableness was understood in the *Wednesbury* sense and did not seem to require any serious involvement with the merits of the decision because the defect it punished was to clearly appear on its face. By contrast, in the context of the review of executive interpretations of the law, *CUPE* defined a patently unreasonable decision as one that could not be "rationally supported by the relevant legislation."[64]

The law–discretion dichotomy therefore seemed firmly entrenched in judicial review of administrative action. However, another decision of the Supreme Court handed down the same year as *CUPE* paved the way for the profound restructuring of the law of judicial review that would occur 20 years later.

As explained by Grant Huscroft in Chapter 5, in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*,[65] the Supreme Court expressly stated that the distinction between law and discretion was not a reliable criterion for determining the domain of application of procedure in administrative matters. On the one hand, it was very difficult to make formal

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63 The expression is from R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: I" (1980) 25 McGill L.J. 520 at 534.

64 *CUPE*, *supra* note 62 at 237.

65 [1979] 1 S.C.R. 311 [*Nicholson*].

distinctions between legal (or "quasi-judicial") decisions and discretionary (or "administrative") ones; on the other hand, the focus on formal categories masked a fundamental aspect to be considered in the discussion, that of the consequences of a decision for the individual concerned. In so saying, the Court questioned the justification for using precisely this distinction for the purpose of judicial control of administrative decisions. In other words, if the difficulty (if not the impossibility) to neatly differentiate law and discretion, together with the necessity to shift the focus of the analysis toward the individual concerned, justified changing the conditions of application of procedural rights, it became increasingly difficult to maintain that distinction as a justification for exercising different forms of control for law and discretion. The tensions thus created eventually resulted in the Supreme Court's decision in *Baker*, which marked a turning point in the law of discretion in Canada.

IV. Discretion from Baker to Dunsmuir and Beyond

A. The Contemporary Framework of Analysis

The facts of *Baker* are described more fully by Grant Huscroft in Chapter 5. The *Baker* case was concerned with the legality of the minister's refusal to exempt Ms. Baker from the application of the *Immigration Act*. Such exemptions could be accorded if the minister was satisfied that compassionate and humanitarian considerations existed. One of the arguments that were made on behalf of Ms. Baker was that the minister's decision was unreasonable because insufficient attention had been given to the interests of her children.

L'Heureux-Dubé J., speaking for the Court on this particular question, elucidated the proper approach for the review of administrative discretion. She recalled that traditionally, the control of that kind of decision was limited to the specific grounds of abuse of discretion, as opposed to the review of decisions interpreting rules of law, which proceeded under the "pragmatic and functional approach," as it was then termed (see Audrey Macklin, Chapter 9). In her opinion, the traditional approach to the review of discretion, with its limited grounds of review, incorporated two central ideas. One is that the decision-maker must be given an important margin of manoeuvre when exercising discretion.[66] The other idea is that the decision-maker must nonetheless act within certain limits:

> [D]iscretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute. … [It] must be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis* …), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications v. Davidson* …).[67]

In her opinion, no strict dichotomy could be made between discretionary and non-discretionary decisions: decisions made by the executive could never be neatly associated with either category, because they were usually composed of a mixture of characteristics

66 *Baker*, *supra* note 2 at para. 53.

67 *Ibid.*

that prevented such a classification. Moreover, the exercise of discretion and the interpretation of rules of law could not be easily differentiated, notably because both involved making choices between two courses (action or inaction), or between various options opening up in cases of legal silence or ambiguity.[68]

The review of discretion could follow the pragmatic and functional approach, L'Heureux-Dubé J. said, because the factors it put forward to determine the applicable standard of review in any given case could accommodate the specificity of discretionary powers. This would not lead to more intervention into that kind of decision, because the pragmatic and functional approach would take into account that discretion inherently requires leeway, while recognizing that "discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."[69] In the circumstances, she concluded that the minister's decision had to be reviewed on the standard of reasonableness *simpliciter* (as it then existed: see Sheila Wildeman, Chapter 10) and that, on the facts of the case, the decision failed to meet the required standard. The reasons that supported the decision showed that the officer failed to give "serious weight and consideration to the interests of the children."[70] As such, this demonstrated that it was "inconsistent with the *values* underlying the grant of discretion"[71] and therefore unreasonable.

