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Abstract
If administrative law is seen as the study of the use of power, one of its most important interests is discretion, since the limits on discretion are at the same time the limits on the power that anyone can have in our type of democracy. The massive expansion of the powers of the state, and the growth of immensely powerful committees, commissions and other bodies, against which may be juxtaposed a new and fervent interest in civil liberties and human rights, renders a re-examination of discretion and discretionary powers both essential and inevitable. It is the purpose of this essay to clarify the concept of discretion, to demonstrate how far the courts have been willing to tolerate it, and to chart some of the new paths that appear to be opening before those who advocate wide judicial review.

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DISCRETION IN ADMINISTRATIVE LAW

By J. H. Grey*

I. INTRODUCTION

If administrative law is seen as the study of the use of power, one of its most important interests is discretion, since the limits on discretion are at the same time the limits on the power that anyone can have in our type of democracy. The massive expansion of the powers of the state, and the growth of immensely powerful committees, commissions and other bodies, against which may be juxtaposed a new and fervent interest in civil liberties and human rights, renders a re-examination of discretion and discretionary powers both essential and inevitable. It is the purpose of this essay to clarify the concept of discretion, to demonstrate how far the courts have been willing to tolerate it, and to chart some of the new paths that appear to be opening before those who advocate wide judicial review.

II. THE CONCEPT OF DISCRETION

Discretion may best be defined as the power to make a decision that cannot be determined to be right or wrong in any objective way. A university that interviews prospective students has the power to admit some applicants and reject some; an executive may choose a secretary out of a field of applicants; the sovereign may pardon some convicts and not others. While one could disagree with any of these decisions, there is no body or person entitled, as a general rule, to correct them and declare them wrong.1 Lord Diplock put it well in a recent case when he said:

"The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred."2

It would not be incorrect to say that discretion involves the creation of rights and privileges, as opposed to the determination of who holds those rights and privileges.

As soon as this definition has been postulated, it becomes tempting to describe in theoretical terms the relationship between those who have discretion and those who are subject to it. In his famous essay, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," Hohfeld attempted to

1 Although the courts possibly could act in cases of unlawful practices by the university or the sovereign. The executive could also be caught by modern antidiscrimination laws. This essay will attempt to underline exceptions to this categorical statement.

describe analytically the types of legal relations persons may have with each other.\textsuperscript{3} To do this he divided relations into pairs of complementary concepts such as right-duty, power-liability, and no-right-privilege. When X has a right against Y, Y must have a duty towards X. A similar formula can be used for each of the pairs of concepts.

Fuller simplified the scheme when he said:

The Hohfeldian analysis discerns four basic legal relations: right-duty, no-right-privilege, power-liability, and disability-immunity. Of these, however, the second and fourth are simply the negations of the first and third. Accordingly the basic distinction on which the whole system is built is that between right-duty and power-liability; this distinction coincides exactly with that taken by Hart.\textsuperscript{4}

How does discretion fit into this system? It is clear that as long as there is a discretion, the relationship fits into the power-liability side of Fuller's division. But it is also clear that as soon as the limits of discretion are reached, the holder of a discretion may be bound to a duty; the subject of a liability may have a right. In short, a discretion may be coupled with a duty.\textsuperscript{5} The point is made clear by Colin Tapper in his essay, "Powers and Secondary Rules of Change," when he says:

Within a group the relationship is best described as one of limiting negatives. The two terms are exclusive and exhaustive. A must have either a duty or a privilege as against B. He cannot have neither or both in relation to a given situation. This does not hold true of the groups themselves. It does not follow that because A has, say, a duty as against B, that he cannot therefore have a power or a disability against him. In fact, because the two groups have internally an identical logical structure, the converse is true. If A has a duty against B, he must also have a power or a disability against him. This follows because it is implicit in the decision that A has a duty against B that a legal relationship exists between them.\textsuperscript{6}

The duty may be to exercise the power, i.e., address one's right to a discretionary power one possesses,\textsuperscript{7} or it may be merely a duty to act honestly and in good faith.\textsuperscript{8} In all such cases, the subject of the discretion will have a correlative "right."

We can therefore summarize the debate by saying that discretion is a power that is almost always or always is attached to some level of duty. Review of discretion means determining how far the power extends and at what

\textsuperscript{3} Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913), 23 Yale L.J. 16.

\textsuperscript{4} Fuller, The Morality of Law (New Haven and London: Yale University Press, 1964) at 134. This passage comes in a footnote, however, and was perhaps not intended to have the significance it is given here.

\textsuperscript{5} It will be argued later that, at least in public law, it always is.


For purposes of this essay, the third edition of Dias will be used throughout in preference to the fourth (1976) edition, which has less relevance for us.

\textsuperscript{7} Tapper, id. at 272.

\textsuperscript{8} I have searched in vain for a public law example of bad faith or dishonesty that the courts decided to tolerate because of "unreviewable discretion."
point the "duty" is ignored and the correlative "right" violated. As soon as that point is reached, the courts can interfere; before that they will abstain from doing so.

It is useful in dealing with the concept of discretion to consider the notions of "weak" and "strong" discretion as explained by Dworkin:

I call both of these senses weak to distinguish them from a stronger sense. We use 'discretion' sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question.9

Dworkin used this distinction in order to show that "strong discretion" does not exist in law and therefore legal positivism fails as a philosophy. This is far removed from ordinary issues of discretion in administrative law. Nevertheless, the analysis suggested above is useful in explaining Dworkin's distinction. The "weaker" the discretion, the closer the point at which a "duty" exists. Conversely, the "stronger" the discretion, the more distant and more nebulous the duty.

"Strength" and "weakness" of a discretion are clearly part of a continuum and not necessarily "either-or" alternatives. Dworkin appears to recognize this when he says:

The strong sense of discretion is not tantamount to license, and does not exclude criticism. Almost any situation in which a person acts (including those in which there is no question of decision under special authority, and so no question of discretion) makes relevant certain standards of rationality, fairness, and effectiveness. We criticize each other's acts in terms of these standards, and there is no reason not to do so when the acts are within the center rather than beyond the perimeter of the doughnut of special authority.10

Logically, the "strongest" discretion would mean untrammeled power to act in any way that the party possessing the power desired. There would be no duty at all, not even one of good faith. It goes without saying that the "stronger" the discretion claimed by officials, the greater the controversy about the possibility of this type of power in our law.

One more point should be noted in connection with the concept of discretion—it is not limited to public law. Private law is replete with examples of discretion.11 Since Hohfeld dealt almost exclusively with private law,12 the Hohfeldian analysis is, if anything, more apt in private law.13 In any case, there is very little difference between private and public law in this field and one must agree with Dias when he says of powers: "Broadly, they may be

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10 Id. at 46 (Summers), 33 (U. Chi. L. Rev.). This weakens Dworkin's case against the existence of "strong" discretion. He should perhaps have spoken of the "limits of strong discretion" and concluded that the "strongest" type of discretion does not exist.
11 Discretionary trusts are perhaps the best example.
12 Tapper, supra note 6, at 247.
13 See, for instance, Harris, Trust, Power and Duty (1971), 87 L.Q. Rev. 31.
divided into 'public' and 'private', but for present purposes, nothing turns on the distinction.'

While we shall continue to treat discretion as a problem of public law, we should keep in mind that much of what we conclude will be applicable to private law fields.

Once we have defined and, to some extent, discussed the concept of discretion, it becomes necessary to consider it together with some of the other fundamental notions of administrative law and to place review of discretionary powers in the general context of judicial review.

III. DISCRETION AND JURISDICTION

Discretion and jurisdiction are both words of immense importance in administrative law and since they are sometimes interchangeable, it is not difficult to confuse them.

