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AMELIORATING THE COLLATERAL DAMAGE CAUSED BY COLLATERAL ATTACK IN ADMINISTRATIVE LAW

*Dean R Knight**

Collateral attack is the indirect challenge of administrative decisions, instruments or actions in civil and criminal proceedings for the purpose of determining private rights. Collateral challenges are a common way litigants seek to contest actions of the executive or other public bodies, and represent a different mechanism for the courts to exercise their supervisory jurisdiction over administrative action. The New Zealand courts have adopted a straightforward approach to the doctrine of collateral attack, generally allowing such challenges. This paper explores the principles that underlie the doctrine of collateral attack and the potential difficulties that the doctrine creates. It is argued that the courts should take a more principled approach to determining whether collateral attack should be allowed in any individual case. A number of "touchstones" are proposed to ameliorate any collateral damage to administrative law's unique character while still ensuring that people are able to challenge the invalidity of administrative instruments, decisions or actions as and when they arise in civil and criminal proceedings.

I INTRODUCTION

In recent times, New Zealand's approach to administrative law and judicial review can be characterised as one of simplicity.¹ Lord Cooke's seminal article from the 1980s, "The Struggle for

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¹ Similar sentiments about the "rejection of legal formalism" are expressed by Philip A Joseph and Jason McHerron in *The Laws of New Zealand* (LexisNexis NZ Limited, Wellington, 2004) Administrative Law, para 2 and Philip A Joseph "The Demise of Ultra Vires – Judicial Review in the New Zealand Courts" [2001] PL 354. See also Lord Cooke's own discussion of *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) [*Anisminic*] in *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997) 63. See more generally Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997).

Simplicity in Administrative Law² still serves as a useful framework for students, practitioners, scholars and judges alike. Lord Cooke spoke of his own tripartite cardinal principles of administrative law, namely that decision-makers "must act in accordance with the law, fairly and reasonably".³ While he did not doubt that "many hard, hard administrative law cases lie ahead", he championed "clarity and simplicity"⁴ over the "superfluous complications of principle" and use of "phrases of somewhat arcane concepts, in the nature of catchwords or half truths".⁵ To a certain degree, this tradition of simplicity has continued in the New Zealand courts. Some notable examples include the approach to error of law adopted by the Court of Appeal in *Peters v Davison*⁶ and the justiciability of private bodies under the Judicature Amendment 1972.⁷ More recently, the Court of Appeal reiterated the notion that "[p]ublic law looks at substance" over form.⁸

The approach of New Zealand courts to the doctrine of collateral attack is no different. They have adopted a simple approach to the question of whether the invalidity of an administrative instrument, decision, or action can be challenged in proceedings other than judicial review, in contrast to the approach of their English counterparts. The approach is explained by Blanchard J in the Court of Appeal's recent decision in *P F Sugrue Ltd v Attorney-General (Sugrue)*.⁹

The validity of certain administrative actions can be challenged indirectly in civil proceedings for the purpose of determining private law rights. Such a challenge is referred to colloquially as a "collateral attack" or "collateral challenge". ... In New Zealand, ... collateral challenges have commonly been made, for instance, to bylaws and regulations in civil proceedings (for example, *R v Broad* and *F E Jackson and Co Ltd v Collector of Customs*) and in defending criminal proceedings (for example, *McCarthy v Madden* and *Reade v Smith*) and to particular decisions made in exercise of statutory powers (for example, *Sellers v Maritime Safety Inspector*). In all of the cited cases the challenge succeeded. They may be contrasted with cases such as *Hill v Wellington Transport District Licensing Authority* in

2 Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 1 [Cooke "The Struggle for Simplicity in Administrative Law"].

3 Cooke "The Struggle for Simplicity in Administrative Law", above n 2, 5.

4 Cooke "The Struggle for Simplicity in Administrative Law", above n 2, 17.

5 Cooke "The Struggle for Simplicity in Administrative Law", above n 2, 5. In this group, Lord Cooke mentions terms such as "quasi-judicial", "nullity", "jurisdiction", "jurisdictional fact" and "the face of the record".

6 *Peters v Davison* [1999] 2 NZLR 164 (CA).

7 See for example *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA) and *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA).

8 *Estate Homes Ltd v Waitakere City Council* (11 November 2005) CA 210/04, paras 92, 120 Baragwanath J.

9 *P F Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207, paras 47–49 Blanchard J for the Court (citations omitted) [*Sugrue*].

which administrative decisions relating to a particular individual, particularly those allegedly affected by procedural error, may be treated as valid until a Court decides to set it aside, a decision denied to Mr Hill. Over recent decades New Zealand law concerning the remedies available in respect of administrative action has largely avoided some of the complexities to be seen in cases such as *O'Reilly v Mackman*, *Boddington v British Transport Police* and *Neat Domestic Trading Pty Ltd v AWB Ltd*: see, for example, *Royal Australasian College of Surgeons v Phipps* (an issue not affected by the decision of the Privy Council in *Phipps v Royal Australasian College of Surgeons*).