L'Heureux-Dubé J. argued that the reasonableness of the exercise of a discretionary power conferred by Parliament depended on the words "compassionate and humanitarian considerations" and their meaning.[72] The relevant provisions showed that Parliament's intention was that decision-makers exercise discretion "in a humanitarian and compassionate manner."[73] Now, to be able to determine the meaning of those crucial words (stated differently, to determine "whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law"),[74] the Court had to engage in a process of statutory interpretation, through a contextual approach. Such a contextual interpretation required taking into account the objectives of the *Immigration Act*, international instruments, and ministerial guidelines. These indications revealed that "[c]hildren's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society."[75] Therefore, a reasonable exercise of the power required close attention to the interests and needs of the children.

By applying the pragmatic and functional approach to the control of discretion, *Baker* marked the end of the law–discretion dichotomy in the domain of substantive judicial review. The Supreme Court recognized that the substance of discretionary decisions could be

68 *Ibid.* at para. 54.

69 *Ibid.* at para. 56.

70 *Ibid.* at para. 65.

71 *Ibid.* (emphasis added).

72 *Ibid.* at para. 66.

73 *Ibid.*

74 *Ibid.* at para. 67.

75 Ibid.

made subject to a control based on reasonableness. As a result, the Court moved away from Dicey's conception of discretion, because he conceived discretion as exercised on the basis of considerations that were not part of the law, and therefore impossible to control judicially. The approach put forward by the Court in *Baker* is much closer to the perspective endorsed by Robson, Jennings, and Willis, who had emphasized the difficulty of differentiating decisions on the basis of their discretionary or non-discretionary content and the need to confer the control of administrative decisions to institutions attentive to the distinctive features of public administration.[76] The pragmatic and functional approach aimed at the same objective. In other words, if it was not possible to clearly differentiate in any given case discretion from law, the differentiation could not be the basis for the determination of the approach to judicial review.

In addition, the *Baker* case softened the dichotomy between procedure and substance. The Court not only required that reasons be given for decisions having important consequences for the individuals concerned, but also required that those reasons demonstrate that the decision made was sensitive and attentive to the situation of those individuals. *Baker* thus recognized that procedure may affect the substance of the decision.[77] More generally, *Baker* is in line with the decision of the Supreme Court in *Nicholson*,[78] which shifted the starting point for determining the legality of executive action, from the nature of the power to the consequences of the exercise of that power on the individual. This is clear from the rationale put forward by the Court for imposing a duty to give reasons on decision-makers endowed with extensive discretionary powers:

> The profound importance of [a humanitarian and compassionate] decision to those affected … militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one, which is so critical to their future not to be told why the result was reached.[79]

Therefore, the duty to give reasons does not depend on the kind of power that is exercised by the executive, but rather on the consideration that the dignity of the individual requires that he or she be told why a decision that is critical to his or her future was made.

Baker thus moves closer to a conception of discretion as exercised in a "space controlled by law,"[80] as opposed to a conception of discretion as inherently political or giving the executive "free reign within legal limits."[81]

As explained by Audrey Macklin and Sheila Wildeman (see Chapters 9 and 10), the Supreme Court's decision in *Dunsmuir* reassessed the approach to be taken to judicial review of decisions of administrative decision-makers generally. On the one hand, *Dunsmuir* said

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76 For further details, see text under section II.B, "Discretion and Academics," above.

77 Further discussion of this argument will be found in D. Dyzenhaus & E. Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v. Canada" (2001) 51 U.T.L.J. 193.

78 *Supra* note 65.

79 *Baker*, *supra* note 2 at para. 43.