Discretion has been defined above. Jurisdiction is a more general concept of power to do a particular thing, whether it involves discretion or not. One could not improve on the formulation given by Dussault: "Il peut, en fait, se définir comme la capacité d'agir dans un domaine précis d'autorité."

It follows from this that in order to have discretion one must have jurisdiction, but that the converse is not necessarily true. If one exceeds the bounds of one's discretion, one automatically exceeds one's jurisdiction, but the limits of jurisdiction can be violated even by those who have no discretion. For instance, an official who has, in the Hohfeldian sense, a duty only and no power can act ultra vires by failing to carry out his duty.

Some have viewed discretion as an element tending to extend jurisdiction. However, the better view is that discretion is merely one type of jurisdiction. Courts will always review excesses of jurisdiction, and thus an act beyond the limits of discretion will usually be reviewed. A fact at times not clearly understood is that, since powers and duties are often intertwined, an official who does possess discretion may act ultra vires for reasons having nothing to do with the discretion as such. The presence of discretion should therefore not, in itself, suffice to prove unreviewability on other jurisdictional grounds.

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14 Dias, supra note 6, at 267.
15 There are differences, of course, but these do not seem to lie in the area of basic concepts.
16 Dussault, supra note 2, at 1266. De Smith's definition in Judicial Review of Administrative Action (3d ed. London: Stevens & Sons Ltd., 1973) at 96 is more specific: "Jurisdiction means authority to decide." "Decide" may, however, be too specific a word, for one may have authority to act without necessarily making decisions.
17 Dussault, supra note 2, at 1266: "Et cette autorité comprend parfois une part de discrétion lui permettant d'agir avec plus ou moins de liberté, sans risquer d'être importunée par les tribunaux judiciaires."
19 This error, it is respectfully submitted, was made by Mr. Justice Greenberg in Services Juridiques de St-Louis Inc. v. Commission des Services Juridiques, unreported, Qué. S.C. no. 03-00-1646-775. (The case is presently under appeal.)
IV. DISCRETION AND THE ADJECTIVES “ADMINISTRATIVE” AND “JUDICIAL.”

The words “judicial,” “quasi-judicial” and “administrative” play a great role in administrative law (and have played a greater one) when they modify the noun “function.” It has always been a serious obstacle to judicial review when an official has been held by the courts to have performed an administrative function.

Sometimes administrative functions were held to be almost immune from review, at least on grounds of natural justice;20 at other times, they were at least held immune from certiorari.21 The more modern approach makes administrative functions reviewable for gross violations of natural justice on the theory of the “duty to act fairly.”22 This doctrine is clearly established in Britain and in other Commonwealth countries. In Canada, its position is more tenuous,23 but, in the opinion of this writer, its existence, if not its scope, is beyond question following the decision in Hardayal.24 But there is no doubt that it is more difficult to obtain review if a function is held to be administrative than if it is quasi-judicial or judicial.

How does this affect the use of the adjective “administrative” to describe discretion? In certain cases, the use is exactly the same.25 This has its logic, because functions that are held by the courts to be administrative almost always have a component of discretion or no debate could have arisen. In the case of a pure duty without any power, mandamus will lie to compel its performance.26 However, it seems certain that the “administrative” or “quasi-judicial”

22 See MMI v. Hardayal, [1978] 1 S.C.R. 470 at 479, 75 D.L.R. (3d) 465 at 471: It is true that in exercising what, in my view, is an administrative power, the Minister is required to act fairly and for a proper motive and his failure to do so might well give rise to a right of the person affected to take proceedings under s. 18(a) of the Federal Court Act but, for the reasons which I have outlined, I am of the opinion that the decision does not fall within those subject to review under s. 28 of the said Federal Court Act.
26 See Garner, Administrative Law (4th ed. London: Butterworths, 1974) at 183: “The order is therefore not restricted in operation to orders against inferior tribunals and government agencies required to act judicially or quasi-judicially.”
aspect of a dispute refers to the type of function and not to the type or intensity\textsuperscript{27} of discretion. The case of \textit{Mitchell v. The Queen} is an excellent illustration.\textsuperscript{28} The reason for the Court's refusal to interfere with the Parole Board's exercise of discretion was that, following \textit{McCaud} and \textit{Howarth}, revocation of parole was considered administrative, and not because the type of discretion used in decisions about parole was essentially different from discretion exercised by the courts.\textsuperscript{29} It would therefore seem proper to limit the use of "administrative" and "quasi-judicial" to functions and to avoid applying it to discretion.

However, the word is sometimes used with discretion, and it is used to raise the spectre of unreviewability. While the concept of unreviewable discretion will be considered at length further on, this is the proper time to consider the notion of "administrative discretion."

A striking example of this usage is found in the recent Federal Court decision of \textit{Bhadauria v. MMI}, in the course of which Mr. Justice Walsh said:

In any event the Court has no jurisdiction to grant the relief sought, which would require the Court to substitute itself for the immigration or visa officer and make a determination on a matter within his administrative discretion, and to issue an order to the Minister with respect to an administrative matter. The decision to grant or refuse admission to Canada as a permanent resident in accordance with the \textit{Immigration Act} and \textit{Immigration Regulations} is an administrative decision and if refused is not subject to judicial review or review by anyone other than the Minister.\textsuperscript{30}

It is submitted that the honourable justice did not intend to postulate an unreviewable type of "administrative discretion." Rather, he intended to say, first, that the function was administrative and, therefore, not subject to the full application of the principle of \textit{audi alteram partem},\textsuperscript{31} and, second, that where a discretion exists, the court of review will not substitute its opinion for that of the official or the court who has the discretion, if no excess of jurisdiction was committed. The second point almost goes without saying once one has defined discretion as a power to make decisions for which no "right formula" exists.\textsuperscript{32} This analysis is consistent with the short judgment of Mr. Justice Abbott in \textit{Koula Gana v. MMI}, on which the \textit{Bhadauria} decision is based.\textsuperscript{33}

The recent judgment of the Federal Court of Appeal in \textit{Martineau v. Matsqui Institution} can also be interpreted in the same way.\textsuperscript{34} Briefly, this means that discretion is not generally reviewed on the merits.

\textsuperscript{27} I.e., "strong" or "weak" discretion.
\textsuperscript{32} See \textit{Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council}, supra note 2, and accompanying text.
\textsuperscript{34} \textit{Martineau v. Matsqui Inst. (No. 2)}, supra note 20.
If Bhadauria, Koula Gana and Martineau\textsuperscript{38} were given a broader meaning, they would constitute a threat to the notion of fairness in discretionary matters.\textsuperscript{39} One could argue on this basis that, however unfair an official exercising the “administrative” discretion might have been in his procedure, only political redress is possible.\textsuperscript{37} When viewed in perspective, these cases say no such thing. Rather, they reiterate that administrative functions may be exercised properly with less form than judicial ones, and also that courts do not review proper exercise of discretion on the merits. This does not mean that where an official acts unfairly (and, therefore, it is submitted, commits a breach of duty), or otherwise acts outside his jurisdiction, the courts cannot interfere.

The conclusion we reach is that the term “administrative discretion” is a confusing and unnecessary addition to the already complex lexicon of “functions” and “discretions” in this area of law.\textsuperscript{38}

Another argument against the use of words such as “judicial” to describe discretion is that discretion can clearly exist in all types of functions. Obviously, administrative functions can be discretionary and that is what the Bhadauria and the Gana cases are about.\textsuperscript{30} But, equally clearly, judicial functions may be discretionary. For instance, the leading case, Boulis v. MMI, concerns the Immigration Appeal Board, which is a court of record.\textsuperscript{40} There are different rules dealing with the procedure to be followed in these cases, but as far as the discretion is concerned, the principles of review are the same. The rule that no review on the merits is possible and that the courts will not substitute their opinions for those of competent authorities is well-established, both where the discretionary function is judicial and where it is administrative. Therefore, no possible gain can be found in classifying “discretions” in this way.

