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Section 7 and Administrative Law Deference: No Room at the Inn?

David Mullan

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I. INTRODUCTION

Section 7 of the *Canadian Charter of Rights and Freedoms*[2] poses special problems for Administrative Law. What aspects of the administrative process engage the right to "life, liberty and security of the person"? For those that do, what constitute the principles of fundamental justice in both a substantive and a procedural sense? Where the procedural elements of "fundamental" justice are triggered, what is the relationship between the constitutional standard and traditional common law precepts of procedural fairness and natural justice? When state interests are set up in answer to a claim of violation of the principles of fundamental justice, within what framework should courts consider those claims: as part of the process of delineating the scope of the "principles of fundamental justice" or in the context of a section 1 justification where the burden of persuasion rests clearly on the state?[3]

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[1] This paper owes much to conversations that I have had over the years with my former co-teacher of Advanced Constitutional Law, David Stratas, and also to his paper: David Stratas, "Constitutional Remedies in Administrative Proceedings: Supervision, Striking Sections, Policing Discretions, Standards of Review and Prospects for the Future" (Paper delivered at the Ontario Bar Association Conference "The Constitution in Your Administrative Law Practice", March 2, 2004, at 6-10). I am indebted to him for his insights, which have been a great influence on my thinking about this issue. See also Geneviève Cartier, "The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004), at 61; Lorne M. Sossin, "Reconciling Constitutional Law with Administrative Reality: The *Charter* and the Dilemmas of Discretion" (Paper delivered at the Ontario Bar Association Conference "The Constitution in Your Administrative Law Practice", March 2, 2004); and David A. Wright, "Evaluating Policy-Based Decisions for *Charter* Compliance" (Paper delivered at the Ontario Bar Association Conference "The Constitution in Your Administrative Law Practice", March 2, 2004).

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Charter"].

[3] I have written about a number of these issues previously. See *e.g.*, "The *Charter* and Administrative Law" in *The 2002 Isaac Pitblado Lectures — The* Charter*: Twenty Years and Beyond* (Winnipeg: Law Society of Manitoba, 2004), at X-1.

These are all issues that have been the subject of both judicial scrutiny and academic commentary. In many respects, they remain questions to which the Supreme Court has yet to provide definitive answers. Indeed, they could each justify detailed treatment within the time allocated to me today. However, I have chosen to confine my remarks on this occasion to another aspect of section 7's intersection with Administrative Law: What standard of review should the courts apply in reviewing decisions by statutory and prerogative authorities on whether the right to life, liberty and security of the person is affected by an administrative process and, in situations where the right is engaged, whether any deprivation has been in accordance with the principles of fundamental justice? At either of these stages, is there any place for judicial deference to the judgment of state authorities? Indeed, this is a question that transcends section 7 and resonates whenever statutory authorities are making decisions (including the exercise of discretion) that have an impact on Charter rights and freedoms. As recent case law illustrates, it is also a question that is integrally related to the role that section 1 plays when statutory authorities are trading in Charter rights and freedoms.

In fact, the immediate stimulus for this paper was the March 2, 2006 judgment of the Supreme Court of Canada in *Multani v. Commission scolaire Marguerite-Bourgeoys*.[4] There, a majority of the Court, in a judgment penned by Charron J.,[5] flatly rejected any role for Administrative Law principles and standard of review analysis in the evaluation of claims that administrative action has violated Charter rights and freedoms. In determining the constitutional questions that arise from such claims, there is no room for the argument that the reviewing court owes any degree of deference to any aspect of the administrative process that has generated the challenge.

In this paper, I argue that this articulation of an apparently general principle ignores other recent Supreme Court of Canada authority. As a consequence, the Court seems to be taking inconsistent positions on the relationship between Administrative Law and Constitutional Law review, a situation that poses challenges for litigants, counsel and lower courts. It is also questionable whether such a blanket denial of the relevance of

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[4] [2006] S.C.J. No. 6, 2006 SCC 6 [hereinafter "*Multani*"].

[5] Chief Justice McLachlin, Bastarache, Binnie and Fish JJ. concurred in Charron J.'s judgment. Justices Deschamps and Abella, in a joint judgment, concurred in the result but reached that conclusion by a different route. The same was true of LeBel J.

Administrative Law principles to constitutional adjudication is appropriate from broader policy perspectives. There may well be occasions where the courts should afford deference to statutory and prerogative authorities even when the exercise of their powers engages constitutional rights.

II. ADMINISTRATIVE LAW STANDARD OF REVIEW ANALYSIS IN CONSTITUTIONAL CASES — THE BACKGROUND

For almost 20 years, the Canadian law of judicial review of administrative action has been bedevilled by the imperative of having to establish a standard of review as a prelude to any engagement with the merits of the exercise of statutory (and, for that matter, prerogative) authority. By reference to the various criteria established by the Supreme Court as the elements of its edict that the standard of review depends on a "pragmatic and functional" approach, which of three standards applies to the particular exercise of authority that is subject to judicial review — [in]correctness, unreasonableness or patent unreasonableness? As scores of Supreme Court of Canada judgments illustrate,[6] this is in no sense a self-applying or bright line delineation exercise.