I am not one to criticise the endeavour for simplicity in administrative law. Quite the opposite; where possible it ought to be encouraged. However, I am concerned if the quest for simplicity has a deleterious effect on administrative law principle and doctrine. I am not suggesting here that Lord Cooke's tripartite principles necessarily fall into this trap; by his own admission, these grounds serve as a framework or set of touchstones for analysis rather than rigid classifications, with these grounds being "neither exhaustive nor mutually exclusive".¹⁰ But I have real concerns about the oversimplification of the doctrine of collateral attack. I am concerned about its impact on the special and unique nature of administrative law proceedings. I am particularly worried that reliance on this alternative procedure may produce results that would not result from the ordinary application of administrative law principles in judicial review proceedings – the outcome therefore varying according to the method by which the challenge is made. Such disharmony complicates, rather than simplifies, administrative law theory and doctrine.

In this paper I outline the collateral attack doctrine and survey its application in England and New Zealand. I then discuss some of the difficulties it presents. I conclude by proposing a number of touchstones which I argue allow the question of whether to permit a collateral challenge in any particular case to be assessed in a more principled and nuanced way.

II COLLATERAL ATTACK: THE PRINCIPLE

As Blanchard J noted in *Sugrue*, collateral attack is the colloquial description of when the validity of certain administrative actions is challenged indirectly in civil or criminal proceedings for the purpose of determining private law rights.¹¹ The starting point for any discussion of collateral attack and the related debate begins with the presumption of validity of administrative acts: as Sir William Wade explains, "the court will treat an administrative act or order as invalid only if the

¹⁰ Cooke "The Struggle for Simplicity in Administrative Law", above n 2, 6, adopting the comments of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL). See Lord Cooke's similar qualification in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, 552 (CA): "The Minister was bound to act in accordance with law, fairly and reasonably. The threefold duty merges rather than being discrete."

¹¹ *Sugrue*, above n 9, para 47 Blanchard J for the Court.

right remedy is sought by the right person in the right proceedings".¹² This approach was endorsed by the House of Lords in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*.¹³ Lord Diplock explained it in these terms:¹⁴

Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it, are presumed.

This means an illegal decision is "still capable of legal consequences" and "[u]ntil the necessary proceedings are taken, it will remain effective for its ostensible purpose".¹⁵ The approach has important consequences for the status of ultra vires decisions. Not only do ultra vires decisions remain effective if no one challenges them in court, but they may remain effective even if they are challenged.¹⁶

The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The [decision] may be hypothetically a nullity, but the court may refuse to quash it ... In any such case the "void" order remains effective and is, in reality, valid.

Of course, Wade's theory of legal relativity is not universally accepted. New Zealand's Professor Michael Taggart has propounded his alternative "relative theory of invalidity"; that is, an ultra vires decision is conclusively valid (and not merely treated as such) until a court declares it invalid. The courts' actions are therefore "constitutive", not merely "declaratory"; their actions involve the retrospective invalidation of a decision, not merely the recognition of the decision's lack of legal consequence.¹⁷

12 William Wade and Christopher Forsyth *Administrative Law* (8 ed, Oxford University Press, London, 2000) 281.

13 *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 (HL). Wade argued there still may be a class of cases where the illegality was so "patent" or "flagrant" that an order quashing the decision may not be needed, Wade and Forsyth, above n 12, 309. See similar comments expressed by Cooke J in *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).

14 *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*, above n 13, 1153–1154 Lord Diplock.

15 *Smith v East Elloe Rural District Council* [1956] 1 All ER 855, 871 (HL) Lord Radcliffe.

16 Wade and Forsyth, above n 12, 308.

17 See Michael Taggart "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences" in Michael Taggart *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) 70 [Taggart "Rival Theories of Invalidity in Administrative Law"]; Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2 ed, Brooker's, Wellington, 2001) 769–776, providing a helpful discussion of the various theories [Joseph *Constitutional and Administrative Law in New Zealand*]. See also Christopher Forsyth "The Metaphysics of

While the difference between these theories of invalidity may have some implications for the principle of collateral attack,¹⁸ at this point the critical proposition is their commonality: an administrative instrument, decision, or action has some form of validity in law unless and until it is challenged. That is, both theories move past the now historic, pre-*Anisminic* theory of absolute invalidity.¹⁹ For present purposes, this highlights the imperative underlying collateral attack. Where a citizen seeks to raise the invalidity of an administrative instrument, decision or action, it is not sufficient to merely argue its invalidity; he or she must obtain a ruling from an appropriate court about its invalidity (except, perhaps, in the cases of "flagrant" or "patent" invalidity).²⁰

