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A Comparison of the Impact of the New Zealand Bill of Rights Act and the Canadian Charter of Rights and Freedoms on Judicial Review of Administrative Action

David J Mullan*

This article is an edited version of a paper delivered on 1 May 2001 at the Victoria University of Wellington Law School. Professor Mullan was hosted by the New Zealand Centre for Public Law while in Wellington as a Chapman Tripp Visiting Fellow. In this article he compares the impact on administrative law of the Canadian Charter of Rights and Freedoms with that of its younger cousin, the New Zealand Bill of Rights Act 1990.

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I am grateful to Chapman Tripp and the New Zealand Centre for Public Law for making possible my presence in New Zealand and the opportunity to research, reflect, and write on the topic dealt with in this paper. I am also very appreciative of comments and material that I received from a number of people in varying formats: Jane Adams, Ben Keith, Janet McLean, Tony Shaw, Esther Wallace, and especially Mike Taggart and Grant Huscroft. (In the case of Grant, it is, however, particularly important to enter the usual caution that the views expressed are those of the author and do not reflect the position of those to whom acknowledgements have been made.) Some of my thinking in the Canadian parts of this paper is also developed in the following: David J Mullan and Deirdre Harrington "The Charter and Administrative Decision-Making: The Dampening Effects of *Blencoe*" (2002) 27 Queen's LJ 879; David J Mullan "The Charter and Administrative Law" (Law Society of Manitoba Isaac Pitblado lecture, Winnipeg, 2002) and David J Mullan "Deference from *Baker* to *Suresh* and Beyond: Interpreting the Conflicting Signals" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004).

> One valuable lesson from the Canadian experience with the Charter is that once the first wave of constitutional litigation has broken over the criminal law bar the next area to be swamped is administrative law. While we believe this will be the case in New Zealand also, it is important to bear in mind that the two sections of the Canadian Charter which have had the most impact on the administrative law of that country have no direct counterparts in our Bill of Rights. Apart from the case-law generated by ss 7 and 15 of the Charter, the Canadian courts and commentators have had remarkably little to say about the impact of the Charter on a critically important area of administrative law: the control of discretionary power. It is this aspect that we will concentrate on in this paper, for the reason that our "ordinary" statute Bill of Rights is likely to have a greater impact on this area of New Zealand administrative law than any other.[1]

I INTRODUCTION

As the distinguished authors of the prologue observe, the criminal process often provides the initial location for the testing of the scope of many newly-adopted bills of rights. In large measure, this is because prominent provisions in typical bills of rights have as their direct or obvious focus the functioning of the criminal law. Also, in a practical sense, investigations, and prosecutions are constantly ongoing in great numbers, and those who are their subjects are not surprisingly always looking for ways in which to avoid the weight of the criminal law.

In contrast, bills of rights tend to have fewer provisions with administrative processes as their exclusive or even clear concern,[2] so that the scope for asserting bill of rights-based administrative law claims may not be nearly so obvious. Moreover, while the quantity of administrative decisions or actions far exceeds the number of criminal prosecutions, making an effective claim based on a bill of rights will normally depend on taking the pro-active step of applying to a court for review of the decision of an executive or governmental official or an administrative agency or tribunal. That is a rather different process from simply raising a bill of rights argument as part of a defence to proceedings in a criminal court. Nevertheless, in due course, to the extent that the relevant bill of rights potentially offers protections for citizens embroiled in administrative or executive processes, it seems inevitable that challenges will start occurring and the courts will explore the scope for the application of the bill of rights to those non-criminal yet governmental processes.

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1 Janet McLean, Paul Rishworth, and Michael Taggart "The Impact of the Bill of Rights on Administrative Law" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 62, 62–63.

2 An obvious exception is the Constitution of the Republic of South Africa 1996 with its guarantee in s 33 of rights to administrative justice.

In this paper, I examine the extent to which the Canadian Charter of Rights and Freedoms[3] has gradually come to have an impact on administrative law since it came into force in 1982 and compare the situation in Canada with that in New Zealand under its eight-years-younger New Zealand Bill of Rights Act.[4] In doing so, I want to concentrate particularly on four matters that the authors of the "lesson" raise either directly or by necessary implication[5] about the likely degree of penetration of the two bills of rights into the administrative law principles of each jurisdiction:[6]

(1) That the entrenched nature of the Canadian Charter makes it far more likely that it will have a significant impact on Canadian administrative law than will be the case in New Zealand with its unentrenched, "ordinary legislation" Bill of Rights.

(2) That this situation will be exacerbated by the absence of any direct equivalents in the Bill of Rights of the Canadian Charter's section 7, guaranteeing the benefit of the

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3 Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B). Hereafter "Canadian Charter" or "Charter".

4 Hereafter "Bill of Rights". In so labelling it, I am fully aware that I run the risk of incurring the wrath of James Allan, who in "Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990" (2000) 9 Otago L Rev 613, 613 railed against any reference to this statute as a "Bill of Rights" as opposed to a "Bill of Rights Act":

> A Bill of Rights Act is a statute; a Bill of Rights is not. What's in a name? Sometimes an accurate description of the status (and so powers) of the thing being described.

While acknowledging the force of that concern and the normative weight that careless use of language can carry with it, I contend that, even within the realm of unentrenched legislation, some Acts do carry more normative weight than others. In this respect, I would cite not only the Bill of Rights of 1688 but the also the 1960 Canadian Bill of Rights, SC 1960 c 44, reprinted in RSC 1985 app III. While I am not completely comfortable with the nomenclature, the Supreme Court of Canada has labelled such legislation "quasi-constitutional", starting with Laskin J (as he then was) in reference to the unentrenched Canadian Bill of Rights in *Hogan v The Queen* [1975] 2 SCR 574, 597. In the balance of the paper, I attempt to make an argument that the New Zealand Bill of Rights Act 1990 merits this special status. More specifically, I reject Allan's argument that the Bill of Rights is no more than "a parliamentary Bill of Rights" which left Parliament as the guardian of the rights and freedoms of New Zealanders: Allan, above, 616–17.

5 In fairness to the authors, I have removed the paragraph used in the prologue from its context. It comes in an introductory section in a paper the principal purpose of which is to advance the contention that there is considerable potential in the Bill of Rights for an expanded review for abuse of discretionary powers. The authors do not in fact examine in any depth the other propositions emerging from that paragraph.

6 This paper is not about the relative merits of entrenched and unentrenched bills of rights. My preference is for entrenchment. However, one of the points of the paper is that, to this point, the reality is that the entrenched nature of the Canadian Charter has had very little impact on the extent to which the Charter has affected administrative law.

"principles of fundamental justice" when "life, liberty and security of the person" are in jeopardy, and section 15, the equality provision.

(3) That there will nonetheless be considerable room under the Bill of Rights for challenging the exercise of discretionary decision-making powers for violations of protected rights and freedoms, even though the authors found surprisingly little academic interest in or the actual making of these kinds of challenges in Canada at least as of 1992.

(4) That, in any event, it is likely that, as in Canada, New Zealand administrative law will ultimately be "swamped" with attempts to invoke the Bill of Rights in the context of challenges to the functioning of the administrative and executive process.

I also examine how, since the advent of the Charter, many of the evolutions in Canadian administrative law that have had as their focus the enhanced protection of rights and freedoms have been the product not of the Charter but of a revivified common law of judicial review, reliance at the federal level on the Canadian Bill of Rights[7] and in Quebec on its Charter of Human Rights and Freedoms,[8] and appeals to underlying constitutional principles.

After an examination of these propositions, my essential theses will be:

(1) Leaving aside Canadian case law in which the courts have in the name of section 15 and occasionally section 7 struck down or modified the substantive (as opposed to procedural)[9] provisions of legislation administered by state officials, agencies, and tribunals, there is to this point little evidence to support the contention that the entrenched nature of the Canadian Charter has led to its having had a significantly greater impact on the administrative process than is feasible under the unentrenched Bill of Rights.

(2) This is particularly true in the case of litigation involving section 7 of the Canadian Charter and its application to administrative regimes. Here, the principal impact has not been in the domain of primary legislation but rather with respect to procedural regimes created by subordinate legislation and agency and tribunal rules, as well as procedural rulings in individual matters. The Canadian courts have also so limited the reach of section 7 that it applies to a comparatively narrow range of administrative

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7 Canadian Bill of Rights SC 1960 c 44, reprinted in RSC 1985 app III.

8 Quebec Charter of Human Rights and Freedoms RSQ 1977 c C-12 (re-enacted SQ 1982 c 61, s 16).

9 In other words, those instances where, for example, the courts have held that legislation administered by a government official, agency or tribunal is ultra vires because its substantive provisions deny substantive rights (especially s 15 (equality)) and freedoms (such as s 2(b) (freedom of expression)) explicitly guaranteed by the Charter.

decision-making. To this extent, section 27(1) of the Bill of Rights, with its more generous realm of application and its potential for similarly dealing with procedural challenges to subordinate legislation, agency and tribunal rules, and individual procedural determinations, may have a broader capacity to provide relief than exists under section 7 where there are claims to procedural protections beyond the requirements of pre-Bill of Rights common law.

(3) While there is some limited room under the Canadian Charter for the striking down of statutory discretions that have the potential to affect Charter rights and freedoms on the basis that they are too broadly expressed or insufficiently confined or structured, this has not been and seemingly will not be a common phenomenon. Rather (though the examples, as in New Zealand, are still relatively few in number) the principal work in this domain will be in situations involving challenges to individual exercises of statutory discretions on the basis that they violate the Charter or Bill of Rights rights and freedoms of the applicant.

(4) In neither country has administrative law been "swamped" by litigation asserting violations of protected rights and freedoms, a proposition that requires not just empirical support but also, given the McLean, Rishworth, and Taggart predictions, an attempt at explanation or justification.

(5) It is likely that in both countries the common law of judicial review (underpinned by a more broadly-based conception of administrative law as part of constitutional law)[10] will continue to evolve and play a significant role in the protection of individuals against state abuse of power in both procedural and substantive domains.

(6) Nonetheless, in the case of both Canada's entrenched Charter and New Zealand's unentrenched Bill of Rights, over-reliance on the common law involves the danger of not providing the kind of protection that a purposive interpretation of these instruments demands and of a resulting debasing of the coinage of rights and freedoms.

II OVERALL SCOPE AND IMPACT

In any assessment of the relative impact on administrative law of the Bill of Rights and the Canadian Charter, it is critical to identify at the outset the salient differences between the general or overall reach and impact of these two instruments.

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10 For a recent exploration of the linkages in Canadian law, see Geneviève Cartier "The *Baker* Effect: A New Interface between the Charter and Administrative Law—The Case of Discretion" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004).

First, as already noted, the entrenched nature[11] of the Canadian Charter very obviously gives it considerably more room to operate than is possible under the Bill of Rights.[12] This enables not only the judicial invalidation of primary and subordinate legislation, but also more limited remedial responses such as severance or reading out, reading in, and the provision of constitutional exemptions. Canadian courts also have the capacity to use the Charter to fill gaps in legislation and, more generally, in the straight interpretation of legislative provisions. However, as Janet McLean has shown,[13] short of invalidating primary legislation, the New Zealand courts through interpretive techniques and the generous application of section 6 of the Bill of Rights[14] can achieve many of these same ends.[15] Also relevant are the important qualifications on the entrenched nature of the Canadian Charter. Not only does section 33 allow for legislative override of many of the rights and freedoms recognised in the Charter[16] (admittedly a capacity seldom relied upon to this point) but also, by virtue of section 1, all of the rights and freedoms yield when the Government demonstrates that the relevant violation is "demonstrably justified in a free and democratic society".[17]

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11 Section 52 of the Constitution Act 1982 provides for the supremacy of the Constitution of Canada (including the Charter) over all other laws.

12 Section 4 of the Bill of Rights provides that it does not invalidate or render ineffective any other enactment whether passed or made before or after the commencement of the Bill of Rights.

13 Janet McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] NZ Law Rev 421.

14 Section 6 requires that, if a provision in an enactment can be given a meaning which is consistent with the rights and freedoms contained in the Bill of Rights, that is to be preferred to all other interpretations.