Nonetheless, ask most administrative lawyers what standard applies when a statutory authority is dealing with constitutional (including Charter and perhaps even *Canadian Bill of Rights*)[7] questions and the most likely answer is "correctness". Why? Because, from time to time, the Supreme Court of Canada appears to have said so. We see this most clearly in the Supreme Court's case law involving an issue over which there has been considerable vacillation: the entitlement of statutory authorities to determine constitutional questions. In the latest pronouncement on this vexed question,[8] the Court appears to have endorsed a strong presumption in favour of tribunals having implicit authority to deal with constitutional questions in general and Charter questions in particular. However, irrespective of the existence of such a

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[6] The foundation judgment is *Union des employés de service, local 298 v. Bibeault*, [1988] S.C.J. No. 101, [1988] 2 S.C.R. 1048, and the most authoritative more recent articulations can be found in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18, [2003] 1 S.C.R. 226 and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982.

[7] S.C. 1960, c. 44.

[8] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504.

strong presumption, the Court's position has always been that where that right to consider constitutional questions exists, the standard of judicial scrutiny of any such exercise of authority is that of correctness.[9]

What may, however, be critical is that, at least until *Multani*, most of this case law has involved situations where the Court has been concerned with the entitlement of statutory authorities to deal with questions as to the constitutional validity of constitutive or relevant legislation. It therefore seemed to be important to read the Court's apparent assertion of a universal standard of correctness review in a context-sensitive manner.

Indeed, when one comes to the section 7 jurisprudence involving judicial review of exercises of discretion engaging Charter rights and freedoms, the picture that emerges is quite different. In this respect, the most prominent example remains *Suresh v. Canada (Minister of Citizenship and Immigration)*.[10] However, the Court's position can be illustrated much more simply by reference to its judgment in the companion case of *Ahani v. Canada (Minister of Citizenship and Immigration)*,[11] judgment in which was delivered the same day.

As was the case with *Suresh*, *Ahani* involved the process of making removal orders against a person who in the opinion of the Minister of Citizenship and Immigration "constitutes a danger to the security of Canada", a discretion that applies even in the case of Convention refugees. For the purposes of its analysis, the Court accepted that the making of a removal order would engage the Charter where the subject of the order would "face a substantial risk of torture on removal".[12] However, notwithstanding that, the Court in no way accepted the proposition that the courts should conduct judicial review of any such decision on a straight correctness basis.

First, the Court segmented the decision-making process into three stages. The first stage was the ministerial determination that the person constituted a "danger to the security of Canada".[13] This precondition to the exercise of jurisdiction was subject to review only if "patently unreasonable". That meant it must have been

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9 *Id.*, at para. 31, reaffirming *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] S.C.J. No. 42, [1991] 2 S.C.R. 5, at 17.

10 [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 [hereinafter "*Suresh*"].

11 [2002] S.C.J. No. 4, [2002] 1 S.C.R. 72 [hereinafter "*Ahani*"].

12 *Id.*, at para. 17.

13 *Immigration Act*, R.S.C. 1985, c. I-2, s. 53(1)(b).

> . . . made arbitrarily or in bad faith, cannot be supported on the evidence, or did not take into account the appropriate factors. A reviewing court should not reweigh the factors or interfere merely because it would have come to a different conclusion.[14]

As I have pointed out elsewhere,[15] this process of segmenting the decision-making process to remove an important element of it from the very application of section 7 in itself has ramifications for the conduct of judicial review of decisions, which can have an impact on the right to life, liberty and security of the person.

However, much more directly, the Court's pronouncement on how courts should approach the next stage of the process suggests very strongly the need for judicial deference to at least elements of decisions about the reach and application of section 7. In deciding whether someone who is a danger to the security of Canada faces a substantial risk of torture on deportation, courts are directly determining whether life, liberty and security of the person is at stake. According to the Supreme Court, such decisions are "largely fact-based" and, as such, "largely outside the realm of expertise of reviewing courts and possess a negligible legal element. Considerable deference is therefore required".[16]

What is then left in this decision-making process for those that actually get in that door is the determination whether such a person should in fact be deported despite the substantial risk of torture. What is the standard of review applicable to this third stage in the process? *Ahani* does not purport to answer that question nor, in fact, does *Suresh*. Certainly, the Court in *Suresh* controversially seemed to accept the possibility that deportation to torture might be justified "in exceptional circumstances".[17] However, it did not go on to elaborate what standard of review would be applied to such an exercise of discretion. Rather, it left the question dangling by asserting that the ambit of any such

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[14] *Ahani*, *supra*, note 11, at para. 16.

[15] "Deference from *Baker* to *Suresh* and Beyond — Interpreting the Conflicting Signals" in Dyzenhaus, *supra*, note 1, at 21.

[16] *Ahani*, *supra*, note 11, at para. 17.

[17] *Supra*, note 10, at para. 78.

"exceptional discretion" had to "await future cases".[18] It also left open the question whether the justification for such a decision would be evaluated in the context of "the balancing process mandated by s. 7 of the *Charter* or under s. 1".[19] I will later return to the question whether it is a necessary implication of either or both of those balancing exercises that the Court is conducting correctness review.

Irrespective, however, of how the Court ultimately comes down on this last question, what is clear is that even where a threat to life, liberty and security of the person as serious as torture is in issue, there will be (at certain levels) deference to executive judgment, particularly where that executive judgment involves factual determinations and, one might add, factual determinations with a national security element.