Of course, centuries ago, tort law was the primary mechanism for challenging public bodies that had exceeded their jurisdiction. As Carl Emery notes, "a person's chief or sole remedy for the enforcement against him of a judgment outside jurisdiction was a civil action for trespass to person or property".²¹ The quashing of erroneous decisions within jurisdiction by the present prerogative writ of certiorari was developed in the 17th century, with it also becoming the usual remedy for jurisdictional errors in the 18th century.²²

The "procedural exclusivity" of judicial review for determining the validity of administrative instruments, decisions and actions was, however, firmly asserted by the House of Lords in *O'Reilly v Mackman*.²³ A number of prisoners sought to challenge disciplinary decisions by Boards of Visitors in proceedings commenced by originating summons and by writ. They sought declarations that the

Nullity' – Invalidity, Conceptual Reasoning and the Rule of Law" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Oxford University Press, London, 1998).

18 I return to these differences later, see Part III D Institutional Competence.

19 Before *Anisminic*, above n 1, a distinction was drawn between decisions that were "void" and those that were "voidable". The former applied to decisions that were ultra vires, while the latter applied to decisions quashed for error of law on the face of the record. However, that distinction was rejected in *Anisminic* and the new theory was adopted, which avoided the conclusion that every decision that was ultra vires was a "nullity", "void ab initio" or a "legal nothing".

20 See above n 13.

21 Carl Emery "Collateral Attack – Attacking *Ultra Vires* Action Indirectly in Courts and Tribunals" (1993) 56 MLR 643, 652 [Emery "Collateral Attack"]. For this historical summation, Emery draws heavily on Amnon Rubenstein *Jurisdiction and Illegality: A Study in Public Law* (Oxford University Press, London, 1965).

22 Emery "Collateral Attack", above n 21.

23 *O'Reilly v Mackman* [1982] 3 All ER 1124 (HL). For a thorough discussion of the case and its principle, see Clive Lewis *Judicial Remedies in Public Law* (3 ed, Sweet & Maxwell, London, 2004) 100.

decisions were "null and void" due to non-compliance with natural justice; notably though, they did not also seek damages. The House of Lords struck out the claims. Lord Diplock said:²⁴

Now that those disadvantages to applicants [for judicial review] have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities. My Lords, I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis[.]

The rule was justified on two key bases.²⁵ First, as noted by Lord Diplock in the first sentence of the passage above, prior to the reform of the judicial review procedure in 1977, the procedure contained a number of impediments which made it desirable to seek a declaration in ordinary proceedings. These impediments included "no power to grant disclosure"²⁶ and "cross-examination on [affidavit] evidence [being] virtually unknown".²⁷ Secondly, "specific protections" had been built into the judicial review procedure "for the benefit of public authorities".²⁸ Some of these protections included the requirement for leave "to filter out unmeritorious or frivolous claims"²⁹ and short time-limits and a speedy procedure to "[protect] the public interest in ensuring that public bodies and third parties are not kept in suspense as to the validity of a decision and the extent to which it could be implemented or relied upon".³⁰ The latter repeats the mantra of "legal certainty", the thread of the Rule of Law that contends that people ought to be able to plan their lives conscious of the

24 *O'Reilly v Mackman*, above n 23, 1134 Lord Diplock.

25 Lewis, above n 23, 101.

26 Lewis, above n 23, 102.

27 Lewis, above n 23, 102.

28 Lewis, above n 23, 102.

29 Lewis, above n 23, 102.

30 Lewis, above n 23, 102.

(legal) consequences that may flow from their choices.³¹ It is on the concept of legal certainty that a number of other well known legal doctrines are based: for example, stare decisis and the law's objection to legislation with retroactive effect.

In addition to the rationale set out by Lord Diplock in *O'Reilly v Mackman*, procedural exclusivity is often justified by reference to the uniqueness of judicial method in judicial review proceedings and limited grounds on which a court can impugn a decision. In the companion case to *O'Reilly v Mackman*, *Cocks v Thanet District Council*,³² Lord Bridge referred to the "dichotomy of functions" in public and private law and questioned the lower Court's:³³

... implicit assumption that the court has the power not only to review the ... authority's public law decision but also to substitute its own decision to the contrary effect in order to establish the necessary condition precedent to the ... authority's private law liability.