V. DISCRETION AND THE ADJECTIVE “MINISTERIAL”

The adjective “ministerial” has been used both to describe powers where there is virtually no discretion and to describe powers that are very wide.\textsuperscript{41} The very fact that such different meanings have been given to this word should put us on guard and, indeed, no advantageous use can be found for it. Like “administrative” and “judicial,” this is a term that leads to confusion and should be eschewed.

\textsuperscript{38} Bhadauria v. MMI, supra note 30; Gana v. MMI, supra note 33; Martineau v. Matsqui Inst. (No. 2), id.
\textsuperscript{39} See MMI v. Hardayal, supra note 22.
\textsuperscript{41} See de Smith, supra note 16, at 64, warns against any use of the adjective “quasi-judicial.” With respect to discretion, such a warning should be doubly potent and apply to all such terms.

\textsuperscript{30} Bhadauria v. MMI, supra note 30; Gana v. MMI, supra note 33.
\textsuperscript{33} See de Smith, supra note 16, at 59-60; and Dias, supra note 6, at 267-68. The word “ministerial” appears with no explanation in Re Multi-Malls Inc. and Min. of Transp. and Commun. (1976), 14 O.R. (2d) 49 (C.A.) at 60. It is also used with the noun “function” in Services Juridiques de St-Louis v. Commission des Services Juridiques, supra note 19, and here it seems to be used as a synonym for “duty.”
VI. GENERAL PRINCIPLES OF REVIEW OF DISCRETION

For all the confusion surrounding the concept of discretion, the general principles of review of discretion are simple and accepted by interventionists and conservatives alike. A recent Supreme Court decision sums them up:

In my opinion, however, such an appeal can succeed only if it be shown that the Board (a) has refused to exercise its jurisdiction or (b) failed to exercise the discretion given under s. 15 in accordance with well established legal principles. As to those principles, Lord Macmillan speaking for the Judicial Committee said in *D. R. Fraser and Co. Ltd. v. Minister of National Revenue* at page 36:

The criteria by which the exercise of a statutory discretion must be judged have been defined in many authoritative cases, and it is well settled that if the discretion has been exercised bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally, no court is entitled to interfere even if the court, had the discretion been theirs, might have exercised it otherwise.42

If the Canadian Supreme Court is considered a very conservative body, it is for once in agreement with Lord Denning, whose words, although differently slanted, mean exactly the same thing:

Undoubtedly those statutory provisions give the Minister a discretion as to the issue and revocation of licences. But it is a discretion which must be exercised in accordance with the law, taking all relevant considerations into account, omitting irrelevant ones, and not being influenced by any ulterior motives.43

It should be noted that neither of these cases can be taken to mean that there is in all cases a duty to exercise a discretion. There are many powers that may, but need not, be exercised.44 Even where there is no duty to exercise the discretion, however, the restriction on the use or nonuse of discretionary powers, as explained in *Boulis* and *Congreve*, applies.46 These can be summarized as a duty to act:

(a) in good faith,
(b) uninfluenced by irrelevant considerations or motives,
(c) reasonably, and
(d) within the statutory bounds of the discretion.

The last duty is so obvious that it hardly need be specified.46 As long as these duties are respected, the courts will not interfere, because that would mean usurping the discretion.47

If the duties are breached, courts will often correct the situation. What do these duties mean?

(a) *The duty to act in good faith*

It has become an accepted principle that bad faith vitiates the use of a discretion and that bad faith has a broader meaning in this field than in many others. Wade says:

43 See *Bhadauria v. MMI*, supra note 30.
The judgments discussed in the last few pages are freely embellished with references to good and bad faith. These add very little to the true sense, and are hardly ever used to mean more than that some action is found to have a lawful or unlawful purpose. It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words, they impute no moral obliquity.48

Rand J. defined "good faith" in Roncarelli v. Duplessis:

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.49

There exist, of course, cases of the "moral" type of bad faith,50 and, in other cases, it is difficult to determine whether "moral" bad faith is involved.61 Nevertheless, it is clear that the notion of bad faith is being used to describe various forms of behaviour, ranging from clear moral turpitude to errors not intrinsically different from those influenced by irrelevant considerations or unreasonable acts.

It would probably serve clarity best if the expression "bad faith" were limited to situations where moral turpitude was present and if "irrelevant motives" and "unreasonableness" were kept separate from it.53 At present, it is difficult to be certain what type of error of discretion is invoked and discussion can become very muddled. For instance, it is difficult to see the place of "good faith" in relation to discretion in Wade's otherwise excellent analysis of the subject.54 A narrower definition would bring everything into focus.55

(b) The duty not to be influenced by irrelevant considerations or motives

This duty appears to cover two types of problems. First, it forbids the nonexercise of discretion for ulterior motives, such as personal gain, dislike, ethnic feeling and so on. Second, and more significantly, it forbids the use

51 E.g., Roncarelli v. Duplessis, supra note 49; Congreve v. Home Office, supra note 43.
52 Gershman v. Manitoba Vegetable Producers' Marketing Bd., supra note 50.
53 It goes without saying that hermetic separation is impossible and that all three will often be present. Indeed, Rand J.'s definition of good faith (Roncarelli v. Duplessis, supra note 49) is a perfect illustration of this.
54 Wade, supra note 40, particularly at 372-75, but de Smith, supra note 16, at 304 makes a clear distinction between the concepts.
55 This is not to quarrel in any way with the result or reasoning of Roncarelli v. Duplessis, supra note 49, but only to quibble about a definition.
of discretion for purposes other than those intended by the instrument that created the discretion. Although the two cases are frequently difficult to distinguish, it is possible to point to examples that are more one than the other.

The celebrated case of Smith and Rhuland Ltd. v. The Queen is an example of the first type of error, caused by consideration of an individual's political views. To an attempt to refuse certification of a union because its secretary-treasurer was a Communist, Mr. Justice Rand answered as follows:

I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. Regardless of the strength and character of the influence of such a person, there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit.

Examples of the second type of misuse of discretion abound, particularly in recent years. Perhaps the classic statement can be found in Lord Reid's judgment in Padfield v. Minister of Agriculture, Fisheries and Food:

Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.

This type of thinking was applied in a ringing manner in Congreve v. Home Office, where Lord Denning emphasized that discretionary powers to cancel a licence could not be used as a way of enforcing the purchase of a new, higher-priced licence, and he made clear the importance of this principle for human rights in a democratic society.

An important recent Canadian application of this type of analysis can be found in Re Multi-Malls Inc. and Minister of Transportation, where Lacourcière J.A. said:

I am of opinion that the Minister of Transportation and Communications allowed himself to be influenced by extraneous, irrelevant and collateral considerations which should not have influenced him in the exercise of his discretion to refuse the entrance permit. It seems clear that the purpose of the Act in general is not to ensure proper land use planning but generally to control traffic.

This is clearly one of the main battlegrounds in administrative law and

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56 Was Roncarelli v. Duplessis, id., a case of personal vindictiveness or was it a case of tragic (in the classical sense) disagreement about the nature and purpose of discretion and government between Duplessis and the courts?
57 Smith and Rhuland Ltd. v. The Queen, [1953] 2 S.C.R. 95.
58 Id. at 100.
60 Congreve v. Home Office, supra note 43.
61 Re Multi-Malls, supra note 41, at 62-63.
an area of some uncertainty. An “interventionist,” such as Lord Denning, has
great scope for judicial review, for the court is the ultimate arbiter of the
meaning and purpose of a statute as well as of the relevance and irrelevance
of various considerations. On the other hand, a “conservative” could, without
repudiating any of the basic principles of review, rely on the more restrictive
views of Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v.
Wednesbury Corp. and on the Supreme Court of Canada in Boulis v. MMI to
argue that inconsistency with a statute or its purposes should be invoked only
in flagrant cases, and never when an official has acted in a remotely reason-
able manner.62

In England, the interventionist theory clearly prevails. In Canada, de-
spite the excellent example of Multi-Malls, some doubt remains. While Boulis
v. MMI could clearly be used by either camp, it is distinctly conservative in
flavour. Moreover, recent judgments of the Federal Court, while not directly
on point, also showed a marked tendency towards strict construction and
narrow review.63 However, given the fact that Canadian courts have in the
past pioneered in establishing the principles of review,64 and that the inter-
ventionists have already won battles here,65 it is most likely that our law is
in substance the same as England’s, and that our courts possess vast powers
of review of discretion by proper construction of statutory purposes.