The truth, of course, is that in the world of general Constitutional Law, this notion of deference to statutory authority assessment of "constitutional facts" is not a novel concept. Thus, in the domain where administrative tribunals have been called upon to make factual determinations bearing on whether a business is federal or provincial for division of powers purposes under sections 91 and 92 of the *Constitution Act, 1867*,[20] there is jurisprudence supporting not only the initial primacy of tribunals in making such decisions but also the obligation of reviewing courts on ultimate judicial review to give respect or deference to at least the factual components of the tribunal's determination.[21]

More recently, the Supreme Court accepted the need for deference to agency and executive assessment and judgment in a rather different constitutional setting. In *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*,[22] the Court was

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[18] *Id.* For an instance where the Federal Court applied patent unreasonableness to the review of this balancing exercise and refused the application for review despite the presence of a substantial risk of torture, see *Re Jaballah*, [2006] F.C.J. No. 404, at para. 18, 2006 FC 346. This judgment was criticized trenchantly by Audrey Macklin in "On rationalizing handing a human being over to likely torture" *The Lawyers Weekly* (2 June 2006), at 24. However, MacKay J. emphasized that he was only reviewing the refusal of a protection order under s. 112 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The issue might well take on different dimensions in the face of a deportation order: see para. 17.

[19] *Supra*, note 10, at para. 78.

[20] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[21] See *e.g.*, *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] S.C.J. No. 27, [1998] 1 S.C.R. 322, at paras. 40-42.

[22] [2005] S.C.J. No. 47, [2005] 2 S.C.R. 286 [hereinafter "*Provincial Court Judges' Assn. of New Brunswick*"].

evaluating the implementation of its call in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*[23] for the creation of judicial compensation commissions as a way of ensuring the institutional independence of provincially appointed judges. More particularly, the issue of principle was the role of the courts in judicially reviewing any decision of the government rejecting or modifying the recommendation of the independent commission.[24]

In *Provincial Court of Prince Edward Island Reference*, the Court had accepted the entitlement of the government to reject a commission's recommendation provided that the decision to reject could be defended on the standard of rationality. In *Provincial Court Judges' Assn. of New Brunswick*, the Court went on to elaborate how that fed into the judicial review process. It was not a situation where the reviewing court was obliged to evaluate the government's decision by reference to a standard of correctness.

> The reviewing court is not asked to determine the adequacy of judicial remuneration. Instead, it must focus on the government's response and on whether the purpose of the commission process has been achieved. This is a deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs.[25]

In its precise application, the Court saw this process of deferential review as involving a two-stage inquiry: whether there were legitimate reasons for the rejection of the commission's recommendations and, if so, whether there was a "reasonable factual foundation" for those

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[23] [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 [hereinafter "*Provincial Court of Prince Edward Island Reference*"].

[24] It is interesting to note that in the Court's judgment in *Provincial Court Judges' Assn. of New Brunswick*, the basis for judicial independence is said to rest in the common law and the constitution (*supra*, note 22, at para. 4), and there is no specific reference to the Charter. This is in contrast to *Provincial Court of Prince Edward Island Reference*, where the guarantee of independence for the provincially appointed judges was found primarily in s. 11(*d*) of the Charter, applicable by reason of the fact that such judges have extensive criminal law jurisdiction. However, it is also worth recollecting that Lamer C.J. prefaced his judgment by accepting that the argument for independence could also be made from the Preamble to the *Constitution Act, 1867* and underlying constitutional principles. Given that there is no reference to the Charter in the more recent case, one wonders whether the Court has now fully endorsed the alternative ground in the earlier case and placed interference with the independence of provincially appointed judges beyond the possibility of legislative override and the realm of a s. 1 justification, both possibilities to the extent that the protection was solely Charter-based.

[25] *Supra*, note 22, at para. 30.

legitimate reasons.[26] The latter inquiry is obviously deferential and while the former does not self-evidently contain an element of deference, at least part of the Court's explication of what constitute legitimate reasons does have that effect. Indeed, it defines a process as much as a review of the merits of the reasons for rejection:

> Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.[27]

In many ways, the concept of legitimacy in this setting is met by adherence to a heightened sense of what constitutes adequate reasons under the common law prescription of an obligation to give reasons endorsed authoritatively for the first time in *Baker v. Canada (Minister of Citizenship and Immigration)*[28] as part of the common law governing statutory authorities.

Returning to *Suresh*, the Court also makes it clear there that deference to executive or tribunal discretion will intrude indirectly in the determination of what fundamental justice requires in a procedural sense. While the Court has seemingly accepted that, as a matter of general law, the standard of review for procedural questions is that of correctness,[29] what the Court has also done is provide a list of factors or considerations that have to be taken into account in evaluating the extent of a statutory authority's procedural obligations. These factors, first

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[26] *Id.*, at paras. 30-33.

[27] *Id.*, at para. 25.

[28] [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 [hereinafter "*Baker*"].