In contrast, collateral attack is grounded in the notion of individual fairness. As Lord Fraser noted in *Wandsworth London Borough Council v Winder*, the arguments for procedural exclusivity "have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims".³⁴ Emery suggests the "ordinary right of any individual to

31 Some notable expressions of this principle are found in the works of Friedrich A von Hayek, Joseph Raz and Jeremy Waldron. In *The Road to Serfdom* (University of Chicago Press, Chicago, 1944) 54, Hayek says the Rule of Law:

... stripped of all technicalities ... means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

Raz says the corollary of the notion that people should obey the law is the notion that "the law must be capable of being obeyed" and must be "capable of guiding the behaviour of its subjects". He contends this means, amongst other things, all laws should be prospective, open and clear, and should be relatively stable: "[O]nly if the law is stable are people guided by their knowledge of the content of law": Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979) 212. Waldron explains it in terms of liberty, autonomy and freedom in Jeremy Waldron *The Law* (Routledge, London, 1990) 49:

[P]eople like to be able to plan their lives, to know what they can count on, to know what things they can do without inviting official intervention and what are the sort of things or situations that *will* call down the forces of the state upon them. ... Then we have some idea of what we have to do to avoid official disruption, and can plan accordingly. Or – if the interference is universal and unavoidable, like taxes say, or speed limits, or conscription – we can plan around it, taking it into account, like the cost of living or the possibility of rain.

See also A V Dicey *Introduction to the Study of the Law of the Constitution* (MacMillan, Basingstoke, 1959, first published 1885).

32 *Cocks v Thanet District Council* [1982] 3 All ER 1135 (HL).

33 *Cocks v Thanet District Council*, above n 32, Lord Bridge.

34 *Wandsworth London Borough Council v Winder* [1984] 3 All ER 976, 981 (HL) Lord Fraser [*Winder*].

defend an action" against them is "one of high constitutional importance".³⁵ Rigid application of the doctrine of procedural exclusivity "makes it likely that meritorious claims [or defences] will fail for no reason other than the wrong choice of procedure".³⁶ The embracing of collateral attack by New Zealand's courts is therefore not surprising; as mentioned above, the canons of simplicity and fairness abound in New Zealand's recent administrative law jurisprudence.³⁷

The imperative flowing from the catch-cry of fairness should not, however, be overstated. A refusal to allow a collateral challenge does not foreclose a person's options to challenge the validity of an administrative instrument, decision or action. Resort to the orthodox judicial review procedure remains. Proponents of an expanded role for collateral attack suggest this may be unrealistic and point to the complexity for litigants in dual proceedings, additional cost and potential timing problems.³⁸ But these concerns are not grave or insurmountable, especially when set against the problems of collateral attack. Notably, litigants in New Zealand do not confront the same procedural hurdle to instigate judicial review proceedings as their English counterparts.³⁹

After *O'Reilly v Mackman*, the English courts struggled to come to terms with the doctrine of procedural exclusivity, particularly the scope of the collateral attack exception. Speaking of that era,

35 Carl Emery "The Vires Defence – 'Ultra Vires' as a Defence to Criminal or Civil Proceedings" (1992) 51 CLJ 308, 331 [Emery "The Vires Defence"]; commenting on the right as described by Lord Fraser in *Winder*, above n 34.

36 Sandra Fredman and Gillian Morris "The Costs of Exclusivity: Public and Private Re-examined" [1994] PL 69, 80.

37 For the promotion of the doctrine of substantive fairness in New Zealand (and latterly its "abuse of power" sibling embraced in *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850 (CA)), see *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747 (HC); *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA); *Challis v Destination Marlborough Trust Board Inc* [2003] 2 NZLR 107 (HC); and the discussion in Melissa Poole "Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" [1995] NZ Law Rev 426.

38 For example, in *Boddington v British Transport Police* [1998] 2 All ER 203, 227 (HL) [*Boddington*], Lord Steyn said the following about whether the instigation of direct challenges is realistic (emphasis in the original):

The defendant may, however, be out of time before he becomes aware of the existence of the byelaw. He may lack the resources to defend his interests in two courts. He may not be able to obtain legal aid for an application for leave to apply for judicial review. Leave to apply for judicial review may be refused. At a substantive hearing his scope for demanding examination of witnesses in the Divisional Court may be restricted. He may be denied a remedy on a discretionary basis. The possibility of judicial review will, therefore, in no way compensate him for the loss of *the right* to defend himself by a defensive challenge to the byelaw in cases where the invalidity of the byelaw might afford him with a defence to the charge.

See also Emery "The Vires Defence", above n 35, 331.