An interesting side issue is found in the question of acceptance or refusal
of evidence or weight given to evidence. When do such matters amount to
“irrelevant considerations”? It is clear that in certain cases they do,66 but it is
also clear that it is harder to win on evidentiary issues than where a power is
used for the wrong purpose. Weight of evidence, in particular, is a very diffi-
cult ground for upsetting the otherwise legitimate exercise of a discretion. In
Re Township of Innisfil and City of Barrie, Robins J. said:

Once it is recognized that the Board is entitled to accept the policy statement, it
follows, in my view, that it is for the Board to determine the weight to be given
to it. It is not for the Court to enter the arena in such proceedings and judge the
effect to be given material before the body charged with the decision. If a matter
may properly be considered it is, I think, “scarcely possible for a court ever to say
that too much weight was given to it or that it ought not to have been allowed
to outweigh other considerations”, to adopt the words of Windeyer, J. in R. v.
Anderson Exp. Ipec-Air Pty. Ltd. (1965), 113 C.L.R. 177 at p. 205.67

While it is impossible to formulate a general rule, it is therefore possible

223, [1947] 2 All E.R. 680. This case was at least partially discounted, however, in
Re Multi-Malls, id. See also Boulis v. MMI, supra note 40.
63 See Martineau v. Matsqui Inst. (No. 2), supra note 20; Kurek v. Solicitor General,
unreported, Federal Court (Tr. Div.) T-1324-75; Inuit Tapirisat of Canada v. Léger
64 Roncarelli v. Duplesis, supra note 49.
65 Re Multi-Malls, supra note 46; Re Doctors’ Hosp. and Min. of Health (1976),
66 See de Smith, supra note 17, at 301-03; Re Bernstein and College of Physicians
67 Re Township of Innisfil and City of Barrie (1978), 17 O.R. (2d) 277 at 287, 80
to state that in the evidentiary area the “conservative” view appears stronger than it does where a discretionary act is challenged on the merits.68

(c) The duty to act reasonably

There have been many expressions which have here been subsumed under the word “reasonably.” In Boulis v. MMI, the Supreme Court sanctioned the use of “arbitrarily.”69 De Smith uses “manifest unreasonableness.”70 It is suggested that parallels can be drawn with private law, and that conduct so arbitrary, capricious, or blatantly erroneous that no reasonable, properly directed person could have engaged in it, will be grounds for review. As Lord Diplock said:

My Lords, in public law “unreasonable” as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.72

In analysing Dworkin’s categories of discretion, we noted that there is no single “strong” and “weak” discretion, but rather a continuum.73 Nowhere is this more evident than here, for clearly what is reasonable in one place will be unacceptable in another.74 In a statement applicable to other areas of discretion, but particularly apt here, Lord Wilberforce said: “But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed; each statute or type of statute must be individually looked at.”74

One of the criteria the courts may use is whether reasonableness is prescribed by statute, and if so, how the statute is phrased and what are its purposes.75 But, it is submitted, the presence of a duty to act reasonably need not be specified; it is always presumed.

Without doubt, the most significant development in the use of reasonableness as a ground for review is the case of Secretary of State for Education v. Tameside Metropolitan Borough Council.76 In that case, the Secretary of State was given a statutory power to overrule an elected local council if he was “satisfied . . . that any local education authority . . . have acted or are proposing to act unreasonably.” A Secretary of State, who was a member of the Labour Party, used this section to block the implementation of the poli-

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68 As with many of our distinctions, however, the boundaries are often blurred between evidentiary and other issues.
69 Boulis v. MMI, supra note 40.
70 De Smith, supra note 16, at 304.
71 Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council, supra note 2, at 1064.
72 Dworkin, supra note 9.
73 Id. See also note 10, supra, and accompanying text.
74 Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council, supra note 2, at 1047.
75 Special wartime laws, for instance, will rarely be reviewed; see note 129, infra, and accompanying text.
76 Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council, supra note 2.
cies of a Conservative local authority. There was then a conflict of discretion—the discretion of the Secretary of State in deciding when “he is satisfied” and the discretion of the local Council to make policy, which should be overturned only for unreasonableness.\(^7\) There was an explicit finding of good faith on the Minister’s part.\(^7\) Furthermore, there was no conclusive evidence that the Minister misdirected himself or considered irrelevant matters.\(^7\) Nevertheless, the Minister’s decision was reviewed and quashed.

The explanation must be that the Secretary of State made a decision so manifestly unreasonable about the reasonableness of the local Council’s policies that the Court was entitled to quash it even without an explicit error or misdirection on the Minister’s part. If so, this ground can be used to review blatant errors of law or fact even when they do not go to jurisdiction. All that is necessary is that the discretionary decision be such that no reasonable person could make it.\(^8\)

Is the “duty to be fair”\(^8\) always part of the duty to act reasonably? Generally, the duty to be fair has been viewed as a procedural one,\(^8\) and it is dangerous to make hard and fast rules about the procedure for the exercise of discretionary powers. Nevertheless, de Smith suggests that “fairness” has a substantive side and applies in some form to most questions of discretion.\(^8\) This conclusion is strengthened by a passage in \textit{Re Multi-Malls}\(^8\) where fairness as expounded in \textit{R. v. Liverpool Corp.}\(^8\) is accepted as a basic principle in what is, in essence, a case on discretion. It is thus very likely that the doctrine of “fairness” will apply, to some extent, to all use of discretion, although the extent will vary greatly from discretion to discretion.

\textbf{(d) The duty not to exceed the statutory bounds of the discretion}

It is patently obvious that, if an administrative body that is given the discretionary power to fix railway rates purports to fix import quotas, its decision is null and void on the \textit{ultra vires} principle. Since statutory limits of a discretion will often be narrowly construed, especially where private rights might be affected,\(^8\) this principle could prove practical in preventing abuse of power. Even in less blatant cases, discretionary powers might be reviewed if they are not exercised in strict compliance with the statutes or regulations creating them. An obvious example of this is the illegal subdelegation of dis-

\begin{itemize}
\item \(^7\) It is likely that, with the growth of government, coupled with the increase in regulation and the number of regulatory agencies, such conflict will become very common.
\item \(^7\) \textit{Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council, supra} note 2, at 1065 \textit{per} Lord Diplock.
\item \(^7\) \textit{Id.} at 1071 \textit{per} Lord Salmon.
\item \(^7\) \textit{Id.} at 1064; see also note 71, \textit{supra}, and accompanying text.
\item \(^8\) See \textit{MMI v. Hardayal, supra} note 22.
\item \(^8\) See \textit{Mullan, supra} note 23.
\item \(^8\) \textit{De Smith, supra} note 16, at 303.
\item \(^8\) \textit{Re Multi-Malls, supra} note 41, at 65.
\item \(^8\) See \textit{Manitoba Gov’t Employees Ass’n v. Manitoba, [1978] 1 S.C.R. 1123, 79 D.L.R. (3d) 1.}
\end{itemize}
cretionary powers. Generally, powers must be exercised by those entrusted with them by law and not by others.\(^8\)

It is much more difficult to decide when the exercise of power is tainted, if exercised under compulsion or under the influence of another. The case of *Township of Innisfil and City of Barrie* illustrates that considerable reliance may be placed on government policy.\(^8\) On the other hand, it would be logical to assume that there is a point at which obedience becomes equivalent to subdelegation and therefore illegal.\(^8\)

Exercise of a discretionary power so as to violate any law or make it inoperative will almost always be viewed as illegal.\(^9\) This is a necessary consequence of the rule of law, for otherwise officials exercising discretion would be exempt from it.