15 It is also worthy of note that the New Zealand Court of Appeal has asserted a capacity to make non-binding declarations that an enactment is inconsistent with the Bill of Rights albeit that the courts are still bound by s 4 to give effect to that enactment: *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA). For a discussion of the nature of this authority, see Paul Rishworth, Grant Huscroft, Scott Optican, and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 833–838. See also Rodney Harrison "The New Public Law: A New Zealand Perspective" (2003) 14 Pub L Rev 41, 41–45 for a discussion of both this aspect of the Bill of Rights and the explicit declaration of inconsistency jurisdiction created by Part 1A of the Human Rights Act 1993, as inserted by the Human Rights Amendment Act 2001.

16 The override procedure is applicable to s 2 and ss 7–15 of the Charter. It does not reach ss 3–6 (the sections on democratic and mobility rights) and ss 16–23 (dealing with official languages and minority language educational rights).

17 The Bill of Rights, of course, also has an equivalent to s 1. Section 5 provides for justification of violation of the rights and freedoms recognised by the Bill of Rights. Obviously, as opposed to the Canadian Charter, its principal area of operation will be decisions made or actions taken under an enactment. Now, however, that the courts have asserted the jurisdiction to make a non-binding declaration that an enactment is inconsistent with the Bill of Rights, s 5 will also play a role in the determination of whether to utilise that authority. See *Moonen*, above, 16–17 paras 18–20.

Still, the capacity to invalidate primary legislation constitutes a fundamental difference between the two bills of rights and one that cannot or should not be underestimated. Nonetheless, in what follows in this paper, I will be arguing that, at least to this point in the evolution of the Charter's impact in the domain of administrative law, the ability of the Canadian courts to override legislative provisions has not made all that much of a difference. Rather, the Charter's greatest impact on administrative law has been by way of filling legislative gaps and, more generally, in the interpretation of legislative provisions that affect Charter rights and freedoms. That means that for practical purposes, in the short term at least, the single most important difference between the two instruments may not have had any significant impact.

The second general difference between the two instruments is one that cuts the other way, in the direction of greater coverage under the Bill of Rights than under the Canadian Charter. Section 32(1) of the Charter states inter alia that it applies to the government of Canada, the provinces, and the territories. In 1990, in a series of four cases, the Supreme Court of Canada decided that this represented a legislative statement to the effect that the Charter applied only to exercises of power that were truly governmental in nature. It was not sufficient to establish that the power in question was a public one or even that it was derived from statute. Rather, the body exercising that power either had to be part of central government or have a sufficient nexus to central government to constitute it as essentially part of government.

In the particular circumstances of the four cases,[18] this led to the Court's holding that the retirement policies of universities in British Columbia and Ontario and hospital boards in British Columbia were not subject to direct attack by reference to the Charter's equality provision, section 15. Even though these bodies were established by primary legislation and were sufficiently public to attract the attention of the substantive principles and remedies of public law,[19] they were insufficiently subject to government direction and control to count as "government" for the purposes of section 32 in particular and the application of the Charter in general. In contrast, community colleges in British Columbia were subject to the Charter largely on the basis of the extent to which the Government involved itself on a more regular basis in the direction and operation of such bodies and, in particular, had a dominant role in the appointment of their governing bodies.

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

19 In *McKinney*, above, para 34, La Forest J, delivering the judgment of the majority, was explicit that the holding did not affect the courts' public law judicial review jurisdiction over decision-making within universities.

Much more recently, in *Eldridge v British Columbia (Attorney General)*,[20] the Supreme Court of Canada "clarified" one aspect of its judgments in the earlier cases: bodies which were not themselves government could on occasion be subject to the direct application of the Charter because government had given them responsibility for the implementation of a specific governmental policy or programme, or because they were involved in the performance of "inherently" governmental functions (for example, private prisons). In that case, it meant, somewhat ironically, that the Charter did apply to hospitals and hospital boards in British Columbia to the extent that they were engaged in the implementation of the province's medical services scheme and more particularly the provision of services under a medical treatment benefits programme. It has also been confirmed that the Charter reaches municipalities and agencies,[21] such as human rights commissions,[22] in fulfilling their statutory mandates, even if for many purposes, such bodies have independence from central government.

Nonetheless, what remains the case is that not all statutory authorities exercising what would normally be considered to be powers having a public purpose or significant public element are subject to the direct application of the Canadian Charter. Universities remain largely immune and doubts exist still, for example, about bodies such as law societies and, more generally, the governing bodies of all sorts of professions and occupations.

This stands in very sharp contrast to the wording of the Bill of Rights. There, one of the touchstones for application set out in section 3(b) is simply that the actions or decisions in question be taken or made:

> By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Indeed, this comes after a subsection to the effect that the Bill of Rights applies to the "legislative, *executive*, or judicial branches of the government of New Zealand",[23] thus making it abundantly clear that section 3(b) extends the reach of the legislation well beyond the realm of the *executive* branch as generally understood. The procedural protections provision in the

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20 *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

21 See the judgment of La Forest J in *Godbout v Longueuil (City)* [1997] 3 SCR 844, para 15, as endorsed in *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, para 51.

22 See *Blencoe*, above, para 51. Here, very surprisingly, the Supreme Court spent a good deal of time dealing with what seemed an incontrovertible proposition that Human Rights Commissions were "government" in terms of the Charter: paras 32–40. Indeed, while ultimately sustaining the presumed position, the Court left dangling the question of whether Human Rights Tribunals adjudicating complaints advanced by Commissions were covered by the Charter. It is, however, very difficult to conceive that they would not be.

23 (Emphasis added.)

Bill of Rights, section 27(1) also refers to "any tribunal or other *public* authority".[24] In short, the scope of the Bill of Rights could well be coterminous with that of public law as commonly understood.[25]

While the jurisprudence on this point is limited, and while at least one New Zealand judge has found the Canadian jurisprudence on the reach of the Charter "useful",[26] it is significant that the struggles that have taken place have been couched in terms of whether bodies which derive at least some of their capacities from statute are "public" as opposed to "private", not "governmental" as opposed to "non-governmental". By reference to those concepts, the Board of Trustees of Palmerston North Boys' High School[27] and Television New Zealand (TVNZ)[28] did not come within the reach of section 3(b) notwithstanding their statutory recognition. In removing a boarding pupil, the Board of Trustees was not exercising a statutory power of decision but a private power in the course of an essentially commercial operation. This mirrored the earlier approach of Blanchard J in the context of TVNZ's carrying out of its trading activities and the control of its copyright.

In Canadian law, the closest parallel is in fact not to the principles governing the application of the Charter but in the case law concerning the application of public law remedial regimes, such as the Federal Court Act[29] and the Ontario and British Columbia

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24 (Emphasis added.) Rishworth, Huscroft, Optican, and Mahoney note that the reach of s 27(1) may be narrower than the overall reach of the Bill of Rights as provided for in s 3(b) (see Paul Rishworth, Grant Huscroft, Scott Optican, and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 759). Not only must the decision-maker in question be engaged in "the performance of any public function, power, or duty" but it must also have an essentially public character as reflected in the choice of the term "public authority". Thus, it might be claimed that a "domestic tribunal" exercising public power would not come within the reach of s 27(1). As well, of course, to trigger the procedural protections of natural justice under s 27(1), it is also necessary that the function in issue affect "a person's rights, obligations or interests protected or recognised by law". I discuss this requirement below in considering the scope of s 27(1).

25 Much may depend on how the New Zealand courts interpret the word "law" in the expression "conferred or imposed on that person or body pursuant to law". Is law confined to those exercising power under statute or residual prerogative or does it extend to functions of a public nature that arise out of powers recognised by common law or conferred by agreement?

26 Goddard J in *McGuinn v Board of Trustees of Palmerston North Boys High School* [1997] 2 NZLR 60, 70 (HC).

27 *McGuinn* above, 70–71.

28 *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91 (HC).

29 Federal Court Act RSC 1985 c F-7 (as amended by SC 1990 c 8). Generally, the judicial review provisions of the Act apply to the exercises of jurisdiction or power "conferred by or under an Act of Parliament or by or under an order made pursuant to the prerogative of the Crown". However, the mere fact that a body derives its existence from a federal statute is not sufficient. It must be given

Judicial Review Procedure Acts.[30] Indeed, there also seem to be close parallels between the interpretive perspectives in these cases and those deployed by the New Zealand courts in defining the reach of the public law remedial provisions of New Zealand's equivalent to the Judicial Review Procedure Acts, the Judicature Amendment Acts of 1972 and 1977.[31] It also invites consideration of the rich United Kingdom jurisprudence[32] and literature[33] concerning the reach of public law generally and the judicial review regime in particular. Indeed, Lord Woolf has gone so far as to suggest that section 3 of the Bill of Rights may, by focussing on the function exercised (as opposed to the nature of the body exercising that function), have overcome some of the restrictive British case law on the reach of public law relief.[34]

While the full ramifications of this are beyond the scope of this paper, the fact that section 3(a) of the Bill of Rights provides that the Act applies to the actions of the judicial branch also stands in sharp contrast to the Canadian Charter. Absent such a clear statement in the Canadian Charter, the Supreme Court has held that the Charter does not apply directly but only indirectly to the common law.[35] In contrast, in New Zealand, the Bill of Rights appears to

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explicit jurisdiction to exercise over others. See for example *Canada (Attorney General) v Lavell* [1974] SCR 1349, 1379.

30 Judicial Review Procedure Act RSO 1990 c J1; Judicial Review Procedure Act RSBC 1996 c 241. Both Acts predicate the availability of an application for judicial review on the scope of the old prerogative writs and, in the case of declaratory and injunctive relief, the exercise of a "statutory power". However, the Ontario courts have been more generous in the scope they have attributed to the "new" remedy than has been the case in British Columbia. Compare, for example, the determinations of whether the exercise of disciplinary powers by trade unions came within the scope of the Act: *Re Rees and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 527* (1983) 150 DLR (3d) 493 (Ont Div Ct); *Mohr v Vancouver, New Westminster and Fraser Valley District Council of Carpenters* (1988) 33 Admin LR 154 (BCCA). I refrain from making any judgment as to whether the exercise of such powers would come within the ambit of either s 3(b) or s 27(1) of the Bill of Rights or the judicial review regime created by the Judicature Amendment Acts, though, if the Rishworth, Huscroft, Optican, and Mahoney conception of the reach of s 27(1) is accepted, it would probably not come within s 27(1), even if the s 3(b) threshold were crossed (see Paul Rishworth, Grant Huscroft, Scott Optican, and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 759).

31 For discussions of the applicability of the New Zealand public law remedial regime, see Michael Taggart "State-Owned Enterprises and Social Responsibility: A Contradiction in Terms?" [1993] NZ Recent LR 343, 356–362 and "Administrative Law" [2000] NZ Law Rev 439, 457–458.

32 Most notably *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815 (CA).

33 See for example Paul Craig "Public Law and Control over Private Power" and Dawn Oliver "The Underlying Values of Public and Private Law" in Michael Taggart (ed) *The Province of Public Law* (Hart Publishing, Oxford, 1997) 196; 217.

34 Rt Hon Lord Woolf of Barnes "Droit Public—English Style" [1995] PL 57, 63–64.

35 See *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573. However, the Charter has been deployed indirectly to influence the evolution of the common law governing relations between private

oblige the courts to shape the development of the common law in accordance with the rights and freedoms found in the Act—even in litigation between private parties.[36]

III PROTECTING PROCESS RIGHTS

A Canada

1 Potentially relevant provisions

Section 7 has become virtually the exclusive preserve for the assertion of Charter-protected procedural rights in Canada.[37] In large measure, this is the result of the refusal of the Supreme Court to give expansive readings to either section 15 or section 11.

Section 15 and its equality protections will provide procedural protections in only the rarest of situations. Since the Supreme Court interpreted section 15 as essentially an anti-discrimination provision,[38] the only real prospect for deploying section 15 in the instance of procedural imbalances or inequalities is in circumstances where that imbalance or inequality is predicated on one of the grounds of discrimination identified explicitly in section 15 or in a category analogous thereto. Examples have not occurred.