39 See below n 127 for a brief discussion of the English judicial review procedure.

Emery said: "The English law on collateral attack [was] flawed by uncertainties and inconsistencies and lack[ed] a basis in sound principle".⁴⁰ The courts struggled to distinguish between situations where the nature of the private claim permitted public law issues to be raised and those that did not.⁴¹ An uncomfortable distinction was drawn between the procedural and substantive invalidity of subordinate legislation; the former was not able to be raised in a collateral manner but the latter could be.⁴² Similarly, challenges under legislation which set out codes for challenging invalid decisions were treated differently than other challenges.⁴³

To a certain degree, however, some clarity was bought to the topic when the House of Lords once again considered the issue in *Boddington v British Transport Police (Boddington)*.⁴⁴ The defendant had been charged with smoking a cigarette in a railway carriage where smoking was banned pursuant to a bylaw. He sought to defend the charge on the basis that the bylaw was (substantively) invalid.⁴⁵ At first instance, the magistrate did not allow the defendant to advance arguments of invalidity and convicted him, fining him £10. Following a case being stated, the House of Lords took the opportunity to clarify the circumstances in which collateral attack, particularly to subordinate legislation, was permissible. Lord Irvine repeated the justification for allowing collateral challenges:⁴⁶

[I]n approaching the issue ... the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings.

40 Emery "Collateral Attack", above n 21, 664. See also P P Craig *Administrative Law* (4 ed, Sweet & Maxwell, London, 1999) 794; Grant Illingworth and Dr Rodney Harrison QC *Challenging the Defective Decision: An Update on Judicial Review and Collateral Attack* (ADLS, Auckland, 1999) 10.

41 For example, compare *Cocks v Thanet District Council*, above n 33, with *Davy v Spelthorne Borough Council* [1983] 3 All ER 278 (HL). See also *Winder*, above n 34 and *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705 (HL).

42 For example, *Bugg v Director of Public Prosecutions* [1993] 2 All ER 815 (DC), contrast *R v Wicks* [1997] 2 All ER 801 (HL).

43 *Plymouth City Council v Quietlynn Ltd* [1987] 2 All ER 1040 (DC) [*Quietlynn*], contrast *R v Crown Court at Reading, ex parte Hutchinson* [1988] 1 All ER 333 (QB) [*Hutchinson*].

44 *Boddington*, above n 38.

45 He argued that a total prohibition of smoking was ultra vires because the empowering provision only provided the power to "regulate" smoking, and the prohibition had been unlawfully promulgated by the Railways Board's delegate. Ultimately, these arguments were rejected.

46 *Boddington*, above n 38, 216 Lord Irvine.

His Lordship was quick to dismiss the distinction between procedural and substantive invalidity that had been raised in *Bugg v Director of Public Prosecutions*: "If subordinate legislation is ultra vires on any basis, it is unlawful and of no effect in law. It follows that no citizen should be convicted and punished on the basis of it."⁴⁷ Lord Irvine then considered whether the statutory scheme precluded such a challenge, as it had done in *R v Wicks*⁴⁸ and *Plymouth City Council v Quietlynn Ltd (Quietlynn)*.⁴⁹ His Lordship noted "the strength of the presumption against a construction which would prevent an individual being able to vindicate his rights in court proceedings in which he is involved"⁵⁰ and concluded "only the clear language of a statute could take away the right of a defendant in criminal proceedings to challenge the lawfulness of a byelaw or administrative decision where his prosecution is premised on its validity".⁵¹ A distinction was drawn between administrative action where there had been "clear and ample opportunity" for a defendant to challenge the validity of the action before being charged with an offence, and subordinate legislation "of a general character in the sense that it is directed to the world at large, [such that] the first time an individual may be affected by that legislation is when he is charged with an offence".⁵² As Boddington's case fell in the latter class,⁵³ collateral attack was therefore permissible, although his challenge was rejected on the merits.

The other Lords, each speaking separately, joined Lord Irvine in allowing the challenge. Particularly notable is Lord Steyn's speech. First, he reiterated the primacy of the ultra vires doctrine: "I see no reason to depart from the orthodox view that ultra vires is 'the central principle of administrative law'"⁵⁴ (a point he subsequently resiled from, later describing the ultra vires principle

47 *Boddington*, above n 38, 215 Lord Irvine, referring to *Bugg v Director of Public Prosecutions*, above n 42. Lord Irvine also said (at page 215) that the distinction between procedural and substantive invalidity "revives the distinction between voidable and void administrative acts" and was contrary to other decisions of the House of Lords.

48 *R v Wicks*, above n 42.

49 *Quietlynn*, above n 43. Lord Irvine said this conclusion was justified in both cases: *Boddington*, above n 38, 216.

50 *Boddington*, above n 38, 217 Lord Irvine.

51 *Boddington*, above n 38, 217 Lord Irvine.

52 *Boddington*, above n 38, 216 Lord Irvine.