[29] *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, [2003] 1 S.C.R. 539, at para. 100 (*per* Binnie J.).

fully articulated in the leading case of *Baker*, include the procedural choices made by any authority exercising a broad discretion over such matters or having field expertise in relation to such determinations.[30] This is undoubtedly a case of expertise intruding through the back door. In *Suresh*, the Court made it clear that the *Baker* factors governed even in situations where procedural claims had a constitutional dimension, as under section 7 of the Charter, albeit with emphasis given to the fact that the procedural entitlement stemmed from a constitutional guarantee as opposed to a "mere" statutory or common law source.[31]

Other section 7 case law also apparently supports judicial deference to discretionary judgments affecting the right to life, liberty and security of the person. *Pinet v. St. Thomas Psychiatric Hospital*[32] provides an illustration. At stake here was the judgment exercised by Review Boards with respect to the continued detention of those found not guilty of criminal offences by reason of insanity. With respect to the legal meaning of the term "least onerous and least restrictive to the accused", there is no doubt that the Court conducted correctness review in determining that, as a matter of law or statutory interpretation, this applied to the possible range of custodial conditions within a particular institution. However, had the Review Board got that determination correct in this particular case, Binnie J., delivering the judgment of the Court, made it clear that it would have been entitled to considerable deference in terms of its actual exercise of discretion as to the patient's conditions of custody:

> The job of the appellate court is not to reweigh the evidence, nor to substitute our views for those of the Review Board. We accept the findings of the Review Board with regard to the appellant and other relevant circumstances, which are supported by the evidence. The problem is that the result was skewed by the Review Board's error of law.[33]

The Court also makes reference to another of its decisions in this same arena, *R. v. Owen*[34] and states that there

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30 *Baker*, *supra*, note 28, at para. 27.

31 *Supra*, note 10, at para. 114.

32 [2003] S.C.J. No. 66, [2004] 1 S.C.R. 528 [hereinafter "*Pinet*"].

33 *Id.*, at para. 27.

34 [2003] S.C.J. No. 31, [2003] 1 S.C.R. 779.

> . . . [it] acknowledged the expertise of the members appointed to Review Boards, and established that their views of how best to manage the risks posed by a particular NCR accused should not be interfered with so long as the conditions of detention lie within a range of reasonable judgment.[35]

The message seems clear: When Charter rights and freedoms are at stake, statutory authorities must get the law correct; however, thereafter, their judgments about the facts and exercises of discretion based on those facts are entitled to deference or respect by the Court. In other words, the Court is eschewing the micromanaging, in the name of correctness review, of bodies such as Review Boards, the work of which invariably involves a Charter right or freedom. Indeed, though this is probably to extrapolate too much from the judgment in *Pinet*, it might conceivably also be seen as an answer to the question left open in *Suresh*: By what standard should the courts conduct a review of executive discretions to deport someone who is a threat to national security, even when there is a substantial threat of torture? To the extent that this is a decision that involves factual inquiries and determinations and the balancing of a range of competing factors, the statutory authority's decision is entitled to a considerable measure of deference, provided it is operating within the correct legal standards.[36]

Another way of describing such a review regime, from an Administrative Law perspective, would be to state that under a pragmatic and functional analysis, questions of pure constitutional law will always be reviewed on a correctness basis. In terms of the elements in that analysis, the nature of the question and considerations of comparative expertise coalesce to indicate that the statutory authority has no entitlement to deference. However, when the issues cease to be pure questions of law and engage the fact-finding capacities of the

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[35] *Supra*, note 32, at para. 22.

[36] In both *Suresh* and *Pinet*, however, there is a complicating element. Clearly, in *Suresh*, the Court is of the view that deportation to torture should be an exceptional event (at para. 78). In *Pinet*, the Court also expressed the view that the s. 7 rights of the applicant should be a "major preoccupation of the Review Board" (at para. 19). Both amount to apparent legal constraints or limitations on the discretion of the decision-maker. As such, presumably, any review of the exercise of each of these discretions then becomes that much more intrusive in that the reviewing court is required to ask, in the one case, whether the discretion was exercised in a frame of mind that saw deportation to torture as an exceptional occurrence and, in the other, whether the Review Board did have a "major preoccupation" with the liberty interest of the applicant. While that does not mean correctness review, it certainly narrows the frame of reference within which the decision-maker is entitled to deference in exercising judgment as opposed to finding facts.

statutory authority and/or the exercise of discretion or judgment that engages their expertise, the fact that constitutional rights and freedoms are in issue does not automatically mean correctness review; there is room for deference at least in some contexts. It is not, of course, at this point to make a judgment on whether this is appropriate or a good thing; it simply describes how cases in which constitutional questions arise are accommodated within the standard review practices of the courts in Administrative Law cases.

III. *MULTANI* — THE MINORITY JUDGMENT

Indeed, this point of view corresponds very much to that advanced by two members of the Court in the very recent judgment in *Multani v. Commission scolaire Marguerite-Bourgeoys*.[37] There, in a judgment concurring in the outcome reached by the majority, Deschamps and Abella JJ. proposed that the general principles of judicial review of administrative action should apply to all exercises of discretion, including those that engage Charter rights and freedoms. Indeed, they found support for that position,[38] not in *Suresh*, *Ahani* and *Pinet*, but in two other judgments of the Court, *Trinity Western University v. British Columbia College of Teachers*[39] and *Chamberlain v. Surrey School District No. 36*,[40] as well as more general references to *Baker*.[41] They also argued, as advanced above, that the cases in which the Court had accepted that correctness was the invariable standard of review where

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[37] [2006] S.C.J. No. 6, 2006 SCC 6 [hereinafter "*Multani*"].

[38] *Id.*, at para. 94.