80 Dyzenhaus & Fox-Decent, *supra* note 77 at 218.

81 *Ibid.* at 204.

that there ought to be only two standards of review: correctness and reasonableness. On the other hand, to identify the applicable standard, one must first determine whether it has already been established in a satisfactory manner in the jurisprudence. Only if no standard of review has been so established will one need to use the "standard of review analysis," a substitute for the "pragmatic and functional approach," to identify the proper level of deference in a given case. In regard to the review of discretion more specifically, *Dunsmuir* does not depart from *Baker*'s general orientation: both questions of law and of discretion are to be reviewed under the same approach. *Dunsmuir* does, however, clearly indicate that questions of discretion "generally attract a standard of reasonableness"[82] and that "deference will usually apply automatically"[83] to that kind of decision.

As the following section illustrates, while *Baker* and *Dunsmuir* set aside the distinction between law and discretion for the purpose of determining the approach to judicial review, they do not completely eliminate the challenges involved in that part of administrative law.

B. The Challenges

1. What Is Left of the Previous Approach?

Baker left us with the difficult question of the remaining role of the categories or heads of review that characterized the traditional "abuse of discretion" approach. This question emerges because *Baker* suggests that those heads of review still have a role to play: recall that "discretion must still be exercised … in line with general principles of administrative law governing the exercise of discretion."[84] Those principles very probably refer to the grounds for review described in the preceding section. How, then, can we reconcile the standard of review analysis with the necessity to ensure the conformity of executive exercises of discretion with those distinct grounds?

As suggested by David Mullan,[85] one might think that those among the previous grounds of review that rely in large part on questions of fact (bad faith, wrongful delegation of power, acting under dictation, or fettering of discretion), are unaffected by that approach. However, the grounds more closely related to an exercise of statutory interpretation (such as unauthorized object or purpose, irrelevant considerations, or reasonableness) might need to be approached in conformity with the appropriate standard of review. In more concrete terms, this could mean that reviewing courts will be called on to intervene only if it was unreasonable (because *Dunsmuir* suggests that this would very probably be the applicable standard in the case of discretion) for a decision-maker to have considered X or Y as a relevant or irrelevant factor, or to have considered X or Y to be the object or purpose of the statute. This is suggested by the following passage of L'Heureux-Dubé J.: "deferential standards of review

82 *Dunsmuir*, *supra* note 7 at para. 51.

83 *Ibid.* at para. 53.

84 *Baker*, *supra* note 2 at para. 53.

85 D.J. Mullan, "Deference from Baker to Suresh—Interpreting Conflicting Signals" in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 21 at 24ff.

may give substantial leeway to the discretionary decision-maker in determining the 'proper purpose' or 'relevant considerations' involved in making a given determination."[86]

This aspect of *Baker* has not been clearly settled by the Supreme Court, but there are indications courts will not easily give up on determining those elements based on what seems to be a correctness standard. Three examples will illustrate that point. In *Lake v. Canada (Minister of Justice)*,[87] LeBel J., speaking for the Court, seems to be saying that the question whether a particular consideration is a relevant factor to the decision to extradite or not is for the Court to decide on a correctness standard (in this case, the consideration that the appellant had already been convicted), while it was for the minister of justice to determine, on a standard of reasonableness, if the factor was met in that particular case.[88] In *Montréal (City) v. Montreal Port Authority*,[89] LeBel J., again speaking for the Court, said that the exercise of discretion by the authority was based on an interpretation of the relevant statute and regulations that was fundamentally flawed[90] and "contrary to the[ir] objective,"[91] suggesting that the determination of the object or purpose of the statute was for the Court to make on a correctness standard. In *Kane v. Canada (Attorney General)*,[92] Evans J. found that a decision of the Public Service Staffing Tribunal was unreasonable because it failed to consider a relevant, although not mandatory, consideration. Stratas J., dissenting, expressed the view that Evans J.'s approach had been set aside in *Baker* and *Dunsmuir*, and that the question whether a consideration was relevant or not was for the tribunal to decide on a standard of reasonableness, not for the Court. The Supreme Court granted leave to appeal,[93] and it is to be hoped that it will shed light on the precise impact of *Baker* on that account.