53 *Boddington*, above n 38, 216 Lord Irvine: "A smoker might have made his first journey on the line on the same train as Mr Boddington; have found that there was no carriage free of no smoking signs and have chosen to exercise what he believed to be his right to smoke on the train. Such an individual would have had no sensible opportunity to challenge the validity of the posting of the no smoking signs throughout the train until he was charged, as Mr Boddington was, under [the bylaw]."

54 *Boddington*, above n 38, 225 Lord Steyn, citing Wade and Forsyth, above n 12.

as a "dispensable fiction"⁵⁵). Secondly, Lord Steyn went to some length to advance the competence of inferior courts to consider these issues.⁵⁶

As indicated earlier, New Zealand's courts have not seemed unduly troubled by allowing collateral challenges. Indeed, such challenges have frequently been permitted without any explicit consideration of the propriety of doing so or the deleterious consequences which may flow from them. As Blanchard J noted in *Sugrue*, collateral challenges to subordinate legislation have historically been commonplace.⁵⁷ Some more recent examples include the collateral challenges to bylaws; Gore's liquor ban;⁵⁸ Wellington's prohibition of living or sleeping on the streets;⁵⁹ and Auckland's restriction on the number and nature of signs permitted on residential properties.⁶⁰

In addition, collateral challenges have increasingly been made to a number of other administrative actions, both in criminal and civil proceedings, as a "sword" as well as a "shield".⁶¹ Collateral challenges have been brought against fees set by public authorities: a challenge to mooring fees was considered (ultimately unsuccessfully) in civil proceedings seeking their recovery,⁶² but the alleged invalidity of dog control charges was not allowed to be raised as a

55 Lord Steyn "Democracy Through Law" (2002) 6 EHRLR 723, 726.

56 *Boddington*, above n 38, 220 Lord Steyn:

On a given day a bench of magistrates may have to decide a more difficult case than an appeal being heard by the Appellate Committee of the House of Lords. Magistrates are the bedrock of the English criminal justice system: they decide more than 95% of all criminal cases tried in England and Wales. Frequently they are called upon to decide complex questions of fact and, with the aid of the justices' clerk, difficult questions of law."

Lord Steyn also said, at 228, that the contention that allowing such challenges in inferior courts would "beckon chaos" was "an unduly pessimistic conclusion".

57 *R v Broad* (1915) NZPCC 658; *F E Jackson and Co Ltd v Collector of Customs* [1939] NZLR 682 (SC); *McCarthy v Madden* (1914) 33 NZLR 1251 (SC); *Reade v Smith* [1959] NZLR 996 (SC).

58 *Police v Hall* [2001] DCR 239.

59 *Wellington City Council v Baxter* [2003] DCR 242. The Council ultimately conceded the bylaw was invalid and the conviction was overturned by consent by the Court of Appeal, *Baxter v Wellington City Council* (25 September 2003) CA 16/03.

60 *Auckland City Council v Finau* [2002] DCR 839.

61 To a certain degree, the fairness justification for collateral attack diminishes when it is used as a sword because the plaintiff has the ability to determine the procedure and is not forced to raise invalidity in a collateral manner to avoid government action.

62 *Brady v Northland Regional Council* (25 October 1996) HC WHA AP25/94 Elias J [*Brady*]. This decision raised the "deep waters" of procedural exclusivity that, Elias J noted, were "hardly stirred in argument". Elias J dealt with the issue briefly in two parts of the decision (page 21): first, whether a collateral issue will be permitted is "probably incapable of determination by hard and fast rules"; secondly, whether it succeeds "will depend on its strength: if the only outcome likely, taking into account the discretionary nature of remedies for direct attack, is invalidity, then the defence will succeed".

defence to a criminal prosecution for non-payment.⁶³ The District Court has allowed a defendant in a criminal prosecution to challenge the validity of a *Gazette* notice prohibiting the farming of sika deer in specified areas.⁶⁴ A trespass notice issued by a local authority against a group of vagrants was invalidated by the District Court (due to problems with delegated authority and non-compliance with the New Zealand Bill of Rights Act 1990 (Bill of Rights)) in a prosecution for trespass taken by the police against the vagrants.⁶⁵ A refusal to grant a clearance for sea travel was invalidated (predominantly for non-compliance with international law principles) in criminal proceedings against a master of a yacht who sailed without obtaining clearance.⁶⁶ A number of prisoners have challenged decisions of the Parole Board, or other bodies whose actions led to their continued detention, through habeas corpus applications rather than directly through judicial review⁶⁷ (although habeas corpus proceedings remain one of the few areas in which the courts have been notably reluctant to entertain collateral challenges).