[39] [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 [hereinafter "*Trinity Western*"]. Here, as a prelude to reviewing an accreditation process that involved an apparent collision of Charter rights and freedoms, the Court conducted a pragmatic and functional analysis to determine the standard for review of the College's decision and reached the conclusion that it should be correctness: at paras. 15-19.

[40] [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 [hereinafter "*Chamberlain*"]. In this instance, the majority in fact never reached the Charter challenge, but rather decided the case on the basis of Administrative Law principles using an unreasonableness standard of review.

[41] *Multani*, *supra*, note 37, at para. 86, referring to *Baker*, *supra*, note 28, at para. 56, and, in particular, L'Heureux-Dubé J.'s oft-quoted statement 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*.

This statement in fact raises another issue about deference: What impact does *Multani* have in cases where the argument is not so much that there has been a Charter violation but that discretion has been exercised without regard for Charter "values"?

constitutional questions were at stake were all ones involving challenges to the validity of a provision, not a decision.

> [W]e do not believe that *Martin* established a rule that simply raising an argument based on human rights makes administrative law inapplicable, or that all decisions contested under the *Canadian Charter* or provincial human rights legislation are subject to the correctness standard.[42]

Multani involved a challenge to a decision by a school board's governing board and council of commissioners overturning an initial decision by the administrative officials of the board that a student could wear an authentic kirpan at school under certain conditions, notwithstanding the school's Code of Conduct that prohibited the carrying of weapons. At stake was whether this was an abuse of discretion on the part of the governing board and council of commissioners, particularly if the matter in issue engaged the student's freedom of religion under section 2(*a*) of the Charter.

According to Deschamps and Abella JJ., it was not only preferable but also, as a matter of Charter theory, mandatory for the Court to approach this question within a standard Administrative Law review framework and, more particularly, against the backdrop of a pragmatic and functional analysis.

What did this mean in terms of carrying out the review function on the facts of this case? For the two judges, there was a potential contest between the student's freedom of religion and the "right of all students to physical inviolability".[43] It was also a balancing exercise that might turn out differently as among different schools. Factual assessment was integral to the exercise.

> Where safety in the schools under its responsibility is concerned, the respondent school board unquestionably has greater expertise than does a court of law reviewing its decision. If the reasonableness standard applied in *Chamberlain*, there is even more reason to conclude that it applies in the instant case because of the factual element associated with the determinations of safety requirements.[44]

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42 *Multani*, *supra*, note 37, at para. 93.

43 *Id.*, at para. 96.

44 *Id.*, at para. 96.

The duo then proceeded to analyze the discretionary determination of the council of commissioners by reference to the reasonableness standard and concluded that its decision was unreasonable because it "did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed by the father and the student".[45]

For Deschamps and Abella JJ., this was a much more apt process than trying to accommodate review of administrative discretions that implicated Charter rights and freedoms within the framework of the *Oakes*[46] (and its progeny's) formula for assessing justifications of constitutional violations by reference to section 1. Indeed, they saw that process of constitutional justification as "developed uniquely" for the assessment of a "norm of general application". It was not apt for the evaluation of the individualized decisions of statutory authorities and would only lead to an unsatisfactory "blurring [of] the distinction between the principles of constitutional justification and the principles of administrative law" in a way that would result in "the impairment of the analytical tools developed specifically for each of these fields".[47]

Indeed, the joint judgment goes even further in asserting that the Court got it wrong in cases such as *Slaight Communications Inc. v. Davidson*[48] to the extent that it accepted that section 1 had relevance to individualized exercises of statutory powers. In so doing, Deschamps and Abella JJ. revisited the old debate as to the meaning of the term "prescribed by law" in section 1 and urged that the Court reverse the position that this threshold to the very applicability of section 1 engaged anything other than a statute, regulation, or other binding normative instrument. More particularly, it should not be read to include as "law" for these purposes the determination or decision of a statutory authority. "Law" and the possibility of a justification for constitutional violations should be restricted to "rules of general application".[49]

IV. *MULTANI* — THE MAJORITY JUDGMENT

However, the majority of the Court rejected this position. Justice Charron (McLachlin C.J., Bastarache, Binnie and Fish JJ. concurring)

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45 *Id.*, at para. 99.

46 *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 [hereinafter "*Oakes*"].

47 *Multani*, *supra*, note 37, at para. 85.

48 [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1308.

49 *Multani*, *supra*, note 37, at paras. 112-25.

asserted that the duo courted the risk of "reduc[ing] the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, caus[ing] confusion between the two".[50] Rather, the integrity of the Charter would be maintained only if the Court itself defined the scope of the protection offered by its rights and freedoms and, in the event of a violation, only upheld the governmental action if it met the requirements of section 1. In this realm, particularly as the case was based entirely on the constitutional right to freedom of religion, there was no room for the intrusion of the Administrative Law standard of "unreasonableness". Where the challenge was to an administrative decision "based on the application and interpretation of the *Canadian Charter*",[51] the Supreme Court's own jurisprudence dictated correctness review.