2. The Level of Deference

Dunsmuir raises questions more directly related to the relevance and impact of the standard of correctness in judicial review of discretionary decisions. Recall that in *Baker*, L'Heureux-Dubé J. said that discretion "must still be exercised in a manner that is within *a reasonable interpretation of the margin of manoeuvre contemplated by the legislature*."[94] *Dunsmuir*'s clear indication that questions of discretion will generally be reviewed on a standard of reasonableness is compatible with that aspect of *Baker*. Hence, in *Montreal Port Authority*, LeBel J., after highlighting the discretionary nature of the decision-making power of the authority, said that this "resolves the question of the appropriate standard of review"[95] as being reasonableness. However, Supreme Court pronouncements indicate that the discretionary nature

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86 *Baker*, *supra* note 2 at para. 56.

87 [2008] 1 S.C.R. 761 [*Lake*].

88 *Ibid.* at paras. 43 and 45.

89 [2010] 1 S.C.R. 427 [*Montreal Port Authority*].

90 *Ibid.* at para. 40.

91 *Ibid.* at 42.

92 2011 FCA 19.

93 December 1, 2011: (2 December 2011) *S.C.C. Bulletin* 1775, LeBel, Fish, and Cromwell JJ.

94 *Baker*, *supra* note 2 at para. 53 (emphasis added).

95 *Montreal Port Authority*, *supra* note 89 at para. 36.

of the decision is not necessarily the determining factor for the identification of the standard of review. In fact, the "interpretation of the margin of manoeuvre" inherent in exercises of discretion may also be viewed either as implying the interpretation of the home statute—which *Dunsmuir* says is to be reviewed on a standard of reasonableness[96]—or as involving a "true question of jurisdiction"—to be reviewed on a standard of correctness.[97] For example, in *Smith v. Alliance Pipeline Ltd.*,[98] the majority of the Court affirmed that the question whether the Arbitration Committee had the authority to determine the nature and amount of the costs that could be awarded in the context of the disputes it was called to settle was a question involving the interpretation of its home statute, hence calling for the standard of reasonableness.[99] By contrast, in *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*,[100] the statute allowed the board to impose "any additional conditions that [it] considers necessary in the public interest."[101] For Binnie J., the question what is necessary in the public interest is "for the Board to decide."[102] On the contrary, Bastarache J., writing for the majority, was of the view that this was a question going to jurisdiction, which was for the court to decide on a standard of correctness.

Because these situations are not easily differentiated, there may be reasons for concern as to the level of deference that is likely to be applied by the courts on judicial review of discretion under the contemporary approach. The recent decision of the Supreme Court in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*,[103] which questions the relevance of the category of "true questions of jurisdiction" in the standard of review analysis, points to future developments that might simplify the issue, at least in cases like *ATCO*.

As this chapter was going to press, the Supreme Court handed down *Doré v. Barreau du Québec*,[104] a judgment that raises the question of the applicable standard of review of discretionary decisions challenged on the basis of Charter arguments (on this question, see, generally, Evan Fox-Decent and Alexander Pless, Chapter 12, The Charter and Administrative Law: Cross-Fertilization or Inconstancy?). Speaking for a unanimous Court, Abella J. writes that the Charter framework—the *Oakes* test developed under s. 1—is inappropriate in the case of judicial challenges to administrative decisions as applied to individual cases, as opposed to "a law or other rule of general application."[105] For those individual cases, the Court points to a proportionality inquiry that would "integrat[e] the spirit of s. 1 into judicial review."[106] Moreover, while there were clear indications in the case law that administrative

96 *Dunsmuir*, *supra* note 7 at para. 54.

97 *Ibid.* at para. 59.

98 [2011] 1 S.C.R. 160 [*Smith*].

99 *Ibid.* at paras. 28-29.

100 [2006] 1 S.C.R. 140 [*ATCO*].