Section 11 potentially held more promise with its assurances of protections against undue delay[39] and the guarantee of an independent and impartial adjudication.[40] However, the language of the introduction to the section ("Any person charged with an offence") as well as the marginal note ("Proceedings in criminal and penal matters"), suggested a range of application that was confined to the domain of criminal law and offences. In fact, that was

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individuals: see for example *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 (a defamation action).

36 See Murray Hunt "Human Rights Review and the Public–Private Distinction" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights*: *Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 73, 74–77. Note, however, the reservations or qualifications expressed by Paul Rishworth, "Liberty, Equality and the New Establishment" in Huscroft and Rishworth, above, 91, 96–100, as well as the much fuller discussion of this issue in Paul Rishworth (ed) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 98. See also *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570, 584 para 41 (CA) to the effect that the Bill of Rights is a limitation on government, not private actions.

37 Section 13 does however provide protection against subsequent use of incriminating testimony given in any proceedings while s 14 guarantees the right to the assistance of an interpreter for anyone who does not understand the language of proceedings or is deaf. There is no reason why these would not apply to administrative hearings.

38 Starting with *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

39 Section 11(b): the right "to be tried within a reasonable time".

40 Section 11(h): the right to "a fair and public hearing before an independent and impartial tribunal".

quickly confirmed by the Supreme Court of Canada and its holding that the section applied only to the criminal law and those very limited situations outside of the criminal law where administrative tribunals or agencies had the ability to impose "truly penal" sanctions.[41]

While the paramilitary nature of the Royal Canadian Mounted Police disciplinary processes with the potential for incarceration came within that range,[42] prison discipline (even involving loss of remission and solitary confinement) did not.[43] Also, the Court seems to have accepted that the imposition of substantial fines and other sanctions by regulatory agencies (such as securities commissions) does not come within the reach of the section.[44] To break the section 11 barrier, the sanctions in issue must be designed to punish or remedy past conduct as opposed to being simply protective and preventive in the sense of the deterrence of future conduct.[45]

Thus, if the right to a reasonably expeditious administrative proceeding and to an impartial and independent tribunal are to ever be part of the procedural rights guaranteed by the Charter, the source for them has to be found in some provision other than section 11. The only other obvious candidate for that and most other procedural protections is section 7, with its guarantee of the benefit of the "principles of fundamental justice" when the actions of government put in jeopardy a person's "right to life, liberty and security of the person".

2 *Section 7*

(a) The threshold

In fact, section 7 has provided a basis for using the Charter in the world of administrative law. However, it has been a comparatively restrained one, dictated by the limitation of the protection to situations where "life, liberty and security of the person" are in jeopardy. This threshold is on its face more limited than the equivalent protection in the Canadian Bill of Rights, section 2(e) of which guarantees the protections of fundamental justice in a procedural sense whenever a federal public authority is determining "rights and obligations".[46] More

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41 See for example *R v Wigglesworth* [1987] 2 SCR 541.

42 *Wigglesworth,* above.

43 *R v Shubley* [1990] 1 SCR 3.

44 See *Johnson v British Columbia (Securities Commission)* (1999) 67 BCLR (3d) 145 (SC), leave to appeal denied (1999) 128 BCAC 207 (CA), applying *Re Malartic Hygrade Gold Mines (Canada) Ltd and Ontario Securities Commission* (1986) 27 DLR (4th) 112 (Ont HC) and *Re Barry and Alberta Securities Commission* (1986) 25 DLR (4th) 730 (Alta CA).

45 See *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, [2001] 2 SCR 132, paras 41–45 Iacobucci J.

46 The Canadian Bill of Rights also contains another provision under which there is room for attacking both federal legislation and decisions for procedural unfairness. This is s 1(a) which provides a

importantly for present purposes, it is narrower in ambit than section 27(1) of the Bill of Rights, which not only guarantees the benefit of the principles of natural justice where rights and obligations are being determined but also "interests protected or recognised by law". Section 2(e) of the Canadian Bill of Rights[47] and section 27 of the Bill of Rights[48] also apply for the benefit of all juridical persons. Only real persons may avail themselves (at least directly) of the benefits of section 7.[49]

Obviously, much therefore depended on how the Canadian courts interpreted the term "life, liberty and security of the person". The interpretive dilemma is in part illustrated by those portions of the Bill of Rights which provide protection to "life and security of the person" and in the domains of "search, arrest, and detention". Sections 8 to 11 in the "life and security of the person" portion of the Act create rights to various forms of *bodily or physical* life or security of the person. Similarly, the portion headed "search, arrest, and detention" contains protections against certain kinds of constraints on "liberty" in the *physical restraint* sense of that word. Was the Canadian Charter using "life, liberty and security of the person" in that same manner, or did these rights have a broader field of application?

The location of section 7 within the Charter also raised another question as to its reach. It is the first section in a Part headed "Legal Rights". The balance of the provisions in that Part of the Charter is concerned primarily with the processes of the criminal law. Did that indicate that section 7 was essentially an umbrella provision restricted in its operation to the domain of criminal law and other legal regimes involving restraints on physical liberty, such as the custody of the mentally ill or children under child welfare legislation?

In fact, there is now a significant jurisprudential history around the dilemma of the reach of section 7 and this is not the place to recount all of its details. Suffice it to say that, after some vacillation, the Supreme Court has accepted that the reach of section 7 extends beyond the criminal and analogous processes, and that "life, liberty, and security of the person" should not

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guarantee of the right to "due process of law" in the face of deprivations of the right to "life, liberty, security of the person and *enjoyment of property*" (emphasis added). In fact, this has been deployed less frequently than even s 2(e). However, its potential was recognised recently in *Authorson v Canada (Attorney General)* (2002) 215 DLR (4th) 496 (Ont CA) (reversed 2003 SCC 39, though without challenge to the general proposition).

47 Section 2(e) is expressed in terms of depriving a "person" of the enumerated right and this has been applied for the benefit of juridical persons such as corporations. See *Air Canada v Canada (Attorney General)* (2003) 222 DLR (4th) 385 (Qué CA). This stands in contrast to s 1(a) which is couched in terms of the right of the "individual" to "life, liberty, security of the person and enjoyment of property". The Federal Court of Appeal has held that the benefits of this provision are restricted to natural persons: *Canada (Attorney General) v Central Cartage Co* [1990] 2 FC 641 (CA).

48 This is spelled out explicitly in s 29.

49 See *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927.

be conceived of solely in terms of the bodily or physical.[50] To illustrate, in *R v Morgentaler*,[51] Wilson J saw "liberty" in section 7 as protective of a woman's right to choice in the matter of an abortion, while other members of the majority accepted that "security of the person" included threats to psychological as well as physical integrity. In combination, this meant that the therapeutic abortion committee provisions of the Criminal Code[52] interfered with both the liberty and the security of the person of women seeking abortions. Much more recently, in *New Brunswick (Minister of Health and Community Services) v G(J)*,[53] the Court held that proceedings in which the State was seeking a renewal of a child custody order affected the security of the person of the mother of that child. Such proceedings had a serious impact on the mother's psychological integrity. La Forest J, concurring in *Godbout v Longueuil (City)*, saw a municipal requirement that employees live within the city boundaries as a restriction on affected employees' right to "liberty" under section 7, in the sense that it involved state intrusion on a "fundamental life choice".[54] This concurring judgment was subsequently to attract the approval of a majority of the Court in *Blencoe v British Columbia (Human Rights Commission)*.[55]

However, this does not mean that section 7 became a provision that applies in an all-embracing sense to the administrative process or even a significant part of it. The very deliberate exclusion of property rights led the Court to reject early on the section's application to purely economic interests[56] or the right to work.[57] This obviously removed from the reach of section 7 the activities of many administrative regimes such as securities commissions and those involved in economic licensing of various kinds, not to mention those tribunals whose focus was on property, both real and personal.

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50 For a good account of the evolution of s 7 from a provision that was conceived of as primarily a source of protection in the exercise of criminal law power and confined to actions affecting physical liberty and security of the person, see the judgment of Bastarache J in *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, paras 41–57.

51 *R v Morgentaler* [1988] 1 SCR 30.

52 Criminal Code RSC 1970 c C-34, s 251.

53 *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] 3 SCR 46.

54 *Godbout v Longueuil (City)* [1997] 3 SCR 844.

55 *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, para 51.

56 See for example *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990] 1 SCR 1123, paras 56–59; *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; and more recently *Siemens v Manitoba (Attorney General)* 2003 SCC 3, paras 45–46.

57 See for example *R v Edwards Books and Art Ltd* [1986] 2 SCR 713.

On the other hand, some saw possibilities for an expansive reading of section 7 in a conception of liberty and security of the person which focussed on "dignity, self-worth and emotional well-being".[58] Thus, for example, in *Blencoe*, this led to arguments that administrative agencies and tribunals that in effect accused persons of misconduct (in that case, discrimination contrary to provincial human rights legislation) were subjecting those persons to a process where their "dignity, self-worth and emotional well-being" were under challenge, in the sense of the stress and stigma of being the target of such accusations and state-enforced or -sanctioned proceedings.

These arguments were rejected by a majority of the Court. The mere fact that proceedings of this kind caused some stress and had the capacity to involve stigmatisation did not bring their impact within the range of a deprivation of the right to life, liberty, and security of the person. They did not impinge on fundamental life choices and hence were not a deprivation of liberty.[59] Nor did they have a sufficiently profound impact on psychological integrity or affect "an individual interest of fundamental importance" as to involve a taking away of the right to security of the person.[60] As a consequence, it became clear that the mere fact that someone was being "accused" under a state-created vehicle for "redressing private rights"[61] was not sufficient to trigger the operation of section 7, even where the matters in issue involved something as serious as sexual harassment of a form that could also have constituted sexual assault under the Canadian Criminal Code. Moreover, while the Court was prepared to concede that extreme cases of excessive delay in the processing of such complaints might activate section 7,[62] it is difficult to envisage examples occurring all that often. After all, as the minority points out graphically in *Blencoe*, even on the majority's own terms, the impact of the proceedings and the delays on Blencoe were many and serious.[63]

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58 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, above, para 59 Lamer J.

59 *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, paras 49–54 Bastarache J for the majority.

60 *Blencoe,* above, paras 81–82.

61 *Blencoe,* above, para 96.

62 *Blencoe,* above, para 98.

63 *Blencoe,* above, para 175 LeBel J:

> There can be no doubt about the impact of the allegations on the respondent and his family. The respondent's career [as a member of the Legislative Assembly and Cabinet Minister] is finished. He and his family have been chased twice across the country in their attempts to make a new life. He was under medical care for clinical depression for many months. In the wake of the outstanding complaints before the Commission, even such a normal aspect of life as coaching his son's soccer team has been denied to Blencoe, since he has faced stigmatization in the form of presumed guilt as a sexual harasser.

There still remains, however, one major area of considerable uncertainty for the reach of section 7, and that is whether it has anything to say about social welfare rights. Will it go so far as to impose on the State a positive obligation to ensure "not only protection of one's physical integrity, but the provision of necessaries for its support"[64] or, failing that, at least an obligation to comport with the principles of fundamental justice in a procedural sense when the State is considering whether to extend or take away some form of social welfare or income support? Is this a terrain where "security of the person" particularly is implicated? For the moment, the best that can be said is that the Court, while rejecting the argument on the facts, certainly seems to have left the possibility open in *Gosselin v Québec (Procureur général)*,[65] a case involving a challenge to the substance of eligibility requirements for subsistence level welfare.

(b) When the threshold is passed

Even when the threshold of "life, liberty and security of the person" is passed, there are still obstacles for those seeking relief under section 7 for alleged denials of the benefit of the principles of fundamental justice in a procedural sense. The Supreme Court has made it clear that the content of the principles of fundamental justice is a varying one and not necessarily demanding of a process comporting with all the traditional features of an adjudicative adversarial hearing.[66] Just as the principles of procedural fairness and natural justice vary at common law, so too do the principles of fundamental justice in a procedural sense. Second, and as a subsidiary of the first point, the Supreme Court has made it clear that state interests of various kinds count in assessing what fundamental justice requires and among the justifications or reasons for denying the applicant for relief a less than full-scale adversarial hearing.[67] In other words, within section 7 itself, the courts engage in a significant amount of balancing of the competing interests of the rights holder and the State. Third, beyond this, there is also the possibility that the Government may justify a violation of section 7 by

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64 A question posed initially by Wilson J in *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177, 207, quoting from the Law Reform Commission of Canada *Medical Treatment and the Criminal Law* (Working Paper 26, 1980) 6.