In elaborating, the majority then went on to assert that unless the Court was being asked to reconcile two constitutional rights by drawing internal limits on the scope of freedom of religion, any concerns with competing values should be left to the section 1 contextual analysis.[52] In other words, any non-constitutional interests of the state in reining in religious freedom was not the proper subject of a balancing exercise at the infringement stage but could only play a role as part of a section 1 justification where the onus was clearly on the state. The task of the person claiming an infringement of the right was to show

> (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.[53]

Then, in the application of those standards to the facts of the case, the majority did its own apparent *de novo* assessment of the evidence on the record and came to the conclusion that the student had met both preconditions. Moreover, particularly when it is juxtaposed against the judgment of the Court of Appeal,[54] it also looks like acceptance of the legitimacy of correctness review of the statutory authority's determination

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[50] *Id.*, at para. 16.

[51] *Id.*, at para. 20. However, *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 [hereinafter "*Martin*"] was the only authority cited.

[52] *Multani*, *supra*, note 37, at para. 29.

[53] *Id.*, at para. 34.

[54] *Multani v. Commission scolaire de Marguerite-Bourgeoys*, [2004] J.Q. no 1904, 241 D.L.R. (4th) 336 (C.A.).

of the student's claims for exemption from or accommodation in the application of the no weapons rule on the basis of religious belief. For the Quebec Court of Appeal, Lemelin J. (*ad hoc*) had assessed the statutory authority's decision not to support accommodation of the student's religious belief on the basis of an unreasonableness standard of review.[55] The majority of the Supreme Court explicitly rejected the contention that the statutory authority was entitled to any degree of deference and then did its own assessment of the evidence and arguments on the critical elements of the claim of violation.

Not surprisingly, the same is true of the next stage of the process: the consideration of the section 1 justification. Certainly, Charron J. gives the standard nod in favour of not demanding perfection of legislators and decision-makers at the minimal impairment stage of the *Oakes* test proportionality analysis: "the courts must accord some leeway".[56] In deciding whether there has been minimal impairment, "perfection" is not demanded, only a solution that comes "within a range of reasonable alternatives".[57] However, in its subsequent consideration of all of the statutory authority's arguments and, in particular, the claim that nothing short of an absolute ban would do to fulfill legitimate objectives, the majority judgment engages in a full evaluation of the evidence and the arguments with not a whiff of deference or suggestion that there might be room for another opinion or assessment of the situation. In short, an absolute ban did not come close in the Court's mind to the kind of reasonable alternative that might justify some measure of deference at the minimal impairment stage.

Where does this leave the law with respect to the role of deference in Charter cases? Are the Court's decisions and reasoning in cases such as *Ahani*, *Suresh* and *Pinet* reconcilable with the majority judgment in *Multani*? I suppose it might be contended that the group of three are section 7 cases and *Multani* is a section 2(*a*) freedom of religion case. It might also be contended that given the apparently very short shrift that the governing board and council of commissioners gave to Multani's freedom of religion assertion, the Court had no alternative but to conduct correctness review or its own assessment of the merits of the

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55 *Multani*, *supra*, note 37, at paras. 10-12.

56 *Id.*, at para. 50, quoting from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at para. 160.

57 *Id.*

claim. There is simply no entitlement to deference when the statutory authority in effect does not face up to a constitutional or Charter claim or fails to deal with it within the legal framework that the Court's Charter jurisprudence demands.

However, neither of those attempts at distinguishing is really all that plausible. First, I do not see any relevant difference for these purposes between decision-making that engages the section 7 guarantees of fundamental justice when life, liberty and security of the person are at stake and decision-making that implicates freedom of religion. Secondly, the majority is quite dogmatic: Administrative Law standards and principles have no application in cases where the courts are assessing exercises of statutory power against the guarantees provided by the Charter. There is no sense in the elaboration that the situation might vary as among various provisions of the Charter or be affected by the extent to which (if at all) the statutory authority has itself addressed the Charter issues. Rather, the standard of review is that of correctness.

Indeed, the majority makes it clear that it rejects the minority's perspective that automatic correctness review only applies in cases where the court is considering the validity of legislation as opposed to the validity of decisions taken under legislation. Not only does the Court affirm the application of *Martin* and its assertion of correctness review in the context of individualized decision-making and discretionary exercises of power, but it also refers with approval to the following statement in *Ross v. New Brunswick School District No. 15*:[58]

> As the Court recognized, "an administrative tribunal acting pursuant to its delegated powers exceeds its jurisdiction if it makes an order that infringes the *Charter*". . . . [59]

Indeed, at the risk of inappropriately re-insinuating the principles of Administrative Law which *Multani* explicitly outlaws, I would venture to say that what the majority is in effect doing is making the assertion that Charter questions always go to jurisdiction and attract correctness review whether it is a matter of pure law, mixed law and fact, or pure fact.

In short, it is my view that the judgment in *Multani* cannot coexist with the three earlier judgments where the Court accepted the legitimacy of some degree of deference to at least certain species of individualized

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58 [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825.