VII. THE PROBLEM OF UNREVIEWABLE DISCRETION

In the preceding section, we considered the principles of review of discretion applicable to most questions, but it is still intriguing to ask if there may not exist certain powers not subject to any form of review whatsoever. In our analytical framework, this would mean a power with no duties attached and therefore no rights arising from either its exercise or nonexercise.

In *Roncarelli v. Duplessis*, Rand J. made a classic, oft-repeated statement which might have put an end to the debate:

In public regulation of this sort there is no such thing as absolute and untrammeled “discretion”, that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. “Discretion” 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.\(^9\)

However, dicta about unreviewability also abound. We could cite, for instance, the Federal Court of Appeal:

There are, however, ministers and officials who have purely administrative powers that are not subject to judicial review. Such persons must also exercise their powers on a fair and just basis because they are acting on behalf of the public; but they are answerable, not to the Courts, but to their superiors or to the appropriate Legislature.\(^8\)

\(^{87}\) *Ramawad v. MMI*, [1978] 2 S.C.R. 375. There are exceptions to this principle, but they are outside the scope of this essay.

\(^{88}\) *Re Township of Innisfil and City of Barrie*, supra note 67.

\(^{89}\) E.g., the illegality of Mr. Archambault’s act in *Roncarelli v. Duplessis*, supra note 49.


\(^{92}\) *Martineau v. Matsqui Inst. (No. 2)*, supra note 20, at 328.
It is true that, as with *Bhadauria v. MMI*, such dicta can be explained and integrated into a scheme which stops short of total unreviewability. Nevertheless, the dispute has remained.

It is interesting to note that de Smith queries the existence of unreviewable powers and then gives a very subtle and cautious answer. Wade, on the other hand, spends less time on the point, but provides, it is suggested, the better answer:

Although the Crown’s lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

In order to see whether any powers under our law are totally outside the control of the courts, we shall look at several types of powers that have been placed in such a category to see how far their immunity extends.

A. Administrative functions subject to political control only

While there have long been restrictions on the review of administrative functions, discretionary or not, courts have rarely postulated complete unreviewability, save on the merits of a discretionary decision. Nevertheless, several recent dicta by the Federal Court might suggest such a doctrine.

Chronologically, the first was *Kurek v. Solicitor General of Canada*. This case dealt with the Crown prerogative of using section 21 of the *Immigration Appeal Board Act*, but its ramifications became far broader when Addy J. said:

In any event, if the decision was a judicial or quasi judicial one it is reviewable only by the Court of Appeal under section 28 and not by the Trial Division. If it was a purely administrative decision, then, since it was rendered by the minister in the exercise of the function with which he was charged by Parliament under the Act, he is answerable first of all to Cabinet and finally to Parliament for any such decision and not to the Courts.

In *Inuit Tapirasat of Canada v. Léger*, Marceau J. included a similar statement:

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83 *Bhadauria v. MMI*, supra note 30.
84 De Smith, supra note 16, at 253-62.
85 Wade, supra note 48, at 340.
86 We should keep in mind Lord Denning’s view that the courts always retain a power of last resort. For instance, in *A.G. v. Chaudry*, [1971] 1 W.L.R. 1614, [1971] 3 All E.R. 938, Lord Denning said at 1624 (W.L.R.), 947 (All E.R.): “The High Court has jurisdiction to ensure obedience to the law whenever it is just and convenient so to do.”
88 See *Bhadauria v. MMI*, supra note 30, and accompanying text.
89 *Kurek v. Solicitor General*, supra note 63.
91 *Kurek v. Solicitor General*, supra note 63.
In my view, in making decisions under 64(1), the Governor-General in Council makes them on the basis of political accountability and not on a judicial or quasi-judicial basis. The scheme of the statutes pertaining to telecommunications is that decisions involving broad economic questions are entrusted to the CRTC which is under a strict duty to hold a hearing and to afford the parties a full opportunity to be heard. The Commission may itself at any time review, rescind, change, alter or vary any of its orders or decisions (section 63 of the National Transportation Act), and these orders or decisions, moreover, are subject to appeal to, and review by the Courts (section 64(2) to (7) of the Act). The power to “vary or rescind” entrusted by section 64(1) to the Governor-General in Council is, as I understand it, a power of a different nature altogether: it is a political power for the exercise of which the Cabinet is to be guided by its views as to the policy which in the circumstances should be followed in the public interest. Its exercise has nothing to do with the judicial or quasi-judicial process. The party who proceeds to adopt the means of questioning an order or a decision of the CRTC provided by section 64(1) is choosing to resort to a political, not a judicial process.102

Despite this sweeping statement, the Inuit case can be explained by the fact that the plaintiffs were really challenging the merits of a policy decision.103 More difficult to rationalize is Martineau v. Inmate Disciplinary Board, Matsqui Institution (No. 2).104 While this case dealt largely with certiorari,105 the appendix to the reasons of Laskin C.I.C. contained the following paragraphs:

3. There are, however, ministers and officials who have purely administrative powers that are not subject to judicial review. Such persons must also exercise their powers on a fair and just basis because they are acting on behalf of the public; but they are answerable, not to the Courts, but to their superiors or to the appropriate legislature. They are not required to act on a quasi-judicial basis.

4. Where a person is aggrieved by a decision that should have been made on a quasi-judicial basis, he may attack it by way of a certiorari, proceedings in the nature of certiorari or s. 28 proceedings; but where he has a grievance in respect of other decisions that are required to be made on a fair or just basis, (apart from an allegation of nullity or voidability if the decision becomes the subject of legal proceedings) his remedy is political.106

With respect, it seems that these judgments107 are incompatible with the notion of a duty to be fair, and, as such, are incompatible with the Supreme Court decision in Hardayal.108 If the intention of the Federal Court was to say that administrative functions cannot ever be reviewed, then, with respect, it is suggested that the Court was in error. If, on the other hand, the Court wanted to underline once again that, where an administrative (or any other) function is discretionary, it will not be reviewed on the merits, then the judgments are very much in the mainstream of legal thinking and one can only regret the use of such sweeping language that seemed to imply much more.

Another possible explanation for these cases is that they reiterate that

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102 Inuit Tapirasat of Canada v. Léger, supra note 63, at 32.
103 See Bhadarau v. MMI, supra note 30, and accompanying text; and the discussion on “policy” and unreviewability, infra.
104 Martineau v. Matsqui Inst. (No. 2), supra note 20.
105 See Mullan, supra note 21.
106 Martineau v. Matsqui Inst. (No. 2), supra note 20, at 328. This passage was partially cited supra note 92.
107 An exception is Inuit Tapirasat of Canada v. Léger, supra note 63.
108 MMI v. Hardayal, supra note 22. See also Mullan, supra notes 23 and 21. We should remark that MMI v. Hardayal is not mentioned in Martineau v. Matsqui Inst. (No. 2), supra note 20.
government policy decisions are harder to review than most other kinds. But, as we shall see, such decisions are not, despite the relatively strong discretion involved, completely immune from review, and the Federal Court probably did not intend such a result.