65 *Gosselin v Québec (Procureur général)* 2002 SCC 84. This involved a substantive claim that restrictions on access to certain welfare benefits infringed the appellant's rights to "life, liberty and security of the person". Two judges accepted this argument: Arbour and L'Heureux-Dubé JJ. Six others held that the claim had not been made out on the facts but expressed the view that they were not dismissing the application of s 7 to impose positive obligations on the State of the kind being asserted. Bastarache J, the seventh judge, rejected this possibility, taking the position that the operation of s 7 was restricted to situations involving the administration of justice.

66 See for example *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779; *Idziak v Canada (Minister of Justice)* [1992] 3 SCR 631; *Dehghani v Canada (Minister of Employment and Immigration)* [1993] 1 SCR 1053.

67 See for example *Chiarelli v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 711; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

reference to section 1, though given the balancing that takes place within section 7 itself,[68] there are no clear examples of this in the administrative law domain. Fourth, save in the few cases where the attack has been on primary legislation, the Supreme Court has for the most part eschewed any reliance on section 7 when there is potential for relief by reference to the common law principles of procedural fairness or natural justice.[69]

Advocates of an expansive reading of section 7 were encouraged by the very first Supreme Court judgment in which the application of section 7 to the administrative process arose for consideration: *Singh v Canada (Minister of Employment and Immigration)*.[70] There, three judges in a six-judge Court[71] were prepared to hold that section 7 applied to the process by which convention refugee status was determined. Convention refugee claimants, by reason of their genuine fear of persecution, were held to be rights holders under section 7 even though they were not Canadian citizens or even landed immigrants, and notwithstanding the fact that any direct threat to their "life, liberty and security of the person" came at the hands of persons outside Canada. Wilson J, speaking for the three judges, held that section 7 could be invoked by anyone physically present in Canada, and if Canada were to return someone to the country from which that person came without a fair hearing, Canada would be implicated in any deprivation of "life, liberty and security of the person" suffered at the hands of a foreign power. All of this led the three judges to conclude, particularly given that credibility was a critical factor, that convention refugee claimants at some point in the process had an entitlement to an oral or in-person hearing by someone with decision-making authority. They could not be cut off from that possibility by a provision that required them to obtain leave for an oral hearing before the then Immigration Appeal Board. The three judges also held, in the context of an attempted section 1 justification by the Government, that, assuming breaches of the principles of fundamental justice could ever be justified in a free and democratic society, it was highly doubtful that utilitarian considerations such as the inefficiencies and expense of such a procedure could count as a legitimate section 1 justification.

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68 For an account and advocacy of leaving most balancing to s 1, see Elissa Goodman "Section 7 of the Charter and Social Interest Justifications", a paper prepared for credit in the course in Advanced Constitutional Law at the Faculty of Law, Queen's University in the Winter Term of 2002 and the winner of the Department of Justice/Canadian Bar Association 2002 Essay Contest marking the 20th Anniversary of the Charter (on file).

69 See for example *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, with the general dictate laid down in *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177, 188.

70 *Singh,* above.

71 Wilson J (Dickson CJ and Lamer J concurring). The seventh judge who sat on the hearing of the case (Ritchie J) took no part in the judgment.

However, even in *Singh*, there were signs that any optimism as to the range of section 7 had to be qualified. Three of the judges[72] decided the case by reference to section 2(e) of the Canadian Bill of Rights, presumably being unwilling to commit to the other three judges' vision of the reach of "life, liberty and security of the person". Even Wilson J, speaking for the three who decided the case on the basis of the Charter, made it clear that the only reason for relying on the Charter was that it was impossible, given the structure and detail of the legislation, to engraft onto an otherwise silent statute the requirements of common law procedural fairness.[73] This, of course, suggested that if the common law would suffice, the courts should stay away from Charter arguments. She also conceded that fundamental justice would not always necessarily require an oral or in-person hearing.

This caution about the reach and impact of section 7 is borne out by subsequent Supreme Court of Canada jurisprudence in the domain of non-Canadians present in the country. *Singh* remains one of the very few cases in which the Court has deployed section 7 to strike down legislation as procedurally deficient. More particularly, in *Chiarelli v Canada (Minister of Employment and Immigration)*,[74] the Court raised doubts as to whether resident non-citizens had any claim to the benefit of section 7 in the context of proceedings to deport them because of conviction on serious charges and fears that, if allowed to remain, they would be a threat to the security of Canada and, more specifically in the instance of Chiarelli, be involved in serious organised crime. The Court then proceeded, without ever resolving that point definitively, to find that the limited procedural protections afforded to those in that position were justified by concerns about national security and the protection of confidential criminal intelligence investigation techniques and sources of police information. This justification of the relevant authorities' having proceeded in part in the absence of the affected person and without revealing to him or his counsel all the relevant material came not within the framework of a section 1 argument but as part of balancing what the principles of fundamental justice required in the circumstances.

Much more recently, in *Suresh v Canada* (*Minister of Citizenship and Immigration*),[75] the Court revisited the rights of non-Canadians in the context of deportation proceedings taken against a landed immigrant who was suspected of involvement in terrorist activities against the government of another country. The applicant's claim was based in large measure on a fear of torture if he were returned to his country of origin. By holding that the proceedings did affect

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72 Beetz J (Estey and McIntyre JJ concurring). The parties had not addressed s 2(e). However, following the hearing of the appeal, the Court asked them to file written argument on whether s 2(e) applied and, if so, to what effect.

73 *Singh,* above, 196–201.

74 *Chiarelli v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 711.

75 *Suresh v Canada* (*Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

Suresh's right to life, liberty and security of the person, the Court apparently put aside the doubts raised in *Chiarelli* about the ability of resident non-citizens to raise section 7 arguments. The Court also found that, in the circumstances of the case, the authorities had denied Suresh the benefits of the principles of fundamental justice in its procedural sense. He had not "been informed of the case to be met".[76]

It is, however, important to set out the framework within which the Court made this finding. First, at the level of principle, the Court stated that the requirements of fundamental justice under section 7 were to be assessed by reference to the same considerations that determined the extent of procedural fairness entitlements at common law.[77] Here, the Court referred to five factors identified in *Baker v Canada (Minister of Citizenship and Immigration)*.[78] Among these factors was the need to be respectful of procedural choices made by the agency itself. In other words, even when Charter rights are at stake, the reviewing court may be required to be at least to some extent deferential to the process chosen by the decision-maker. Second, the Court, undercutting in some measure the sense that deportation of a resident non-citizen involved section 7 rights, stated that the procedural requirements arising out of section 7 did not apply to every instance of the deportation of a convention refugee for reasons of national security.[79] The person affected had an initial onus, that of "showing that a risk of torture or similar abuse exists".[80] Third, the requirements of fundamental justice and the right to be informed of the case to be met had to yield to "privilege or similar valid reasons for reduced disclosure".[81] Finally, despite the fact that, in most instances, credibility would seem to be an issue in such cases, the entitlement was to a written, not an oral or in-person, hearing.[82]

This sense of limited procedural rights in such a setting emerges even more clearly from the parallel case of *Ahani v Canada (Minister of Citizenship and Immigration)*,[83] judgment in which was delivered on the same day. In *Ahani*, the Court was satisfied with the procedures accorded even though they might not have corresponded precisely to the guidelines specified in *Suresh* and even though Ahani had not had access to relevant material—a case management

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76 *Singh,* above, para 123.

77 *Suresh,* above, paras 113–115.

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

79 *Suresh*, above, para 127.

80 *Suresh,* above, para 127.

81 *Suresh,* above, para 122.

82 *Suresh,* above, para 121.

83 *Ahani v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 72.

officer's memorandum on Ahani's submissions and other relevant documents including a legal opinion which was responsive to the legal arguments advanced on behalf of Ahani. To the extent that this did not meet the *Suresh* prescriptions, there was no evidence that the deviations had prejudiced Ahani.[84] What is particularly troubling about this is that it represents a departure from the Court's normal posture in relation to procedural deficiencies at common law: a violation of the principles of procedural fairness gives rise to a free-standing ground of judicial review and the reviewing court is not to speculate on the extent to which that error was material or on whether the outcome would have been different if the requisite procedures had been accorded.[85] To have a more relaxed standard when Charter rights are at stake seems strange to say the least.

It is also worth noting that in *Baker*, the Court adjudicated the applicant's procedural fairness and substantive claims solely by reference to common law principles even though the argument had been made that the deportation of an illegal overstayer who was the parent of Canadian-born children (who, by right of that, were also Canadian citizens) engaged section 7 rights. This too is somewhat puzzling insofar as Baker was not successful in making out all her procedural fairness claims and, in particular, her assertion of a right to an in-person or oral hearing for herself and her children. To the extent, as acknowledged in *Suresh*, that procedural fairness requirements can be enhanced when Charter and not just common law rights to procedural protections are in issue, it seemed imperative that the Court proceed to deal with that aspect of her claim particularly when it was remitting the matter for reconsideration by reason of other procedural and substantive defects.

In this respect, the minority judgment in *Blencoe*[86] parallels *Baker*. LeBel J was quite explicit that this was a case where the Court did not need to go to the Charter arguments. Blencoe's assertion that the proceedings should be enjoined because of excessive delay was a claim that could be dealt with by reference simply to common law principles of procedural fairness.[87] That would have been all very well had the minority been prepared to give Blencoe the remedy that he wanted: a permanent stay of proceedings. However, the minority's view was that his maximum legal entitlement at common law was an order in the nature of mandamus directing the Human Rights Commission to proceed immediately to a hearing. Once again, Blencoe surely deserved the minority's consideration of whether his Charter rights were affected and, if so, whether that would have produced the much more favourable remedy.

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84 *Ahani,* above, para 26.

85 *Cardinal v Director of Kent Institution* [1985] 2 SCR 643, 661 Le Dain J. See in the New Zealand context *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA).

86 *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, para 137.

87 *Blencoe,* above, para 138.

To the extent that *Suresh* did not involve a challenge to a legislative negation or exclusion of procedural protections, it too had the potential to be resolved solely by reference to the common law. However, even though the Court was not explicit about this, the fact that it moved to deal with the procedural claims by reference to section 7 may provide some indication that the Court was of the view that simple reliance on the common law would not have provided Suresh with all of the procedural protections he was seeking. Indeed, even by reference to the Charter, he did not achieve total success with his procedural claims.[88] However, what this case does point to is what is likely to remain the most significant role for section 7 of the Charter in the domain of procedural claims: the recognition or enhancement of procedural claims in situations where the common law would not have provided any or as many procedural protections. The opportunities for asserting the Charter to strike down legislative provisions in the name of procedural fundamental justice will likely remain few, particularly as explicit exclusions are relatively uncommon save perhaps in the domain of structural bias and lack of independence.[89]

What also has to be factored into all of this is the extent to which the common law governing the implication of procedural fairness rights is evolving to take account of a variety of contextual developments. *Baker* provides a prime example of this. Leaving the detail aside, it is fascinating that the Supreme Court was more than prepared to reverse Federal Court of Appeal authority[90] to the effect that deportation proceedings involving overstayers attracted a minimum of procedural fairness protections. The primary bases for this conclusion were the Court's greater sensitivity to the human rights dimensions of such processes (a sensitivity resulting in no small measure from the court's recognition of Canada's treaty obligations to be

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88 For example, the Court held that he was not entitled to an oral or in-person hearing and also that considerations of national security might well dictate less than full access to all relevant information: *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, para 121.