59 *Multani*, *supra*, note 37, at para. 17, quoting from *id.*, at para. 31.

decision-making that implicated Charter rights and freedoms.[60] The pity, of course, is that the Court does not at any point refer to any one of these three judgments. It is also, in my view, the case that these three judgments do not find a true surrogate in the judgment of the duo, so directly or explicitly rejected by the majority. In particular, there is no suggestion in any of the three that section 1 has no relevance to situations of individualized decision-making. Indeed, *Suresh* certainly contemplates a continued role for section 1 in such cases. In other words, what the Court did in these three cases in no way carries with it the implication that *Slaight Communications Inc. v. Davidson*[61] is incorrect in its reading of "prescribed by law" to include the actual outcomes of individualized decision-making. The theory and practice of deference articulated in these three cases in no way requires acceptance of the duo's sweeping away of that part of Charter law.[62]

V. RESOLVING THE DILEMMA

If I am accurate in my assessment that there can be no reconciliation between *Multani* and the other three decisions to which I refer, what is to be done? It is, after all, quite problematic to have the Court espousing two inconsistent theories of the relationship between Constitutional and Administrative Law review and to simply leave the matter of which one has purchase in a particular case to apparently random selection. What is clearly demanded of the Court is that on an appropriate occasion (and, it is to be hoped, sooner rather than later), it recognize the dilemma and come up with an overarching vision of how, if at all, courts should accommodate concepts of deference in constitutional litigation. Moreover, as my colleague David Stratas has pointed out,[63] any such

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[60] Interestingly, while Charron J. does mention both *Chamberlain*, *supra*, note 40, and *Trinity Western*, *supra*, note 39, she never does contest Deschamps and Abella JJ.'s characterization of those two decisions as supporting the place of deference where the exercise of discretion implicates Charter rights and freedoms.

[61] *Supra*, note 48.

[62] Indeed, one of the consequences of the duo's theory would be to discourage rule-making by administrative agencies. If an agency confines itself to making policy incrementally through individualized decision-making, under the duo's theory, it has a considerable chance of attracting deference for each of those individualized decisions. If, on the other hand, the agency engages in rule-making and thereby establishes norms, it opens itself up to correctness review and having to bear the onus that s. 1 places to justify itself when it adopts rules that impinge on Charter rights and freedoms.

[63] In discussion.

overall evaluation must take account not only, on the one hand, of the role of deference in sections 91 and 92 litigation but also, on the other hand, that the Court typically affords no deference to individualized decision-making by public officials when it deals with section 8 search and seizure issues in a criminal context, in this instance police officers determining whether or not to conduct a search. It is only against the backdrop of such a realization of the varying contexts in which this can become an issue that the Court is likely to come up with a coherent theory which can be drawn on irrespective of context.

In all of this, there is, of course, no gainsaying the majority position in *Multani* that full, correctness review of any administrative determination that affects Charter rights and freedoms could have the tendency to increase the occasions on which the Charter will provide "protection". However, there is another reality that emerges very clearly from a consideration of the impact of applying *Multani* in situations such as those which arose in *Pinet*. If correctness review becomes the order of the day in all Charter contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on Charter rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities and the like. Whether that kind of judicial micromanaging of aspects of the administrative process should take place is a highly problematic question. It is one that should not be taken to have been decided by default in *Multani* and its blanket rejection of any room for the principles of Administrative Law and its standard of review analysis in Charter cases.

In *Multani*, at least one member of the Court, LeBel J., recognized that there were problems with making sweeping assertions of the kind emanating from both the majority and the duo:

> Although I agree with the disposition proposed by my colleagues, I remain concerned about some aspects of the problems of legal methodology raised by this case. As can be seen, the case involves diverse legal concepts that, although belonging to fields of law that are in principle separate, are still part of a single legal system the coherence of which must be adequately ensured.
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> . . .

> The approaches followed to apply the *Canadian Charter* must be especially flexible when it comes to working out the relationship between administrative law and constitutional law.[64]

This expression of concern seems fully warranted upon a fuller consideration of the Supreme Court's own approaches to this issue in other contexts. It is to be hoped that this will prove a lifeline for counsel wishing to assert in a later case that standard of review analysis and the possibility of deference to discretionary decision-making are not always the alien concepts that the *Multani* majority has asserted that they are.

It is also worth bearing in mind that the Court itself may have already provided hints of how the dilemma might be resolved satisfactorily. While the Court in an Administrative Law setting has rejected the contention that it should recognize a greater gradation of standards of review than the three currently accepted standards of [in]correctness, unreasonableness and patent unreasonableness,[65] I assume that that has not precluded consideration of whether there needs to be a somewhat different approach to the review of exercises of power engaging constitutional questions and Charter rights and freedoms in particular.

As we have seen, one way of doing this is to place greater emphasis on the nature of the right that is at stake in either conducting a pragmatic and functional analysis for the purposes of substantive review or, in the domain of procedural fairness or fundamental justice, as part of the *Baker* factors used to establish the strength of any claim to procedural fairness. This would, however, involve a concession that *Multani* should not be read as imposing a universal standard of correctness review on every situation when Charter rights and freedoms are at issue irrespective of the nature of the issue before the Court, be it law, mixed law and fact, or fact. It would also force the issue whether, for these purposes, the courts should acknowledge that there is a hierarchy of constitutional rights and freedoms or at least varying levels of harm caused by a failure to afford proper recognition to constitutional rights and freedoms. A decision which may send someone to death and torture at the hands of a barbarous regime may indeed have more constitutional

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64 *Supra*, note 37, at paras. 141 and 152.

65 *Law Society of New Brunswick v. Ryan*, [2003] S.C.J. No. 17, [2003] 1 S.C.R. 247, at paras. 24-26.

significance than routine decisions about the level of security in which those detained in psychiatric institutions are housed.