101 *Ibid.* at para. 89.

102 *Ibid.*

103 2011 SCC 61.

104 2012 SCC 12.

105 *Ibid.* at para. 39.

106 *Ibid.* at para. 57.

decisions dealing with Charter arguments were to be reviewed on a standard of correctness, in *Doré* the Court indicates that the standard of reasonableness is more appropriate in such a context, because "[e]ven where Charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant Charter values *on the specific facts of the case*."[107] The full impact of the decision still needs to be assessed.[108]

3. To "Reweigh" or Not to "Reweigh"

Recall that, in *Baker*, the Court formed the view that a number of elements (the purposes of the legislation, administrative guidelines, and the international *Convention on the Rights of the Child*[109]) pointed to the interests of Baker's children as an important element to be taken into account in the decision to deport her or not. On the facts of the case, the Court found that the decision-maker had failed to give "serious weight and consideration to the interests of the children."[110] In so concluding, the Court clearly suggested that the evaluation of the reasonableness of the decision to deport Baker included the evaluation of the "weight" that had been given to a consideration that was viewed particularly relevant to the decision: the interests of Baker's children. During the months that followed *Baker*, that aspect of the decision became the focus of judicial debate and academic discussion: when called on to review the validity of any given exercise of discretion, can the reviewing court "reweigh" the considerations that were taken into account by the decision-maker? In *Suresh v. Canada (Minister of Citizenship and Immigration)*,[111] the Supreme Court clearly said no: the authority required to "weigh" the relevant considerations in *Baker* was the minister, not the reviewing court:

> *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors.[112]

Reviewing courts must therefore limit themselves to ensuring that only relevant considerations have been taken into account; weighing is for the decision-maker alone.

The Supreme Court has reaffirmed this position on a number of occasions. For example, in *Lake*, the Court said that the minister "is in the best position to determine whether the factors weigh in favour or against extradition"[113] and that the "reviewing court's role is not

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107 *Ibid.* at para. 54 (emphasis in the original).

108 See Sheila Wildeman, Chapter 10, Pas de Deux: Deference and Non-Deference in Action, for an overview of some of the most difficult issues raised by *Doré* in relation to the general question of deference.

109 Can. T.S. 1992, No. 3.

110 *Baker*, *supra* note 2 at para. 65.

111 [2002] 1 S.C.R. 3 [*Suresh*].

112 *Ibid.* at para. 37.

113 *Lake*, *supra* note 87 at para. 41.

to re-asses the relevant factors."[114] In *Canada (Citizenship and Immigration) v. Khosa*,[115] Fish J., dissenting, would have invalidated the decision of the Immigration Appeal Division denying special, discretionary relief from a removal order, because it was based on a factor that could not reasonably be said to "outweigh, on a balance of probabilities—all of the evidence"[116] in the applicant's favour. However, the majority disagreed: reweighing was not the function of the reviewing court.[117]

One can of course wonder how this is any different from the pre-*Baker* era: as we saw from the various heads of review that were used to control discretion, courts were limited to just that same role. Moreover, if we accept that discretion is not intrinsically different from law, as *Baker* indicates, then discretion should be subjected to a form of control that permits an evaluation of the reasonableness of the decision. Now, since the difference between a reasonable and an unreasonable decision sometimes depends on the relative importance, or weight, given to the relevant considerations at play, it is difficult to reconcile the principles established in *Baker* with the position in *Suresh*, *Lake*, and *Khosa*, according to which reviewing courts must not "reweigh" the considerations at play.

It is interesting to compare these decisions with *Németh v. Canada (Justice)*,[118] which adopts a different perspective, closer to *Baker*'s teachings. In that decision, the Court criticized the minister's decision in a case related to the surrender for extradition of a refugee. The Court agreed that the relevant statute set out mandatory grounds for refusing surrender for extradition and that those grounds had to "be considered as a whole."[119] However, in the Court's view, the minister "*failed to give sufficient weight* or scope to Canada's *non-refoulement* obligations."[120] Such a conclusion is clearly at odds with *Suresh*, *Lake*, and *Khosa*, but it will take some time to assess the extent to which it signals a real shift toward the *Baker* view.