Litigants and defendants have frequently sought to collaterally challenge decisions under the Resource Management Act 1991. A collateral challenge to a certificate of compliance issued under the Act was allowed in a civil claim for negligent misstatement taken by a landowner unhappy with the oral advice given by a local authority, despite the Act providing an extensive code for challenging such certificates.⁶⁸ In contrast, the Court of Appeal rejected a purported necessity-style defence based on public law grounds in a prosecution for the theft and destruction of 1080 poison pellets;⁶⁹ the defence raised an improper challenge to an authorisation issued under the Resource

63 *Harwood v Thames Coromandel District Council* (10 March 2003) HC HAM A52/02. Randerson J concluded (at paragraph 29) that "the statutory context under the Dog Control Act and other statutory provisions displace the general principle that an accused person is entitled in criminal proceedings to challenge the validity or unlawfulness of a public act or decision upon which his conviction depends".

64 *Department of Conservation v Hall* [2000] DCR 1. Interestingly, as all necessary elements of the charge were otherwise proved or admitted, the sole issue in the Court's judgment was the validity of the *Gazette* notice.

65 *Police v Ngeru and Others* (2 August 2004) DC WN CRI 2004-085-2534, Judge Davidson.

66 *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) Keith J for the Court. The Court's judgment did not focus on the collateral attack issue, merely stating, at page 62: "The director in his procedures for the grant of a clearance under s 21(1) has set minimum requirements which are not permitted by international law. Those requirements are in breach of the powers conferred by s 21(1) as that provision is to be understood at present. Mr Sellers should not be held to be committing an offence for not complying with requirements set without lawful authority."

67 See for example *van der Ent v Sewell* [2000] 3 NZLR 125 (HC) and *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA). The reasons often advanced for this distinction include the fast-track nature of habeas corpus applications, absence of the decision-maker whose actions are ultimately in issue, and the different burden of proof. See further below n 85, below n 95 (text) and below n 132.

68 *Court v Dunedin City Council* [1999] NZRMA 312 (HC).

69 *R v Hutchinson* [2004] NZAR 303 (CA). The defence argued the dropping of pellets created a danger to the environment and the community.

Management Act 1991 to drop the pellets.⁷⁰ The Privy Council distinguished *Boddington* and the principle of procedural exclusivity in a challenge to the Māori Land Court's jurisdiction to issue an injunction under Te Ture Whenua Māori Act 1993 preventing a motorway being established over Māori freehold land, the motorway being authorised under a notice of requirement issued under the Resource Management Act 1991.⁷¹ While Lord Cooke characterised the challenge in the Māori Land Court as "essentially a direct challenge",⁷² he concluded that a hearing before the local authority and a subsequent appeal to the Environment Court "would offer the best way of having this dispute determined on the merits".⁷³ In a similar theme, an authorisation under the Local Government Act 1974 to enter a property and construct a public drain was successfully challenged in civil proceedings for trespass, due to non-compliance with the notice requirements.⁷⁴ The collateral nature of the challenge was not specifically referred to, although Barker J did adopt a fluid approach to invalidity by assessing whether there had been "substantial compliance" with the prescribed procedure. Ultimately, damages for trespass of nearly \$150,000 were awarded as a consequence of this defect.⁷⁵

Collateral challenges have also been made to actions of enforcement officers, typically in civil claims for compensation. For example, a litigant attempted to challenge a search warrant in civil

70 *R v Hutchinson*, above n 69, paras 63–64 Heath J:

There are real constitutional difficulties with the propositions advanced by Mr Zindel as to why Mr Hutchinson should be entitled to act as he did because the cost of a legal challenge was too high. In a democracy, members of society expect each other to abide by the law laid down by Parliament and to respect and comply with decisions of judicial or administrative bodies required to resolve disputes. Dilution of that expectation risks undermining the Rule of Law. In our view, because 1080 poison was registered as a controlled pesticide in Schedule 7, Part A of the Hazardous Substances and New Organisms Act 1996 and the Council granted a resource consent to permit an aerial drop of the poison to control possums, it would be wrong in principle to permit a defence of duress of circumstances to be used to launch a collateral attack on a lawful decision which has not been challenged through available legal processes. It is important, in the interests of public order, that breaches of the law not be condoned where legal redress is available.

71 *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

72 *McGuire v Hastings District Council*, above n 71, para 13 Lord Cooke: "both the substance of the proceeding in question and the background judicial system have to be taken into account in deciding whether [the *Boddington* line of cases] apply; and this case it outside their purview and spirit".

73 *McGuire v Hastings District Council*, above n 71, para 26 Lord Cooke.

74 *Ardern v Rodney District Council* [1997] BCL 1171 (HC) Barker J; *Roberts v Rodney District Council* [2001] 2 NZLR 402 (HC) (both referring to the same case, as Ardern had changed her name to Roberts by the time of the second decision). The Council notified one of the registered owners of the property but failed to notify the other owner, the plaintiff owner living separately from her husband.