89 There has been a proliferation of litigation involving the issue of whether administrative tribunals and agencies have sufficient structural independence and freedom from an apprehension of bias. This litigation has been dealt with by reference to common law principles (in cases involving structures created by subordinate legislation) (*Canadian Pacific Ltd v Matsqui Indian Band* [1995] 1 SCR 3; *Katz v Vancouver Stock Exchange* [1996] 3 SCR 405), s 11 of the Canadian Charter (*Alex Couture Inc v Canada (Attorney-General)* (1991) 83 DLR (4th) 577 (Qué CA)), s 2(e) of the Canadian Bill of Rights (*MacBain v Canadian Human Rights Commission* (1985) 22 DLR (4th) 119 (FCA); *Bell Canada v Canadian Telephone Employees Association* 2003 SCC 36), s 23 of the Quebec Charter of Human Rights and Freedoms (*2747–3174 Québec Inc v Québec (Régie des permis d'alcool)* [1996] 3 SCR 919), and the underlying principles of the Canadian Constitution as reflected in the Preamble to the Constitution Act 1867 (*Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001] 2 SCR 781— rejected).

90 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, para 32, explicitly refusing to follow *Shah v Canada (Minister of Employment and Immigration)* (1994) 170 NR 238 (FCA).

cognizant of the rights of children,[91] even those of non-Canadian overstayers) and a genuine degree of concern as to the impact of deportation on someone such as Baker, a person with health problems and by then long-term connections with Canada. While the Charter is not mentioned explicitly in all of this, much of what is going on in the judgment reflects Charter values and the impact that the Charter has had on the way that courts conceive of claims that have serious impact on the lives of individuals. In turn, that requires recognition of the fact that the more such values form a critical part in the delineation of the common law of procedural fairness, the less need there will be for applicants to seek refuge in the explicit provisions and direct application of the Charter. The common law, informed indirectly by the Charter and other emerging normative perspectives, will in many instances be more than adequate to the task of providing procedural protections. Nonetheless, as I will argue below, ignoring constitutional and quasi-constitutional instruments can have adverse consequences.

B New Zealand

Limited though the impact of the Canadian Charter on process rights in administrative law has been, it has to be conceded that section 27(1) of the Bill of Rights has barely caused a ripple in New Zealand administrative law.[92] Indeed, Paul Rishworth in his 1997 contribution to a book of essays in honour of Lord Cooke of Thorndon acknowledged that the impact of the Bill of Rights had so far been confined principally to criminal procedure.[93] The predicted deluge of

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91 This aspect of the judgment has been in some senses the most controversial: the extent to which ratified but unimplemented or unincorporated treaties are relevant, indeed mandatory considerations in the exercise of discretionary powers on which those treaties and specific provisions have a bearing. For the majority, at least the thrust of the international Convention on the Rights of the Child, if not the application of its specific provisions was a mandatorily relevant consideration. However, two of the justices, while concurring in the result, refused to accord any significance to the terms of ratified but unincorporated treaties. See the reasons of Iacobucci and Cory JJ delivered by the former (*Baker*, above, paras 78–81). For academic commentary, see Jutta Brunnée and Stephen J Toope "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004).

92 For the purposes of this paper, I do not consider the possibility that "natural justice" as provided for in s 27(1) might have a substantive dimension. While not eliminating the possibility entirely, Rishworth, Huscroft, Optican, and Mahoney consider it unlikely and cite in support the judgment of McGechan J in *Westco Lagan Ltd v Attorney-General* [2001] NZLR 40, 54 (HC) (see Paul Rishworth, Grant Huscroft, Scott Optican, and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 759). They also (at 755) draw attention to s 8 of the Bill of Rights and the right not to be deprived of life save in accordance with the principles of fundamental justice, a provision which the authors of the 1985 foundational government White Paper clearly contemplated having substantive dimensions: "A Bill of Rights for New Zealand: A White Paper" [1984–85] I AJHR A6, para 10.89.

93 Paul Rishworth "Lord Cooke and the Bill of Rights" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 295, 329–330.

administrative law litigation arising out of the Bill of Rights has yet to occur in either the procedural fairness or abuse of discretion domains.

In fact, one does not have to look far for an explanation. Judges have for the most part seen the terms of section 27(1) and its conferral of an entitlement to the benefit of the rules of natural justice when "rights, obligations, or interests" are being determined as no more than an affirmation of the common law rules of procedural fairness or natural justice.[94] Moreover, just like the common law rules, they too, by virtue of section 4(1), must yield to any clear statutory derogation from their application. In such an environment, section 27 not surprisingly tends to feature as no more than an additional reference point in cases decided on the basis of common law principles.

Moreover, there is a sense in which some judges have not been particularly generous in their interpretation of some of the language of section 27(1). Thus, it has been held that the setting of electricity tariffs does not constitute a "determination" of a consumer's "rights, obligations, or interests".[95] Similarly, Hammond J was unwilling to apply the section to directives issued by Ministers which affected the right to log trees. This was the stuff of high government policy (albeit stuff that affected the applicant for relief) and did not come within the scope of section 27(1), the concern of which was much more individuated decision-making.[96] In other words, this type of reasoning has the effect of reining in any attempts to argue that the use of the word "interests" had a broadening effect on the common law of procedural fairness or natural justice and opened up the possibility of claims being made in territory generally put off-limits by the common law (that is, broadly-based policy-making affecting individual interests but with polycentric dimensions). Indeed, the 1985 White Paper *A Bill of Rights for New Zealand*,[97] in which section 27(1) was formulated, provides support for that interpretation:[98]

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94 Thus, in *Manukau City Council v Ports of Auckland Ltd* [2000] 1 NZLR 1, 14 (PC), Lord Cooke of Thorndon spoke of s 27(1) as "[r]einforcing the common law". See also, for example, *Lin v Attorney-General* (19 May 1999) High Court Auckland M 307-SW/99 and *Fullers Group Ltd v Auckland Regional Council* (21 August 1998) High Court Auckland M 1077/98.

95 *Graham v Hawke's Bay Power Distributors Ltd* (25 September 2000) High Court Napier CP 33/95, paras 18–19 M Thomson.

96 *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 374, 373–375 paras 162–185 (HC). For a parallel decision also restrictively interpreting the meaning of the term "rights and obligations" in s 2(e) of the Canadian Bill of Rights, see *National Anti-Poverty Organization v Canada (Attorney-General)* (1990) 60 DLR (4th) 712 (FCA).

97 "A Bill of Rights for New Zealand: A White Paper" [1984–85] I AJHR A6, para 10.89.

98 "A Bill of Rights for New Zealand", above, para 10.169.

> It is not envisaged that the provision will normally apply where the determination is a general one or affecting persons as a class or indirectly—for example a change in local body rates. The phrase "in respect of" is designed to achieve this.

Thus, at least in the short term, the following statement seemed to encapsulate the interpretation of section 27(1):[99]

> The principles of natural justice apply where any Tribunal has power to make a determination in respect of a person's rights, obligations or interests, such being the common law which is affirmed by s 27 of the New Zealand Bill of Rights Act 1990. But that section does not extend the law of judicial review …

Drew v Attorney-General[100] provides a graphic example of the extent to which section 27(1) is generally unnecessary in the assertion of natural justice claims in New Zealand law. At stake there were regulations[101] made under a power to prescribe procedures for prison disciplinary hearings before the Visiting Justice, either on appeal from the prison superintendent or as a matter of original jurisdiction. The regulations contained an outright ban on representation by counsel in such proceedings. It was attacked on both common law and section 27(1) grounds. The Court of Appeal ruled for the prisoner on common law grounds. The regulation-making power did not contemplate the creation of a hearing process which denied common law procedural fairness rights. English common law had already established that blanket bans on legal representation in prison disciplinary hearings on serious matters before a Board of Visitors were a denial of natural justice[102] and thus the relevant regulation was ultra vires, leaving the Visiting Justice with a discretion to allow representation in situations where fairness to the inmate required it. In light of this finding, there was no need to move on to the arguments based on section 27(1) or, for that matter, on sections 24 or 25, establishing very specific procedural rights for those "charged with an offence".[103] And

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99 *T v Attorney-General* [1999] NZFLR 886, 894 (HC).

100 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

101 Penal Institutions Regulations 1999, reg 144, made under s 45(1)(19) of the Penal Institutions Act 1954. There was a similar ban on legal representation in hearings before the prison superintendent: reg 136(4). In a judgment concurring in the result, McGrath J dissociated himself from anything in the majority judgment which suggested that that regulation was also invalid. See the majority judgment for the statement that natural justice might on rare occasions also demand representation in a hearing by the prison superintendent (*Drew*, above, 73–74 para 72).

102 See in particular *R v Secretary of State for the Home Office, ex parte Tarrant* [1985] QB 251 (referred to with approval in *R v Board of Visitors of HM Prison, The Maze, ex parte Hone* [1988] 1 AC 379, 392 (HL)).

103 As with s 11 of the Canadian Charter, both these provisions spoke in terms of the rights of persons charged with an offence and the question they raise is whether a person facing a prison disciplinary hearing stands "charged with an offence". At first instance, John Hansen J, relying on the Supreme Court of Canada judgments in *R v Wigglesworth* [1987] 2 SCR 541 and *R v Shubley* [1989] 1 SCR 143,

this, it seems, will be the way it will always be unless the courts can be convinced to see section 27(1) as more than a codification or reaffirmation of existing common law principles. Without this, the natural tendency of the courts will be to deal with the challenge by reference to common law principles and then make a passing reference to the lack of any need to move to the Bill of Rights argument.

However, three Bill of Rights points do emerge from *Drew*. Not only is the Bill of Rights not entrenched but it apparently must cede to not only primary but also subordinate legislation in the form of regulations. Section 4 speaks in terms of the primacy of any "enactment (whether passed or made before or after the commencement of this Bill of Rights)" and "enactment" is defined in section 29 of the Interpretation Act to include regulations.[104] As a consequence, the Crown argued in *Drew* that section 27(1) could not be invoked against the regulation banning representation by counsel. If accepted, of course, that contention would in effect have meant the protections of the Bill of Rights were weaker than those available under the common law. After all, as the judgment itself confirms, the common law can strike down regulations which do not provide sufficient procedural protections.

Fortunately for the status of the Bill of Rights, Blanchard J, (delivering the judgment of four of the five judges) finessed this argument.[105] Despite the regulation being an "enactment", and despite section 4, section 27(1) could still operate in much the same way as the common law did in *Drew*. As required by section 6 (the interpretation provision of the Bill of Rights), the regulation-making empowering section had to be interpreted if possible in harmony with the Bill of Rights. From that Bill of Rights perspective, the regulation-making empowering provision could not be read as permitting a regulation in violation of section 27(1). Thus, as Blanchard J stated (quoting counsel for the appellant), "s 4 is not reached".[106] As a consequence, only regulations promulgated under provisions in primary legislation which

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had ruled that prison disciplinary charges did not engage either s 24 or s 25 (*Drew v Attorney-General* (2000) 6 HRNZ 111, 118–123 paras 37–63 (HC)).

104 Interpretation Act 1999, s 29, defining "enactment" in terms of "the whole or portions of an Act or regulations".

105 *Drew v Attorney-General* [2002] 1 NZLR 58, 73 para 68. For further discussion, see Paul Rishworth "Human Rights" [2001] NZ Law Rev 217, 228. Rishworth does not consider the effect of regulation-making power which explicitly authorises subordinate legislation which derogates from the Bill of Rights. However, he does raise the possibility that the position adopted by the Court in *Drew* might possibly not apply to pre-1990 regulations. That seems highly unlikely. After all, given that the focus of the Court's position is more on the regulation-empowering provision than it is on the regulation itself, it is significant that in *Drew*, the regulation-empowering section pre-dated 1990. More generally, it is difficult to conceive that the instructions in s 6 as to the manner in which legislation is to be interpreted would apply differently as between pre- and post-1990 enactments.

106 *Drew,* above, 73 para 68.

explicitly authorise regulations violating the Bill of Rights will generate the application of section 4. (This too would also eliminate the possibility of a common law-based attack on the validity of the regulation.)

Second, while not otherwise explicitly addressing the Bill of Rights issue, Blanchard J did in passing refer to section 27(1) of the Bill of Rights as providing a guarantee "which necessarily affirms and *strengthens*",[107] the procedural attack on the regulation. This suggests (albeit thinly) an emerging position that, in determining the extent of procedural protections, courts should see the Bill of Rights as providing an *enhancement* to procedural claims for those who can bring themselves within the scope of its various protections. In this regard, it is of significance that Blanchard J refers in passing[108] to the Canadian Federal Court of Appeal judgment in *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution*,[109] also involving legal representation by counsel in prison disciplinary proceedings. There, the Court was very much of the view that the claims of Howard were magnified by virtue of the fact that he was not forced to rely on the common law but was able to bring himself within section 7 of the Charter.