However, there is another way of creating a compromise or point in between conceptions of deference derived from Administrative Law (unreasonableness or patent unreasonableness review) and correctness review. In standard judicial review, the onus rests with the applicant to establish a basis for judicial review by reference to whatever standard is produced by the pragmatic and functional analysis. As *Provincial Court Judges' Assn. of New Brunswick*[66] makes clear, that is not the only framework within which deferential judicial review of discretionary decision-making or rights determinations can take place. There, as we have seen, the Court placed the onus on the government to justify its rejection or modification of the recommendations of the various judicial remuneration commissions. However, whether the government met that onus was not contingent on it showing the correctness of its views and the incorrectness of the commissions' determinations. Rather, the Court assessed its rationale for departing from those recommendations on the basis of the manner it went about justifying its decisions: a process of judicial evaluation that focused on the extent to which the government gave reasons that genuinely addressed the position of the commission and provided a rational basis for departing from it, and one that was sustainable on a reasonable view of the facts.

While the Court does not explicitly acknowledge the work of David Dyzenhaus, there are distinct echoes here of his theory of deference as respect,[67] a theory that L'Heureux-Dubé J. endorsed in her majority judgment in *Baker v. Canada (Minister of Citizenship and Immigration)*.[68] Reduced to its core, what the Court is calling for is a combination of more elaborate and clearly articulated reasons and greater attention to the rights at stake as a precondition to respect for the agency's judgment and expertise; a culture of justification where constitutional questions, including those affecting Charter rights and freedoms, are at stake.[69] It is not, however, the kind of justification that

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66 *Supra*, note 22.

67 David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), at 279.

68 [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at para. 65.

69 I should note, however, that this kind of approach has apparently been rejected by the House of Lords in *R. (on the application of Begum (by her litigation friend, Rahman)) v. Headteacher and Governors of Denbigh High School*, [2006] UKHL 15. This involved issues similar to *Multani*: a challenge to a decision refusing to allow Begum, a Muslim, to wear a jilbab to

forms the basis of section 1 analysis and, to that extent, this approach is closer to that of the duo in *Multani* than that of the majority. Nonetheless, it certainly does have strong claims for recognition outside the world of judicial remuneration commissions and the protection of the institutional independence of judges.

This notion of deference having to be earned also intrudes in the judgment of Binnie J. in *Pinet v. St. Thomas Psychiatric Hospital.*[70] There, he makes it clear that the requirement that the reviewing Court be restrained in its scrutiny of the Review Board's assessments is predicated on the Review Board approaching its task with the section 7 rights of the detainee as "a major preoccupation".[71] In other words, the Court will be justified in intervening if the Board has failed to take the section 7 rights adequately into account in balancing the various considerations bearing upon its decision. Presumably, as in *Provincial Court Judges Assn. of New Brunswick*, whether that has occurred will be evaluated on the basis of the justifications provided by the Board and the extent to which those justifications find a reasonable basis in the facts.[72]

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school. It was claimed that this decision unjustifiably limited her religious freedoms under article 9 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, and the right not to be denied an education under article 2 of the First Protocol to the Convention. In reversing the Court of Appeal, the House of Lords rejected an approach that evaluated "the quality of the decision-making process" (at para. 31). Rather, the reviewing Court's role was to focus on the practical outcome (at para. 31). However, at least some members of the House of Lords adopted a deferential approach to the task of reviewing the decision. Thus, Lord Bingham of Cornhill went on to state at para. 34:

> It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision. After the conclusion of argument the House was referred to the recent decision of the Supreme Court of Canada in *Multani* . . . . That was a case decided, on quite different facts, under the Canadian Charter of Rights and Freedoms. It does not cause me to alter the conclusion I have expressed.

I am grateful to Roy Lee of the Business Law Section of the Department of Justice Canada for drawing this decision to my attention.

[70] [2003] S.C.J. No. 66, [2004] 1 S.C.R. 528.

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

[72] It may also be the case that there are situations where the institutional framework that forms the context for the judicial review application is one where there can be no reasonable assurance that the decision-maker can or will give the Charter rights and freedoms at stake their appropriate weight. In those instances, the Court may be completely justified in correctness review. Thus, for example, in the context of *Suresh* and *Ahani*, where the decision-maker's primary concerns are the security interests of Canada, the expectation that Charter rights and freedoms will be evaluated properly may simply not be justified at least in the absence of some internal, independent check. If so, the correctness review may be necessary if, indeed, Charter rights and freedoms are not to be devalued.

VI. CONCLUSION

Multani's assertion that correctness is the invariable standard of review when Charter rights and freedoms are at stake is not supported by prior Supreme Court of Canada authority and, as a matter of an appropriate standard for the review of the exercise of discretions that engage Charter rights and freedoms, is too blunt an approach. There is room for deference to the discretionary judgments of statutory authorities exercising powers that have the potential to affect Charter rights and freedoms. To accept this is not to devalue inappropriately those Charter rights and freedoms. However, to prevent this devaluation from occurring, there should be recognition that the framework within which deference operates will often, perhaps invariably, need to be different than it is in the case of judicial review of administrative action that does not affect Charter rights and freedoms. In my view, the genesis for this approach can be found in the Supreme Court's judgment in the recent *Provincial Court Judges' Assn. of New Brunswick* case where the Court requires the relevant state actor to justify its entitlement to deference from the reviewing court by providing reasons that show a heightened awareness of the constitutional rights at stake and a rational basis in terms of the parameters of those rights and the facts to justify the court exercising restraint.