V. Conclusion

No one today denies the central, indeed, the necessary role played by discretion in the day-to-day functioning of the administrative state. Discretion allows the administrative state the flexibility that is required in order either to make individual decisions adapted to particular situations, or to conceive general, regulatory norms that will structure the way in which a particular legislative scheme is to be concretized. As we saw, however, the proper place of discretion within a state governed by the rule of law is not easy to find. From *Roncarelli* to *Baker*, courts oscillated between a view of discretion as governed by politics and one governed by legal principles. The latter now seems formally recognized by the judiciary, but as

114 *Ibid.*

115 [2009] 1 S.C.R. 339 [*Khosa*].

116 *Ibid.* at para. 149.

117 *Ibid.* at paras. 61, 64, and 66.

118 [2010] 3 S.C.R. 281 [*Németh*].

119 *Ibid.* at para. 58.

120 *Ibid.* (emphasis added).

we saw from the preceding analysis of recent case law, the concrete application of such a view of discretion presents important challenges that the courts have not entirely overcome.

In addition to its complex relationship with the rule of law, discretion questions democracy. Simply put, if executive decision-makers define the norms according to which individual cases are to be decided, or simply make individual decisions in the absence of formal legislative norms, can we say that discretion is compatible with democratic values? It is my contention that a particular conception of discretion, termed "discretion as dialogue," as opposed to a conception of "discretion as power," is likely to take up both the challenge of the rule of law and the challenge of democracy. In what follows, and by way of conclusion, I briefly advance this conception for further thought.

As I suggested at the beginning of section III, courts have been oscillating between two different conceptions of discretion at least since *Roncarelli*. I term these contrasting conceptions as "dialogue" and "power." When conceived as the former, administrative discretion must be approached from a bottom-up perspective and thought of as a dialogue[121] between the individual affected by the decision and the public authority making that decision. The exercise of discretion is here viewed as triggering a process of communication between the decision-maker and the individual concerned, in a way that prevents the former from unilaterally imposing its decision on the latter. Dialogue builds primarily on a bottom-up approach to discretionary power and seeks to foster a reciprocal relationship between the decision-maker and the individual. The distinctive features of a conception of discretion as dialogue relate to the content of the communication that it involves and to the effect that the dialogue produces on the outcome of the decision-making process. As to the content, it first allows the individual to expose the particularities of his or her situation and requires the decision-maker to demonstrate openness and listening. Second, it requires the parties to transcend their particular position in order to deliberate on the norms and values that should govern the exercise of discretion. The effect of the dialogue is essentially to narrow the range of outcomes that a decision-maker is legally entitled to reach, because the decision must be responsive to the dialogue that preceded it.

This notion of "discretion as dialogue" is different from what I term "discretion as power"—that is, discretion exercised from a top-down perspective or as a "one-way projection of authority,"[122] where discretionary powers are seen as "direct descendants of what were once considered to be unreviewable or unjusticiable executive prerogatives."[123]

In *Roncarelli*, Rand J. set the stage for a conception of discretion as dialogue that sharply contrasted to Cartwright J.'s view of discretion as an exercise of power, unchallengeable in courts, except when the statute explicitly indicates that such a challenge is authorized. In my view, discretion should be conceived as a dialogue for two reasons.

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121 This expression has been used by J. Handler and L. Sossin. See J. Handler, "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community" (1988) 35 U.C.L.A. L. Rev. 999; and L. Sossin, "The Politics of Discretion: Towards a Critical Theory of Public Administration" (1993) 36 Can. Pub. Adm. 364. But Handler and Sossin focus on cases involving vulnerable people, while I contend that dialogue applies to every exercise of discretion.