This may possibly presage the beginnings of a similar recognition by the New Zealand Court of Appeal of the transformative impact of the Bill of Rights. In short, once rights find their way into a bill of rights, even an unentrenched one, there is a case for treating those rights as especially valued and not necessarily subject to limitations that defined their content in the earlier world of the common law. I return to the validity of this assertion in the case of the New Zealand Bill of Rights in the penultimate and concluding sections of this paper.

Third, from a Canadian perspective, it is interesting to observe that Blanchard J would also have given short shrift to an argument that the outright ban on legal representation could have been justified under section 5 of the Bill of Rights, the New Zealand equivalent of section 1 of the Canadian Charter. Despite some arguments about the cost and inconvenience of allowing representation by counsel, "a total denial of legal representation" could not be "a reasonable limit on the operation of the principles of natural justice".[110] While obviously not totally rejecting cost/benefit analyses in advancing section 5 justifications or even in teasing out the requirements of "natural justice" under section 27(1), the Court seems to have a healthy scepticism about the deployment of such arguments when the effect is the removal of a

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107 (Emphasis added.) *Drew,* above, 72–73 para 67.

108 *Drew,* above, 65 para 31.

109 *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985) 19 DLR (4th) 502 (FCA).

110 *Drew*, above, 72–73 para 67.

procedural protection that may be absolutely critical to at least some inmates resisting charges which will have serious consequences and which implicate their rights under section 27.

Indeed, it is also possible to read section 5 as part of an overall pattern of the Bill of Rights as an enhancer of procedural entitlements. Particularly if it is interpreted as placing the onus on the public authority of justifying derogations from section 27(1),[111] section 5 can be seen as confirming the greater importance the Bill of Rights attributes to the principles of natural justice. No longer is the balancing of the interests of the person affected against those of the State to take place as part of the delineation of the extent of procedural entitlements in which the person affected has the onus. Rather, that balancing is now reserved for section 5, with the inquiry under section 27(1) confined to a consideration of what the person affected needs in order to have a fair hearing.

However, I must concede that Blanchard J in *Drew* does not go this far. In fact, after responding briefly to the argument that the absolute ban on legal representation could be justified under section 5, he went on to suggest that section 5 in fact had no role to play in section 27(1) cases:[112]

> In truth, ... natural justice is itself a flexible concept which adapts to particular situations. Where its principles apply there is no room and no need for the operation of s 5.

This appears to envisage all balancing of competing interests taking place as part of teasing out the content of natural justice under section 27(1). Given that section 5 is clear in its applicability to all of the rights and freedoms contained in the Bill of Rights, I am sceptical as to the appropriateness of this interpretation. In particular where the State is advancing justifications for less than optimal procedures in the name of financial considerations or

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111 It is apparently unclear whether this is so. In *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA), Richardson J (McKay J concurring) endorsed the Canadian approach under s 1 and would have placed the onus of establishing the justification on the State or other respondent seeking to uphold the impugned action. Cooke P and Gault J seemed to suggest that it might be otherwise in that the person seeking relief had the burden of persuasion with respect to the scope of the right including any limits required by s 5. See Janet McLean, Paul Rishworth, and Michael Taggart "The Impact of the Bill of Rights on Administrative Law" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 62, 74–75. Subsequently, in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15–17 paras 15–20 (CA), the Court of Appeal set out a methodology for dealing with the way in which ss 4 to 6 should be deployed in response to allegations of violation of the Bill of Rights. However, in prescribing the impact of s 5, the Court did not deal with the issue of onus, simply using the word "justification" without elaboration throughout. Subsequently, in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA), a challenge to the decision of the Board on the reconsideration resulting from the first *Moonen* judgment, the Court (at 760 paras 14–15) also took pains to emphasise that the five step methodology was just one approach to this difficult exercise: "Other approaches are open".

112 *Drew,* above, 72–73 para 67.

national security, I would contend that the proper location for this kind of argument is not in defining the content of "natural justice" under section 27(1) but by reference to the formula specified in section 5.[113] The structure of the Act and the imperatives of section 5 would seem to demand this.

Subject to this final reservation, each of these three aspects of *Drew* might therefore be seen as presaging a more expansive vision of what the Bill of Rights is all about. If so, the possibility certainly exists that, outside the domain of legislatively authorised derogations, the Bill of Rights will, operating on a larger plain than the Canadian Charter, come to enhance the common law in the same manner that the Charter has done both generally and in the area of procedural rights in particular.

IV DISCRETIONARY POWERS

A Canada

There is no doubt that where discretionary powers in legislation are couched in terms that violate directly the terms of the Canadian Charter, the courts have in the name of the Charter struck down such provisions in their entirety, severed offensive portions, read down the terms of the legislation so as not to permit Charter violations, and even read in Charter protections. This has had an impact on many administrative regimes.

The first two categories of response in particular do distinguish an unentrenched from an entrenched bill of rights. However, as already noted,[114] Janet McLean makes a strong case for the proposition that, given the extent to which reading down and reading in are permissible interpretative techniques under an unentrenched bill of rights, the gap between the two types of instrument is narrowed considerably. This is particularly so to the extent that the courts take seriously the "superior" status of even unentrenched bills of rights and provisions such as section 6 in the Bill of Rights to the effect that interpretations of other legislation which are consistent with the Bill of Rights "shall be preferred to any other meaning".

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113 I develop this argument and the whole question of where balancing should take place in s 7 cases much more fully in both David J Mullan "The Charter and Administrative Law" (Law Society of Manitoba 2002 Isaac Pitblado Lecture, Winnipeg, 2002) and David J Mullan "Deference from *Baker* to *Suresh* and Beyond: Interpreting the Conflicting Signals" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004). This is also the principal thrust of Goodman's paper, "Section 7 of the Charter and Social Interest Justifications", a paper prepared for credit in the course in Advanced Constitutional Law at the Faculty of Law, Queen's University in the Winter Term of 2002 and the winner of the Department of Justice/Canadian Bar Association 2002 Essay Contest marking the 20th Anniversary of the Charter (on file).

114 See text accompanying Janet McLean "Legislative Invalidation, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act" [2001] NZ Law Rev 421.

That, however, is not really my concern in this paper. Rather, I want to look at the extent to which the Canadian courts have used the Charter to actually strike down provisions in legislation which do not infringe directly Charter rights and freedoms but which create powers in executive and administrative officials which have the potential to be used or applied in such a way as to infringe Charter rights and freedoms. If this is a power that is seldom used and if the major way in which the courts deal with such provisions is by way of judicial review of individual rights and freedoms-infringing exercises of discretion, then, in this domain too, there should be little difference between the entrenched Canadian Charter and the unentrenched Bill of Rights.

Another way of stating this question is in terms of K C Davis's famous advocacy of the need to engage in more structuring and confining of discretion.[115] Does the Charter provide a means of indirectly forcing legislators to be more attentive to the way in which discretion is conferred by denying judicial recognition to statutory discretions which are inadequately structured or insufficiently confined?

In fact, the Canadian experience is mixed in this regard. Not surprisingly, the Supreme Court has provided individual remedies in the form of judicial review in situations where Charter violations have occurred in the exercise of discretions which do not necessarily engage a Charter right or freedom every time the power conferred comes under consideration. Thus, in a case such as *Slaight Communications Inc v Davidson*,[116] involving the exercise of broad remedial powers by an adjudicator dealing with unfair dismissal complaints in the federally regulated employment sector, there was no suggestion that the discretion was invalid simply because it was possible to exercise that power in a way that infringed Charter rights and freedoms—in that particular instance allegedly in violation of the employer's freedom of expression.[117]

However, in other instances, where the exercise of the discretion necessarily implicated a Charter right or freedom, the Court did strike down the relevant provision. Here, *R v Morgentaler*[118] again provides an example. The Criminal Code provision authorising

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115 As developed in K C Davis *Discretionary Justice* (Louisiana State University Press, Baton Rouge, 1969).

116 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038. In fact, the challenges based on the individual exercises of discretion were unsuccessful in that case which is also one of the leading Canadian authorities on the relationship between judicial review under the Charter and judicial review at common law. For a critical assessment, see Geneviève Cartier "The *Baker* Effect: A New Interface between the Charter and Administrative Law—The Case of Discretion" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004).

117 *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 provides another example. There, the Court did not strike down the relevant discretions dealing with the provision of health care services but rather remitted the matter to be determined in accordance with the applicant's Charter rights.

118 *R v Morgentaler* [1988] 1 SCR 30.

therapeutic abortion committees to approve abortions inevitably in all of its exercises engaged and involved the potential for infringement of the Charter rights of women seeking abortions. Given the lack of structuring of the discretion that it conferred, the correct remedy, according to the Court, was striking down, not simply relief to individual women denied abortions in violation of their Charter rights.

Indeed, this does seem to be the correct way to proceed in cases where relying on judicial review in individual cases is likely to provide insufficient guarantees that Charter rights and freedoms will be protected. Particularly in situations such as applications for permission to have an abortion, the time element will make the bringing forward of individual challenges highly problematic. More generally, a regime of policing the exercise of the discretion on a case-by-case basis is likely to be an unreliable, indeed overly random check on the use of a controversial grant of power. Judicial review costs a great deal of money and many will not be able to afford it. Moreover, relying on officials and indeed trial level judges to apply the governing precedent or precedents may be misguided. To that extent, the right of the courts under the Canadian Charter to strike down overly broad legislative grants of power does present a significant advantage over the more limited capacity of the New Zealand courts to provide only individual remedies or non-binding declarations of invalidity.

However, it now seems as though the Supreme Court has entered an era in which it is going to be extremely cautious in the exercise of this power even where the discretion in issue implicates Charter rights and freedoms necessarily in all of its exercises. Here, the critical judgment is *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*.[119] This involved a freedom of expression challenge to the way in which customs officials were exercising their discretionary authority to confiscate allegedly obscene material being imported into Canada. It was claimed that the authorities were violating section 2(b) of the Charter in their systematic seizure of gay and lesbian literature.

In the Supreme Court of Canada, both the majority and the minority accepted that systematic violations of the importer's section 2(b) rights had occurred. However, they differed dramatically on the remedy. The minority[120] were of the view that "[i]n the face of an extensive record of unconstitutional application", the Court should strike down the legislation for its failure to provide "an adequate process to ensure that Charter rights are respected when the legislation is applied at the administrative level".[121] In contrast, the majority[122] held that a detailed declaration of the importer's rights was adequate. It was not for the Court in such

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119 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120.

120 Iacobucci J (Arbour and LeBel JJ concurring).

121 *Little Sisters*, above, para 204.

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

cases to force Parliament to legislate appropriate machinery and guidelines for the exercise of this discretion. The capacity existed under the legislation for the executive to do this by way of regulation and legislatively-authorised guidelines.

This does not mean, of course, that the Supreme Court has reversed *Morgentaler*. Indeed, Binnie J, delivering the majority judgment, explicitly distinguished it.[123] As opposed to the situation in *Morgentaler*, there was a legislated standard here: the Criminal Code definition of "obscenity". As a consequence, the problem was simply a lack of adequate process for ensuring that that definition was applied in a manner that was sufficiently respectful of the relevant Charter freedom. Nonetheless, there is much to be said for the minority's position. The mere fact that there is a legislated standard that might work relatively well when applied by judges in the setting of a criminal trial (a controversial assumption in itself in the case of the term "obscenity"!) does not mean that the competing Charter freedoms will necessarily be respected when the same term is being applied on the front line by customs officials without legal training. Absent executive will to rein in that discretion by subordinate legislation and guidelines, there is surely a case for casting that responsibility back on the primary legislator, Parliament. More generally, the majority judgment bespeaks a philosophy of caution in striking down legislation for inadequate structuring and confining and in effect remitting that legislation to Parliament for re-enactment with greater attention to its impact on Charter rights and freedoms.