In conclusion, it would almost certainly be wrong to classify all or even some discretionary administrative functions as reviewable only before the legislature, and not before the courts. Such a position would wipe out the duty to be fair, and would be very unfortunate in the modern bureaucratic state, where political redress is far more difficult to obtain than the judicial kind. But the Federal Court cases can perhaps remain useful as examples of judicial restraint on policy issues.

B. Crown prerogative

The jurisprudence yields many statements about the unreviewability of the exercise of Crown prerogative. Re Multi-Malls Inc. and Minister of Transportation is an excellent example:

The Courts have always been careful to distinguish between acts done pursuant to the exercise of a statutory power—subject to Court review—and decisions made under the Royal prerogative—which are not per se reviewable by the Courts.100

Even this view would clearly allow the courts at least to restrict the operation of prerogative to its proper limits.110 Now, however, in a rather arcane case, Lord Denning has gone further:

The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution.111

Lord Denning’s view was not necessarily the view of the other members of the Court;112 nevertheless, it has great appeal and considerable authority to recommend it. For instance, in Ex parte Lain, there was more than a hint that any executive authority would be subject to review.113

More important, a series of decisions of British cases has, without exposing the executive to undue intervention and scrutiny, clearly placed the prerogative within the ambit of the courts.114

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100 Re Multi-Malls, supra note 41, at 58; app’d in Re Doctors' Hosp. and Min. of Health, supra note 65. See also Kurek v. Solicitor General, supra note 63.
110 I.e., the Crown could not both declare the scope of the prerogative and exercise it.
112 But see id. at 728 (Q.B.), 210 (All E.R.) per Lawton L.J.:
Far from curbing these powers, by section 19(2)(b) Parliament recognised that the Crown had them. This is so; but the Secretary of State cannot use the Crown's powers in this sphere in such a way as to take away the rights of citizens: see Walker v. Baird, [1892] A.C. 491.
Speaking of these, Philip Allott said:

There are indications in decisions other than those at present under consideration that the courts are inclined to be more reticent about controlling the exercise of prerogative powers than they have, over recent years, come to be in relation to statutory powers. It is not easy to see why in principle this need be so, provided that the courts are prepared to acknowledge, as they do in relation to statutory powers, that there are aspects of the actual exercise of such powers which can, if at all, properly only be made the subject of check and control in Parliament and through public opinion. But, within those limits, there is no reason why concepts of unreasonableness, ultra vires and natural justice—the natural legal tests of any limited legal powers—should not be applied in a similar way to that in which they are now applied to statutory powers.\footnote{116}

The only difficulty one can see in applying all the rules of review of discretion is with respect to the notion of “use of power for wrong purpose.” As Allott himself noted, prerogative powers are not usually created by statute and the “purpose” may be difficult to determine without an instrument to construe.\footnote{116} Despite this minor problem, the subordination of Crown prerogative to judicial review would seem both the proper consequence of our concept of rule of law and a necessity in times of big government.

The principle of restraint in reviewing the merits would still hold at least as strongly as in other areas of discretion.\footnote{117} The court would not substitute itself for the Crown. It would interfere only to prevent illegal or grossly unfair conduct.

While this area is by no means free from doubt, it is suggested that, once again, the interventionist solution is correct and should be accepted, although it should remain clear that the intervention is for exceptional cases only.

C. Policy

It is generally accepted that the executive is political, has policies which it wishes to carry out, and is not normally bound by a judicial standard of impartiality. It is accepted as well that it is not the role of the court to intervene in policy matters. As Friedmann put it:

The second category of governmental exemptions from legal responsibility is far more important in the everyday practice of administration. It concerns what is variously called the ‘planning’ or ‘policy-making’ decisions of governments and other public authorities. In its law-making, planning or policy decisions, government must not be hampered by contractual or tort liabilities. In the former sphere this means that either a commitment given to a private individual cannot be construed as contractual or that the contract will be superseded by superior considerations of public policy.\footnote{118}

An excellent example of judicial restraint where policy issues are concerned was furnished by Lord Denning in Lord Luke of Pavenham v. Minis-
In that case, the Minister had refused to accept a planning inspector's report on Lord Luke's application for a building permit. The Minister accepted the findings of fact, but came to different conclusions. Lord Denning said:

I must say that I have considerable sympathy with Lord Luke. The inspector's report was very much in his favour. But it must be remembered that the Minister has the responsibility for planning policy. In order to preserve our countryside he has adopted a policy of setting out an "envelope" for each village. Development is permitted within the "envelope" and not outside it. If one person is allowed to build outside, it will be difficult to refuse his neighbour. So the Minister must be strict. This is planning policy and nothing else. The courts have no authority to interfere with the way the Minister carries it out.120

A recent case in which government policy was given priority was Re Township of Innisfil and City of Barrie, in which the Ontario Municipal Board was held to be entitled to consider itself bound by a minister's opinion.121 Indeed, it could be said that the famous case of Calgary Power Ltd. v. Copithorne, so often used to thwart judicial review in Canada, was in essence nothing more than an illustration of the executive's power to make policy decisions without interference.122 The series of Federal Court judgments discussed earlier in connection with review of administrative functions are also relevant and helpful as another example of this principle.123

But are policy decisions truly unreviewable? It is submitted that they are not. As part of the principle that they do not substitute themselves for officials, the courts try to avoid making blatantly political policy decisions and decline to judge the merits of government policy.124 As soon as policy decisions are found to be illegal or unreasonable, however, the courts may interfere, as they may with other forms of discretion.

Policy cannot justify the executive's dispensing with the law.125 Nor can it justify breaches of the law.126 A pre-established policy may invalidate decisions if the policy prevented the official from considering each case on the merits, e.g., if a policy of "no parole for drug cases" were instituted.127 Finally, the case of Laker Airways Ltd. v. Department of Trade illustrates that government policy, even on questions touching the sensitive area of international relations, will not be permitted to prevail over private rights in the absence of clear statutory authorization.128

The conclusion is that, although policy issues cannot be reviewed on the merits, discretion which involves policy may be reviewed on much the same


120 Id. at 807 (W.L.R.), 1070 (All E.R.).

121 Re Township of Innisfil and City of Barrie, supra note 67.

122 Calgary Power Ltd. v. Copithorne, supra note 20.

123 See Kurek v. Solicitor General and Inuit Tapirasat of Canada v. Léger, supra note 63, and accompanying text.

124 See Bhadoria v. MMI, supra note 30. See also Mullan, supra note 21.

125 E.g., R. v. Catagas, supra note 90.

126 Manitoba Gov't Employees Ass'n v. Manitoba, supra note 86.

127 De Smith, supra note 16, at 274-77. But see Re Township of Innisfil and City of Barrie, supra note 67.

128 Laker Airways Ltd. v. Department of Trade, supra note 111.
grounds as other discretion. It is possible that, in certain cases, review may prove somewhat harder to obtain.

D. Wartime legislation

It is an acknowledged fact that wartime emergency legislation has proved very resistant to judicial review and that discretion exercised under such acts has generally been supported beyond peacetime norms. However, the Reference Re Regulations (Chemicals) under War Measures Act makes it clear that no new unreviewable power has been created. While upholding most of the challenged regulations, Duff C.J.C. said:

It is perhaps advisable to observe also that subordinate agencies appointed by the Governor General in Council are not, by the War Measures Act, outside the settled rule that all statutory powers must be employed in good faith for the purposes for which they are given, although here again, as regards the present Reference, that rule has only a theoretical interest.

The War Measures Act cases are thus no different in principle from others; it is only that a national emergency may at times make the practise rather more peremptory.