122 L.L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969) at 191-95, 204, 209.

123 D. Dyzenhaus, "Introduction" in D. Dyzenhaus, ed., *The Unity of Public Law*, *supra* note 85 at 2.

First, dialogue best explains the development that has occurred in administrative law over the past 30 years. More specifically, it explains why courts have been willing to impose procedural obligations on decision-makers exercising discretion (for example, *Nicholson*) and also an obligation to justify their decisions through a duty to give reasons when the decision has important effects on an individual (for example, *Baker*). Such findings can hardly be reconciled with a view of discretion as power, because such a view posits that the decision-maker is free to impose the decision as he or she sees fit from his or her point of view.

Second, discretion as dialogue not only explains but also justifies the evolution of the law of discretion, because it suggests how discretion is compatible with both the rule of law and democracy. On the one hand, discretion as dialogue, through its requirement of justification, places executive action within the realm of the rule of law through participation and accountability. On the other hand, by creating venues for communication and deliberation, discretion as dialogue allows the individual to participate in the articulation of the norms that will be applied to him or her and substantiates the democratic value of public action. In concrete terms, this could translate in the following way. Suppose that the associate dean of the Faculty of Law has discretion to make changes to the course schedule, but those changes are only made on request and for good reasons. Discretion as dialogue requires the associate dean to listen to the student asking for a change, and also allows the student to express what he or she sees as good reasons in general for agreeing to those requests. As a result, not only does the student expose his or her particular case, but also participates in the articulation of the norms that might guide the decision-maker in treating the request.

The question whether dialogue is likely to impose itself as the background metaphor in the years to come is not an easy one to answer. Three considerations may give reasons for concern. First, while *Baker* clearly put aside the view of discretion as exercised in a legal void, there is still considerable judicial resistance to assessing the substance of discretionary decisions on a standard of reasonableness that goes beyond absurdity or arbitrariness. The refusal (*Németh* excepted) to "reweigh" the factors supporting an administrative decision is one indication of that judicial attitude. Second, a recent decision of the Supreme Court clearly points to a reintroduction of the process/substance distinction in administrative law.[124] That distinction, which *Baker* had considerably weakened, threatens the justification for dialogue, because it does not recognize that processes may affect substance, making individual participation considerably less valuable. Third, when governments are overly sensitive to questions of national security and emergency, as they are now, temptations are great to fall back on a view of discretion that moves away from considerations of participation and accountability.[125] We are never far away from reverting to discretion as a "law unto itself." It is my contention, however, that to have at least a clear view of the competing articulations of discretion at play in these troubled times is the best weapon to protect individual liberty, democracy, and the rule of law.

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124 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

125 On the challenges that those preoccupations present for administrative law, see Craig Forcese, Administering Security: The Limits of Administrative Law in the National Security State, available online at <adminlawincontext.emp.ca.>.

SUGGESTED ADDITIONAL READINGS

BOOKS AND ARTICLES

Cartier, G., "Administrative Discretion and the Spirit of Legality: From Theory to Practice," (2009) 24 C.J.L.S. 313.

Cartier, G., "Administrative Discretion as Dialogue: A Response to John Willis (or: From Theology to Secularization)" (2005) 55 U.T.L.J. 629.

Dyzenhaus, D., "The Deep Structure of Roncarelli v. Duplessis" (2004) 53 U.N.B.L.J. 111.

Mullan, D.J., "Deference from Baker to Suresh and Beyond—Interpreting Conflicting Signals" in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 21.

CASES

Baker v. Canada (Minister for Citizenship and Immigration), [1999] 2 S.C.R. 817.

Lake v. Canada (Minister of Justice), [2008] 1 S.C.R. 761.

Montréal (City) v. Montreal Port Authority, [2010] 1 S.C.R. 427.

Németh v. Canada (Justice), [2010] 3 S.C.R. 281.

Roncarelli v. Duplessis, [1959] S.C.R. 121.

Smith v. Alliance Pipeline Ltd., [2011] 1 S.C.R. 160.

Suresh v. Canada (Minister for Citizenship and Immigration), [2002] 1 S.C.R. 3.