As in the domain of procedural protections, it is the also the case that the Canadian common law of review for abuse of discretion is exhibiting some signs of a greater judicial interventionism where human rights values intrude into the domain of discretionary decision-making. Here too, *Baker* provides the prime exhibit.[124] Once again, without considering whether Baker's Charter rights were at stake, the Court was prepared to review the ministerial exercise of discretion in that case by reference to an intermediate standard of reasonableness, as opposed to patent unreasonableness or *Wednesbury* unreasonableness,[125] normally applicable in the instance of broad discretionary powers conferred on Ministers of the Crown. Again, it was the impact of the decision on Baker's Canadian-born children (as informed by the Convention on the Rights of the Child) as well as the serious consequences for Baker herself that were largely responsible for the Court's moving to this standard of review.

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123 *Little Sisters,* above, paras 126–139.

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

125 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (CA): "something so absurd that no sensible person could ever dream that it lay within the powers of the authority".

At a more general level, L'Heureux-Dubé J, delivering the judgment of the Supreme Court of Canada in *Baker*, spoke of the need for the courts to be vigilant in ensuring that discretionary powers were:[126]

> 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*.

In particular, the appeal to the principles of the rule of law and the fundamental values of Canadian society opens up intrusive review of the exercise of discretionary powers when human rights-centred values are at stake. L'Heureux-Dubé J's location of judicial review of the exercise of discretionary powers in this broader framework also parallels the earlier recognition in *Reference re Secession of Quebec*[127] of four underlying principles of the Canadian constitution: federalism, democracy, constitutionalism and the rule of law, and *respect for minorities*. This too has introduced the possibility of review for abuse of discretion where insufficient attention is paid to minority interests.

While the examples of the successful invocation of this principle are few, indeed perhaps only one, the facts of *Lalonde v Ontario (Commission de restructuration des services de santé)*[128] are illustrative of the possibilities. There, the Ontario Divisional Court (sustained on appeal by the Ontario Court of Appeal) quashed and remitted back for reconsideration the exercise of a very broad discretion to close and restructure existing hospitals within the province. The decision to downsize drastically the operations of the Montfort Hospital, Ottawa's only francophone hospital facility, had been dismissive of the role of that hospital in the life of the capital's minority francophone community. It had therefore failed to take account of one of the underlying principles of the Canadian constitution.

What this suggests is that, as in the area of procedural protections, the more the courts broaden their bases for intervention at common law to take account of the kind of values underpinning bills of rights generally and the Charter in particular, the less need there will be in the domain of abuse of discretion for litigants to rely on specific provisions in the Charter to sustain a claim.

B New Zealand

It was in this area that McLean, Rishworth, and Taggart predicted that the Bill of Rights would have its greatest impact on administrative law. So far that prediction appears not to be

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126 *Baker*, above, para 56.

127 *Reference re Secession of Quebec* [1998] 2 SCR 217, para 32.

128 *Lalonde v Ontario (Commission de restructuration des services de santé)* (1999) 181 DLR (4th) 263 (Ont Div Ct), affirmed (2001) 208 DLR (4th) 577 (Ont CA).

borne out by the case law. There are few judgments in which the New Zealand courts have reviewed, let alone set aside, exercises of executive and administrative discretions by reference to the provisions of the Bill of Rights. Certainly, the Bill of Rights has had an impact on the exercise of statutory and common law discretions by the police.[129] However, it seems that it is only in the domain of censorship that the Bill of Rights has really been deployed to provide a check on the exercise of executive or administrative power.[130]

It is difficult for an outsider to provide reasons for this lack of activity. However, in at least some of the case law and commentary, I see parallels to what has been happening in Canada. First, there seem to be signs of a more intrusive common law of review for abuse of discretion when the discretion in question involves making a decision of serious moment to an individual.[131] More particularly, there has been some disposition to require those exercising discretionary authority involving serious consequences to specific individuals to take into account New Zealand's international treaty obligations even if they have not been specifically incorporated into New Zealand domestic law.[132] The more these lines of authority develop, the more they will provide a surrogate for reliance on the Bill of Rights. Vigorous common law protection of those involved in decision-making affecting matters of fundamental importance to individuals will, as in Canada, provide adequate protection in a variety of discretionary situations.

Nonetheless, there is something a little peculiar about relying on the common law to reinvent itself when the legislature itself has provided a much more blunt and direct way of dealing with the problem in what on its face would appear to be a legislative declaration of commitment to a set of enumerated rights and freedoms. If an unentrenched Bill of Rights does not become at least the focal point of a new order of judicial review of discretionary

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129 See for example *Everitt v Attorney-General* [2002] 1 NZLR 82 (CA).

130 See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) and *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA). In the former, the Board affirmed its original decision and Moonen again sought review. This time, the Court of Appeal was satisfied that the Board had had due regard to the Bill of Rights: *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (CA).

131 This is the view of Michael Taggart. See "Administrative Law" [2003] NZ Law Rev 99, 110–114, referencing W D Baragwanath "The Dynamics of the Common Law" (1987) 6 Otago LR 355, 367 and *Hamilton City Council v Fairweather* [2002] NZAR 477 (HC).

132 See for example the foundation judgment of *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) and the account of the evolution of New Zealand law on the treatment domestically of international law—both treaty and conventional—in David Dyzenhaus, Murray Hunt, and Michael Taggart "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 OUCLJ 5, 8–10. The authors there deal with the subsequent judgment of *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA) and the extent to which it qualifies the seemingly expansive treatment in *Tavita* of unimplemented or unincorporated ratified treaties.

power affecting protected rights and freedoms, its importance in the world of public law will sag dramatically in much the same way as happened to the federal Canadian Bill of Rights until its resurrection in the aftermath of the arrival of the Canadian Charter in 1982.[133]

V TRANSFORMATIVE OR DECLARATORY?

There is, however, at least one potential roadblock to asserting a primary role, let alone a transformative one, for the Bill of Rights in the judicial review of decisions for procedural unfairness and abuse of discretion.[134] In section 2 of the Bill of Rights, it is stated that the "rights and freedoms contained in this Act are *affirmed*".[135] Indeed, the legislative history of the Bill of Rights and, in particular, the ultimate rejection of an entrenched bill of rights are perhaps testimony to a not particularly ambitious exercise.[136] It is also significant that while the 1985 White Paper recommended an entrenched bill of rights, it regarded the language of what ultimately became section 27(1) as largely declaratory of existing common law principles.[137]

This has led some judges to take the position that the Bill of Rights is simply declaratory of rights already existing under statute and the common law. For example, Richardson J, in *Ministry of Transport v Noort*, by reference to section 2 and the Long Title to the Bill of Rights, asserted:[138]

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133 It was only with the use of s 2(e) of the Canadian Bill of Rights as an alternative to the use of s 7 of the Charter in *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 SCR 177, that any real optimism existed that the Canadian Bill of Rights could provide another avenue for challenging legislation and administrative action which violated the rights and freedoms recognised in that federal legislation. Up until that point, it had been interpreted very restrictively (see for example on the meaning of "right" in s 2(e): *Prata v Minister of Manpower and Immigration* [1976] 1 SCR 376 and *Mitchell v the Queen* [1976] 2 SCR 570) and only on one previous occasion to actually invalidate legislation: *R v Drybones* [1970] 2 SCR 282. This resulted not just from the Court's treatment of the Canadian Bill of Rights as a piece of ordinary legislation but also from an interpretation of "due process of law" in s 1 as meaning "in accordance with existing law both common and statutory".

134 This question has also arisen under the Canadian Charter, and, in particular, the giving of content to the expression "principles of fundamental justice" in s 7. Thus, in *Chiarelli v Canada (Minister of Justice)* [1992] 1 SCR 711, Sopinka J (delivering the judgment of the Court) states, para 24, that "in determining the scope of principles of fundamental justice as they apply in this case, the Court must look to the principles and policies underlying immigration law". For these purposes, he then went to the historical situation of non-citizens under Canadian statute and common law.

135 (Emphasis added.)

136 For a forceful account, see James Allan "Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990" (2000) 9 Otago LR 613.

137 "A Bill of Rights for New Zealand: A White Paper" [1984–85] I AJHR A6, para 10.168–171.

138 *Ministry of Transport v Noort* [1992] 3 NZLR 265, 277 (CA).

> [T]he deliberate reference to "affirm" in the long title and in s 2 ... makes the very important point that the Act is declaratory of existing human rights. It does not create new human rights.

Read in isolation, such a statement might be seen as suggesting that the Bill of Rights finds its origins in already existing positive law and that its specific guarantees must be read in the context of that already existing positive law, be it common law and statutory. Thus, as already discussed, such a conception of the "affirming" nature of the Bill of Rights has led to interpretations of section 27(1) as simply a confirmation of existing common law governing procedural fairness.

However, to latch on to the use of the word "affirm" in both the Long Title and section 2 is to overlook other language and provisions in the Bill of Rights. The Long Title also describes the Act as one intended to "protect, and promote human rights and fundamental freedoms in New Zealand". "Promote" particularly speaks to an ambition beyond that of simply committing to the preservation of the existing common law and statutory protections of human rights and fundamental freedoms. The Long Title also includes an affirmation of New Zealand's commitment to the International Covenant on Civil and Political Rights.[139] Thus, the rights and freedoms enshrined within the Bill of Rights are to be applied within the context of New Zealand's international obligations and not just existing domestic common and statutory law.

Indeed, it seems clear that when, in *Noort*, Richardson J emphasised the declaratory nature of the Bill of Rights and the fact that it did not create new rights, he was not necessarily seeing the situation in the purely positivistic terms of existing common and statute law. Thus, he goes on to refer to the philosophical "underpinning" of a conception of rights and liberties as part of what is being affirmed.[140] As well, he reinforces this by quotation from the preamble to the International Covenant on Civil and Political Rights. Human rights "derive from the inherent dignity of the human person" and states parties to the Covenant are required to "promote universal respect for, and observance of, human rights and freedoms".[141] In his view, therefore, what is being affirmed is not just the detailed prescriptions of existing positive law but a normative vision of the place of rights and freedoms in New Zealand law. At the very least, this would seem to allow for the use of that normative conception as a basis for giving content to the specific provisions of the Act which extends beyond the ambit of existing positive law in the form of domestic common law and statutes.[142]

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139 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

140 *Noort,* above, 277.

141 *Noort,* above, 277.

142 See more generally K J Keith "Concerning Change: The Adoption and Implementation of the New Zealand Bill of Rights Act 1990" (2000) 31 VUWLR 721, 735–741.

Further fuel for this more expansive view of the ambitions of the Bill of Rights can also be found in the structure of Part I of the Act ("General Provisions"). In this respect, I remain convinced by the argument developed by McLean, Rishworth, and Taggart in their pioneering article. Referring particularly to section 6 and its mandating of interpretations consistent with the Bill of Rights, and to section 5 and its recognition of the possibility of derogations from the protections of the Bill of Rights, they argue that this imposes a new "constitutional methodology" which "is logically prior to administrative law issues and at a higher level".[143] Where administrative decision-making implicates rights and freedoms protected by the Bill of Rights, traditional common law approaches to the delineation of the scope of such rights and freedoms have to yield to a process of analysis which has a greater capacity for the recognition of the scope of those rights and freedoms.[144]

> Whereas both the Bill of Rights and administrative law address the same interpretive question—what is the extent of the power?—Parliament has directed that the Bill of Rights be applied pre-emptively to interpretive issues involving the alleged infringement of rights under discretionary authority. The question under the Bill is whether the decision amounted to an unreasonable invasion of a right in the Bill. This requires assessment of administrative acts from the starting point of fundamental rights and freedoms, evaluated in the crucible of s 5. ... The Bill of Rights, then, requires administrative lawyers to "repackage" what they already know, and perhaps to rethink some of the old learning.

James Allan has condemned this position[145] as part of an attempt by academics and judges to circumvent Parliament's desire to have a non-entrenched "parliamentary bill of rights"; to convert a Clark Kent Bill of Rights into a Superman Bill of Rights. In truth though, the cute imagery is not fairly or appropriately deployed.[146] The arguments of those such as McLean, Rishworth, and Taggart are not aimed at subverting the clear legislative intention to leave the Bill of Rights unentrenched. They have as their objective an understanding of the parliamentary intention in legislating for protection of fundamental rights and freedoms. What does the structure of this obviously significant piece of legislation say about the way in

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143 Janet McLean, Paul Rishworth, and Michael Taggart "The Impact of the Bill of Rights on Administrative Law" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation, Auckland, 1992) 62, 68.