E. Privative Clauses

To the extent that privative clauses can exclude judicial review in administrative law, they can exclude judicial review of discretion. Since discretion is not the same thing as jurisdiction, a privative clause, even according to the traditional restrictive view, could have had great effect where misuse of discretion did not entail loss of jurisdiction. Now, with the new force given privative clauses by Pringle v. Fraser and Re Executors of the Estate of Woodward and Minister of Finance, privative clauses could prove to be the most efficient instrument for delegating virtually limitless discretion. This is not the place for a detailed analysis of problems associated with privative clauses, but the possibility that the recent successes of interventionists in cases like Laker, Congreve, Tameside and Multi-Malls will be largely nullified by privative clauses must be noted with apprehension.

F. Domestic Tribunals

There are many cases in which public law recourses are denied because the decision-making body was a “domestic tribunal” or because the rela-

129 The best-known example is Liversidge v. Anderson, [1942] A.C. 206. [1941] 3 All E.R. 338, but there are countless others.
130 Reference Re Regulations (Chemicals) under War Measures Act, [1943] S.C.R. 1. This case deals with the validity of delegated legislation, but the principles are the same.
131 Id. at 13.
132 See the discussion of these terms in the text accompanying notes 16 and 17, supra.
135 Laker Airways Ltd. v. Department of Trade, supra note 111; Congreve v. Home Office, supra note 43; Secretary of State for Educ. and Science v. Tameside Metropolitan Borough Council, supra note 2; Re Multi-Malls, supra note 41.
tions between the parties were purely contractual. Such cases have theoretically nothing to do with discretion or unreviewability as such, but rather with the boundaries between private and public law.

Despite weighty jurisprudence to this effect, it is difficult to accept this explanation in the case of prison disciplinary tribunals. Where a domestic tribunal is connected with a private club or even a professional association, the contractual avenue may provide an adequate recourse, and it is arguable that the parties have bound themselves contractually to respect the tribunal's decision. Neither of these points makes sense in a prison situation. Therefore, the Hull Prison case seems rather to be hinting at a special form of unreviewable discretion—that of prison discipline (and possibly certain other similar fields). The true rationale is public order, and this becomes evident when Lord Denning is quoted on this topic:

I am conscious of the fact that Lord Denning M.R. is so right, if I may say so, in his judgment and the observation he made about this problem in Becker v. Home Office [1972] 2 Q.B. 407, 418 where he said:

“If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action.”

These cases bear resemblance to the two recent Canadian cases involving prison discipline, and perhaps the whole subject should be viewed as sui generis, without broad implications for administrative law.

Even so, it is difficult to believe that the discretion given to these unlike-ly “domestic tribunals” is truly unreviewable and that the most blatant abuse would be tolerated by the courts. What, for instance, if prison officials violated all notions of humanity or decency in their penalties? What if prisoners’ safety were endangered? What if prisoners were given internal self-government so that the stronger could terrorize the weaker through “domestic” trials? It is obvious that a limit must exist and that courts would at some point determine where it lies, giving prison officials more rope than other officials, but still denying them infinite quantities of rope.

The final conclusion on unreviewability must be that it is no part of our law. Some discretions (e.g., wartime or prerogative ones) are stronger (in Dworkin’s sense) than others, but all are subject to review at some point.

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139 R. v. Board of Visitors of Hull Prison, supra note 136.
140 Id. at 606.
141 Martineau v. Matsqui Inst. Inmate Disciplinary Bd. (No. 1), [1978] 1 S.C.R. 118. See also Martineau v. Matsqui Inst. (No. 2), supra note 20. Parole cases also tend to be decided in this manner (e.g., Howarth v. National Parole Bd., supra note 29).
142 One might argue, however, that the courts could apply private law remedies—damages and injunctions. Indeed, R. v. Board of Visitors of Hull Prison, supra note 136 only decides that certiorari is unavailable in these cases.

On the subject of prison correction and administrative law, see Price, Doing Justice to Corrections? Prisoners, Parolees and the Canadian Courts (1977), 3 Queen’s L.J. 214.
It should be added that if a discretion were created so strong that no court could review it, even for clear excess of jurisdiction, the official entrusted with this power would be usurping not only the functions of a court, but also of the legislature. He would be no less than a dictator, and the logic of our division of power would be destroyed. Since this division has been judicially recognized and invoked in many different situations, it is likely that the courts would find a way of striking down an instrument that purported to grant such vast powers or else of limiting the power by attaching to it the fundamental duties which restrict the use of discretion.

VIII. THE GENERALITY OF THE PRINCIPLES DISCUSSED

It is important to remember in a discussion of this type that the principles involved are the basic principles of administrative law and that they recur, with slight modifications, in all areas of the subject.

For instance, the basic rules of review are the same as the basic rules for determining the validity of delegated legislation. The same duties to act in good faith, reasonably, and on relevant considerations apply in both cases.

The War Measures Act cases affect all areas of law, rendering review more difficult in practice.

The questions of government policy are also not confined to discretion. They are frequently present in discussions of tort and contract, as well as in problems involving bias.

The notion of the court's ultimate right to intervene in all matters is also very firmly entrenched, and indeed one could view democracy as depending on it for survival.

The requirement of good faith is a general one in public law and relief is axiomatic whenever bad faith is found, especially if moral turpitude is involved.

Where the question of "relevant grounds or reasonableness" arises, recourse may be had to well-established rules of statutory interpretation, such as avoiding injustice, affecting vested rights as little as possible, and

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143 Thus possibly violating section 96 of The British North America Act, 1867, 30 & 31 Vict., c. 3.
145 See, for instance, Reference Re Regulations (Chemicals) under War Measures Act, supra note 130, and Toronto v. Forest Hill, [1957] S.C.R. 569. However, in cases of delegated legislation, unlike ordinary cases of discretion, it is difficult to speak of a duty to be fair.
148 See, for instance, A.G. v. Chaudry, supra note 96.
150 Id. at 212-15.
preventing absurd or unreasonable results.\textsuperscript{151} These rules are all subordinated to the cardinal rule of statutory interpretation—that of reading the words as they stand. Nevertheless, they are strikingly similar to aspects of the principles of review of discretion.

When these links are considered, it becomes apparent that administrative law, for all its conceptual difficulties, is animated by a very small number of basic principles concerning the use of power and that if one simplified the concepts (e.g., discretion, jurisdiction) by careful definition, the entire field would become very straightforward.

\textit{Review of discretion and remedies}

No discussion of any area in administrative law would be complete without a discussion of the remedies open to those aggrieved. The remedies constitute the largest factor of uncertainty and unpredictability.\textsuperscript{152}

It appears that the nature of the remedy open to a complainant depends not on the presence or absence of discretion or the "strength" of the discretion,\textsuperscript{153} but rather on the nature of the function.

Where an official is exercising a judicial function, \textit{certiorari}, prohibition and their statutory equivalents or replacements\textsuperscript{154} will be available for an excess of jurisdiction, including a violation of natural justice and for error on the face of the record.\textsuperscript{155} It is possible as well that these remedies will be available for administrative functions where the duty to be fair is not observed,\textsuperscript{156} but that is still a contentious issue.\textsuperscript{157}

There appears to be little sense in placing on attorneys the burden of deciding, in advance, the type of function involved, especially since numerous

\begin{itemize}
  \item \textsuperscript{151} Id. at 210-12.
  \item \textsuperscript{152} On the subject of complexity and unpredictability of remedies, see Dussault, \emph{supra} note 2, at 1067.
  \item \textsuperscript{153} If the discretion was properly exercised, however, there can be no remedy.
  \item \textsuperscript{154} E.g., \textit{Federal Court Act}, S.C. 1970-71-72, c. 1, s. 28.
  \item \textsuperscript{155} But probably not where there is a privative clause in the latter case.
  \item \textsuperscript{157} De Smith, \emph{supra} note 16, at 301-02 and at 67, is more optimistic about the use of \textit{certiorari}. In Canada, the case of \textit{Martineau v. Matsqui Inst. (No. 2)}, \emph{supra} note 20, seems to reiterate the old distinctions. It is possible, however, that the last paragraph in \textit{Hardayal v. MMI}, quoted in full, \emph{supra} note 22, will open the door for a more flexible approach. It would be a step forward if Canadian courts adopted the view put forward recently in \textit{R. v. Board of Visitors of Hull Prison}, \emph{supra} note 136, at 603:
  One must start this question of whether certiorari will or will not go with a recognition of the fact that there is not, and one may hope never will be, a precise and detailed definition of the exact sort of order which can be subject to certiorari. If we ever get to the day when one turns up a book to see what the limit of the rights of certiorari is it will mean that the right has become rigid, and that would be a great pity. Therefore, we approach it today, in my judgment, on the basis that there are no firm boundaries, and one has to look to such clear and useful, helpful pointers as, with the assistance of counsel, we have been able to derive from the authorities.
\end{itemize}
jurisprudential examples illustrate that such decisions are far from simple or mechanical.\textsuperscript{168}

The availability of the writ of \textit{mandamus} is less problematic. Despite occasional and, with respect, heretical dicta to the contrary,\textsuperscript{169} the distinction between administrative and judicial functions has no place here, and the writ can issue whenever a public duty is not performed. Since discretion is always coupled with a duty, it follows that this is a very useful remedy in reviewing abuse of discretion.

Although \textit{mandamus} will issue to compel the performance of a duty, it will usually not compel a particular result in the exercise of discretion.\textsuperscript{160} However, where an exercise of discretion is patently incorrect, the courts may treat it as void and thus, indirectly, compel a different result by \textit{mandamus}.\textsuperscript{161} Nevertheless, the theoretical explanation must remain the breach of a fundamental duty, which is enforced by \textit{mandamus}.

It is possible that greater intervention in the \textit{merits} of the exercise of discretion could be justified in Québec than elsewhere, because article 844 of the \textit{Code of Civil Procedure} speaks not only of commanding the performance of a duty but also of an "act which is not of a purely private nature."\textsuperscript{162} However, if a broader base for review exists, it has so far remained unnoticed by the courts, and no cases can be found concerning this difference.

The declaration is possibly the safest remedy; it is certainly the safest in proceedings against the Crown. However, it too may be subject to technical

\textsuperscript{168} E.g., \textit{Howarth v. National Parole Bd.}, supra note 29.


\textsuperscript{160} Reid, \textit{Administrative Law and Practice} (Toronto: Butterworths, 1971) at 381. This is part and parcel of the principle that discretion is not reviewed on the merits.


Sometimes mandamus may control a discretion even more closely. The court may exclude so many considerations as being wrong ones that the administrative body is left without a choice, and must act in a particular way; in such a case the court will order it to act in that manner.

\textsuperscript{162} \textit{Code de procédure civile} Art. 844:

\textit{Any person interested may apply to the court to obtain an order commanding a person to perform a duty or an act which is not of a purely private nature, more particularly:}

1. when a corporation, public body, or group of persons contemplated in article 60 omits, neglects or refuses to perform any duty or act incumbent upon it by law;

2. when a corporation or group of persons contemplated in article 60 omits, neglects or refuses to proceed to an election which by law it is bound to make, or to recognize such of its members as have been legally chosen or elected, or to reinstate those who have been removed without lawful cause;

3. when a public officer, or a person holding an office, or a person holding an office in a corporation, a group of persons contemplated in article 60, a public body or a court subject to the superintending and reforming power of the Superior Court, omits, neglects or refuses to perform a duty belonging to such office, or an act which by law he is bound to perform;

4. when an heir or representative of a public officer omits, neglects or refuses to do an act which, in such capacity, he is bound by law to perform.
There is jurisprudence to the effect that a declaration under section 18 of the Federal Court Act will issue only on an action, whereas mandamus, prohibition and the other remedies may be obtained by motion. Thus, once again, the rights of parties are made dependent upon a choice made by their lawyers.

Among other remedies at times open for abuse of discretion are injunctions and damages. At the end of Freedom Under the Law, Lord Denning wrote:

Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions, and actions for negligence: and, in judicial matters by compulsory powers to order a case stated.

Despite his plea, the remedies of injunction and damages have remained marginal in this area.

The way out of this morass must be either the legislative creation of a general application for review or the proposition made by Wade:

The solution should be to make all remedies interchangeable, so that the court can award whichever is most suitable, irrespective of the procedure, and irrespective of the group to which the remedy belongs. Here is a clear case for law reform.

It would seem logical that this last simplification could be brought about by courts alone, without parliamentary interference, and it is respectfully suggested that no time should be lost.

IX. CONCLUSIONS

It is difficult to reach specific and categorical conclusions in a survey essay of this nature. However, the following tentative conclusions might be accepted:

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103 See, for example, Punton v. Minister of Pensions and Nat'l Ins., [1964] 1 W.L.R. 226, where a declaration is held not to lie where it would contradict a subsisting ministerial order and thus produce two inconsistent "decisions." See also Poitras v. A.G. Alta. (1969), 7 D.L.R. (3d) 161 (Alta. S.C.).


105 The holding in B.'s case, id., is currently being challenged before the Federal Court of Appeal in Ospina v. Lefebvre after apparently having been upheld by Mr. Justice Decary, unreported, T-1263-78 (F.C.T.D.).


107 See Roncarelli v. Duplessis, supra note 49; and Gershman v. Manitoba Vegetable Producers' Marketing Bd., supra note 50. The recourse in damages is essentially a private law one, used in public law most often when an official is found outside the limits of his discretion or is no longer acting in his public capacity.


109 Something that England, Ontario and New Zealand (to name a few) now appear to have done.

110 Wade, supra note 48, at 556.

111 This was Lord Denning's view in Freedom Under the Law, supra note 168, at 126.
1. Discretion means essentially “power” and is, in public law, always coupled with certain basic duties. Therefore, there is always a limit to judicial restraint in this field.

2. Discretions have different “strengths,” and the threshold of judicial intervention varies from statute to statute and from situation to situation, although the principles remain fairly constant.

3. It is important to define discretion so as to separate it clearly from the other fundamental concepts of administrative law. Once the concepts are established, many of the complexities of the subject evaporate.

4. We live in an era of expansion of the concepts of “unreasonable” use of discretion and use of discretion on irrelevant grounds, or in a manner contrary to the purposes of an instrument creating it. Except for Re Multi-Malls, the leading cases on the subject have been British cases, and the pioneering judge has often been Lord Denning. There is no reason to think that, even with Canada’s recent conservatism in administrative law, the basic principles do not obtain here. There is no fundamental difference between Canadian and British administrative law, and it would be to our detriment to attempt to create one in this area.

5. No expansion of review of discretion can eliminate the principle that courts do not interfere on the merits and substitute their opinions for those of officials. To say otherwise would constitute a violation of our division of powers, and would turn the courts into a superexecutive. This would probably be administratively unmanageable, as well as constitutionally undesirable.

6. Crown prerogative, while justifiably difficult to review, is no longer to be viewed as outside control at all times.

7. The expansion of review of discretion is justified by the corresponding expansion of government, with increasing potential for abuse. The new weight given privative clauses, although it has as yet had no serious consequences in this area, can give rise to legitimate worry about the future, because it could check the trend towards review without affecting the growth of bureaucratic power.

8. The remedies must be simplified without delay, and the Federal Court Act is a prime candidate for reform.

9. It is an essential part of our ideology that no official or type of case is entirely immune from review. Some may be more protected than others, but everyone works and lives under the law and therefore under the courts. This should be kept in mind at all times.

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172 Re Multi-Malls, supra note 41.

173 As contrasted with our vision twenty-five years ago. See Beaudoin, La Cour suprême et la protection des droits fondamentaux (1975), 53 Can. B. Rev. 675.

174 Or, it is suggested, in any other.