144 McLean, Rishworth, and Taggart, above, 96–97.

145 James Allen "Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990" (2000) 9 Otago LR 613, and with particular reference at 623 to McLean, Rishworth, and Taggart's article.

146 Neither is it original. Allan borrows it from Michael Taggart's earlier "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" [1998] PL 266. Taggart in turn derived the metaphor from the title to a Jim Croce song and used it in the sense of the judiciary "tugging" on the supremacy of Parliament. Quaere whether "tugging" means restraining or being carried along by.

which the courts should accommodate existing common law principles within a new statutory regime of rights and freedoms and how they should view the impact of the Bill of Rights on the application and interpretation of other statutes? This is purposive statutory interpretation, not a rearguard action by those disappointed at not achieving their primary objective: entrenchment. As suggested earlier, such arguments also lay claim legitimately to the proposition that, in the world of unentrenched legislation, not all statutes are necessarily equal. Legislative intention as indicated by language, structure, and the nature of the subject matter dealt with may indicate superior status.[147]

I must, however, acknowledge that the McLean, Rishworth, and Taggart arguments were developed primarily in the context of the capacity of the Bill of Rights to provide enhanced protection in the case of attacks on the substantive bases for the exercise of discretions. The argument may not be nearly so clear in the instance of section 27(1) and procedural protections. Indeed, as seen already, there are many statements by judges to the effect that section 27(1) is no more than a codification of existing common law principles governing the engrafting of natural justice protections onto otherwise silent statutes. After all, the language used is that of the common law ("natural justice"), not different terminology such as "due process" or "fundamental justice". Also, the protected zone is not a specially chosen set of rights for which enhanced protections seem particularly appropriate ("life, liberty and security of the person") but the very situations where at common law, natural justice rights currently arise: determinations with respect to a person's "rights, obligations, or interests protected or recognised by law".

Nonetheless, as already suggested, there are ways in which the section can be interpreted as not just a restatement of current law. Thus, if focus is directed towards the term "interests", there is an argument that common law natural justice does not apply to every instance where "interests" are affected. Thus, under Canadian common law, there is no right to procedural fairness in the exercise of broadly-based policy-making powers (sometimes defined as legislative or executive decision-making) even where interests are affected.[148] Section 27(1) is at least worded in such a manner as to invite re-evaluation of the scope of that limitation or

147 See K J Keith "Concerning Change: The Adoption and Implementation of the New Zealand Bill of Rights Act 1990" (2000) 31 VUWLR 721, 742. While accepting that "a wholly new power relationship between the courts and Parliament was probably unlikely", he contends that the Bill of Rights "undoubtedly gives greater emphasis to the rights it contains". Later in the same article and with reference to James Allan and assessing the Bill of Rights from the perspective of its specific reference to international norms, Keith speaks of it as "a super Bill rather than a full or half-full Bill": Keith, above, 743.

148 See for example statements by Le Dain J in *Cardinal v Director of Kent Institution* [1985] 2 SCR 643, 653; Dickson J in *Homex Realty and Development Co Ltd v Wyoming (Village)* [1980] 2 SCR 1011, 1051; and L'Heureux-Dubé J in *Knight v Indian Head School Division No 19* [1990] 1 SCR 653, 670.

exclusion of the reach of procedural fairness. It is also the case that, as with review for abuse of discretion, the framework for evaluating whether the failure to provide the relevant procedural protections is reasonable is different from that which the courts generally tend to employ when assessing procedural claims by reference to the common law. As opposed to the integrated methodology used under the common law, the section 5 issue of whether there is a reasonable justification for the denial of or restriction on procedural fairness is isolated from the initial assessment of what natural justice might ideally demand.

In their monumental work *The New Zealand Bill of Rights*, Rishworth, Huscroft, Optican, and Mahoney seem to contend that, on the evidence of the White Paper, section 27(1) is, as some of the judges have suggested, no more than a codification of the common law of procedural fairness or natural justice.[149] And, indeed, it is obviously the case that the authors of the White Paper did not foresee section 27(1) having any radical impact on the circumstances under which procedural claims could be advanced. Nonetheless, the language of the relevant paragraphs of the White Paper is by no means definitive and can be read as an invitation to the judiciary to work with the language and the concepts it embodies within the new Bill of Rights setting. Thus, at one point, the White Paper says that section 27(1) "*largely* reflects basic principles of the common law which go back at least to the sixteenth century".[150] At another, the White Paper states that "[i]t is not envisaged that the provision will *normally* apply where the determination is a general one affecting persons as a class or indirectly".[151] Finally, and perhaps most significantly, it is asserted that:[152]

> In a general sense the provision will not change the courts' normal and long-standing task, except to the extent that the principles will now have an enhanced status.

While this is not the stuff of radical change, it nonetheless recognises not just that the common law of procedural fairness will continue to evolve but that it will do so by reference to the elevated status that the Bill of Rights has accorded to a "person's rights, obligations, or interests" by the very act of specific recognition. Indeed, for courts not to work at effectuating this new conception of the place of procedural protections is to flaunt legislative intention.

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149 Paul Rishworth, Grant Huscroft, Scott Optican, and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 760–761.

150 (Emphasis added.) "A Bill of Rights for New Zealand: A White Paper" [1984–85] I AJHR A6, para 10.168.

151 (Emphasis added.) "A Bill of Rights for New Zealand", above, para 10.169.

152 "A Bill of Rights for New Zealand", above, para 10.171.

VI CONCLUSIONS

At the time of its adoption, it was not at all clear that the Canadian Charter would have much impact on the functioning of administrative processes. As it has become clear gradually that the field of operation of section 7 is not confined to the criminal law and closely analogous domains where decision-making affects "life, liberty and security of the person" in the purely physical sense, there has been a comparatively modest extension of the Charter into the administrative and executive arenas. There is also a limited amount of case law in which the Charter has been deployed to review the exercise of discretions which affect the various enumerated rights and freedoms. However, in neither situation is the striking down of legislation a common phenomenon. Rather, the Charter's principal impact on administrative law has been in relation to actual exercises of statutory power. In the real world of litigation, one of the apparently great gaps between the Canadian Charter and the Bill of Rights has been narrowed significantly. Both instruments have their greatest potential for impact by way of judicial review of administrative action for failing to respect the enshrined rights and freedoms in individual exercises of power.

Indeed, in some significant ways, the Bill of Rights has the potential to have a greater impact on the judicial review of individual exercises of power than the Canadian Charter. While the Canadian Charter does not apply beyond a fairly narrow conception of the exercise of government power, the Bill of Rights applies to all exercises of public functions, powers, and duties. Section 27(1), the general procedural fairness provision of the Bill of Rights, applies whenever a legal person's "rights, obligations, or interests protected or recognised by law" are at stake at the hands of a "tribunal or other public authority". It is not confined (as is section 7 of the Canadian Charter) to situations implicating the "right to life, liberty and security of the person" of natural persons. However, despite this, it seems as though litigants and the courts have relied upon the Bill of Rights in judicial review applications even less than is the case in Canada. Why is that so?

To a limited extent, this may have resulted from conservative interpretations of some of the relevant provisions and terms such as "public function, power, or duty" and "rights, obligations, or interests". However, as in Canada, a more pervasive explanation may lie in the sense on the part of the legal profession and judges that much of what applicants for review are seeking in the domains potentially covered by the Bill of Rights can be accomplished by reliance on the common law. This is particularly so when the common law is itself evolving in the areas of both procedural fairness or natural justice and review of abuse of discretion to be much more accommodating of claims when interests akin to those recognised in the Bill of

Rights are at stake. In such an environment, the provisions of the Bill of Rights become redundant. In this respect, *Drew v Attorney-General* provides a classic example.[153]

However, there are serious questions as to whether atrophy by non-use is a proper fate for such an important legislative initiative. To continue to treat the common law as the principal source of evolution in public law doctrine flies in the face of the structure and especially the interpretative provisions of a statute such as this. Though it is not an entrenched bill of rights, it is relatively easy to conceive of the Bill of Rights as transformative in its ambitions. As McLean, Rishworth, and Taggart have argued convincingly, henceforth, judicial review of administrative action based on the violation of the rights and freedoms specified in the Act should take place in the statutory, constitutional environment provided by that Act. The perspective should be a rights-based one deriving its primary support from the terms and structure of the Act.

Of course, in a country with a strong common law tradition as well as a strongly individually rights-based law of judicial review of administrative action, such a transformation may not come naturally and can be seen easily as not needed. Indeed, it finds reflection in "rules" such as that cautioning against the use of constitutional arguments when there is a perfectly good common law route to the relief sought by the applicant. However, as some of the Canadian experience suggests, such a reliance on the common law has the potential to distract attention from the ambitions and scope of a bill of rights. It is only by analysing the claim from the perspective of the structure and detail of the Bill of Rights that the full dimensions of the rights protection will become evident. (In this respect, as in Canada, administrative lawyers may have a lesson to learn from their criminal law counterparts!)

In New Zealand, this cautious approach to the use of the Bill of Rights in judicial review of administrative action is captured most strikingly by the judicial statements that section 27(1) is no more than a restatement of the existing common law governing the engrafting of procedural fairness entitlements onto silent or "incomplete" statutes. This immediately turns attention away from any inquiry as to whether section 27(1) was in any sense meant to be transformative of the common law; to enhance in some instances what the common law had

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153 I am not arguing in this paper that the common law or, for that matter, underlying constitutional principles do not have a major role to play to in the development of the principles of judicial review of administrative action. Indeed, the advent of the Canadian Charter (as well as the resurrection of the Canadian Bill of Rights) and the New Zealand Bill of Rights Act have had an important impact in illustrating or highlighting the constitutional and human rights dimensions of administrative law. They provide analogies and principles that can inform an ever-evolving common law of judicial review. Rather, my concern is the bypassing of the Charter and the Bill of Rights in situations where there are clear opportunities for their direct application. When that is the case, to go elsewhere to provide relief flies in the face of the primary role that those instruments should be playing in the delineation of the extent to which the protected rights and freedoms place constraints on administrative action.

provided by way of procedural protections to that point. Thus, it is encouraging to see in the judgment of Blanchard J in *Drew* some recognition of the ambitions of section 27(1) as a provision which "affirms and strengthens" claims for procedural decency when protected rights and interests are at stake. There is a need for an application of this kind of thinking across the entire range of provisions in the Bill of Rights (and the Canadian Charter for that matter) that have application to the administrative process. Without it, there remains a strong possibility that the Act and the Charter will never attain the status they deserve as one of the principal sources of judicial protection against unlawful administrative action.

It has been suggested that the Bill of Rights would nevertheless still have an impact on the legislative process in that pending legislation will be withdrawn should the Attorney-General report under section 7 that it is inconsistent with the rights and freedoms contained in the Bill of Rights. Indeed, Allan implies that that is its primary, if not exclusive function.[154] However, that is not what the text says. Section 3(a) applies the Bill of Rights without differentiation to the "legislative, executive, [and] judicial branches of the government of New Zealand". That obliges, not just permits, the judiciary to develop the common law of judicial review of administrative action within the framework or structure provided by the Bill of Rights once the administrative action under review engages one or more of the specified rights and freedoms. I would further argue that that structure or framework is one which, if applied appropriately, leads to the enhancement of the enumerated rights and freedoms—not just a validation of a pre-existing common law.

154 James Allan "Turning Clark Kent into Superman: The New Zealand Bill of Rights 1990" (2000) 9 Otago LR 613, 616–617. In disagreeing with that conception of the Bill of Rights, I am in no sense denigrating the importance of s 7 particularly in a country where there has been such a revitalisation of the role of Parliament. This stands in rather marked contrast to Canada where genuine parliamentary reform remains a forlorn hope, a situation which appears to have placed primary responsibility on the courts for the effectuation of the rights and freedoms enshrined in the Charter.