75 *Roberts v Rodney District Council*, above n 74, para 35 (HC) Barker J. Damages were assessed according to the equivalent cost of a right of passage easement as if the Council had voluntarily negotiated such an entitlement.

proceedings on administrative law grounds in which he sought a declaration of invalidity, damages for trespass and Bill of Rights compensation.⁷⁶ The High Court "doubted" a challenge to the warrant could be made "otherwise than in properly constituted review proceedings", although it did not rule on the point because Bill of Rights compensation could be awarded for an unreasonable search without the need to invalidate the warrant.⁷⁷ Similarly, the plaintiff in *Sugrue* sought to challenge the validity of the seizure of a helicopter by a Wild Animal Control Officer in proceedings seeking damages for trespass and malicious prosecution, as well as compensation for allegedly unreasonable search and seizure under the Bill of Rights. Ultimately, the Court of Appeal did not need to resolve the issue because it found that the seizure of the helicopter was lawful (in contrast to the High Court's finding that it was motivated primarily and erroneously for the purpose of maintaining the "chain of evidence"), largely because other grounds for seizing the helicopter existed such as the desire to deter other possible offenders.⁷⁸

Blanchard J's comments in *Sugrue* about New Zealand's avoidance of the "complexities" of the doctrine of collateral attack are largely borne out by the recent cases. New Zealand's courts have readily permitted collateral challenges without any detailed analysis of the implications of so doing. Few cases identify or discuss the countervailing concerns that arise from the doctrine.⁷⁹ Significantly, in cases in which these issues have been addressed, the collateral challenge has typically been disallowed.

In the next section, I identify the difficulties that collateral attack presents and discuss some of the matters that the courts could address, if they reconsidered their present approach of apparent simplicity in this area.

III COLLATERAL ATTACK: THE POTENTIAL DIFFICULTIES

Many of the difficulties created by collateral attack are symptomatic of a wider contest within administrative law: the perennial public–private law divide.⁸⁰ That is, is public or administrative law distinct and should a boundary be maintained between it and private law? I, for one, am a disciple of

76 *Small v Attorney-General* (2000) 6 HRNZ 218 (HC).

77 *Small v Attorney-General*, above n 76, paras 30–33 Young J.

78 *Sugrue*, above n 9, para 57 Blanchard J for the Court. Collateral attack was not discussed by the Privy Council when it recently dismissed the appeal, *P F Sugrue Ltd v Attorney-General* [2005] UKPC 44.

79 Notable exceptions include *Brady*, above n 62; *Harwood v Thames Coromandel District Council*, above n 63; *R v Hutchinson*, above n 69; and the habeas corpus cases set out at above n 67.

80 See for example Carol Harlow "'Public' and 'Private' Law: Definition without Distinction" (1980) 43 MLR 241; Geoffrey Samuel "Public and Private Law: A Private Lawyer's Response" (1983) 46 MLR 558; Lord Woolf "Public Law–Private Law: Why the Divide? A Personal View" [1986] PL 220; Lord Woolf "Droit Public – English Style" [1995] PL 57; Dawn Oliver *Common Values and the Public–Private Divide* (Butterworths, London, 1999) [Oliver *Common Values and the Public–Private Divide*]; and Peter Cane *Administrative Law* (4 ed, Oxford University Press, Oxford, 2004) 11.

the uniqueness of public law. If nothing else, administrative law has a "vibe" or way of thinking that marks it out from its private law brethren.⁸¹ I am not, though, completely dogmatic about the demarcation. Both bodies of law can learn from each other and may, in appropriate cases, be able to be interwoven. My concern is whether that can be done in this situation in a way that maintains the special characteristics of public law.

Reference to the "vibe" of public and administrative law is, of course, a simplification of many years of academic debate, but is perhaps a useful starting point in the context of this topic. There are a number of particular strands which require some amplification, each of which is dealt with below:

- public law's polycentrism;
- issues of justiciability;
- discretionary remedies and possibility of the same outcome;
- the institutional competence of inferior courts; and
- other procedural features of judicial review proceedings.

A *The Polycentrism of Public Law*

It is frequently argued that public law and decision-making by the administration is "polycentric".⁸² Polycentrism is often referred to as one of the most significant distinguishing characteristics of a public law framework. Its genesis is often attributed to Lon Fuller, but in his seminal article on the concept, Fuller says he derived the concept of the "polycentric" task from Michael Polanyi.⁸³ In simple terms, a polycentric (or alternatively, multi-faceted) decision or situation is one that has many centres. Fuller figuratively describes this type of situation or decision as a spider-web:⁸⁴

A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the double pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" – each crossing of strands is a distinct center for distributing tensions.

81 For a comparison of the values which underlie each, see Dawn Oliver "The Underlying Values of Public and Private Law" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 217 [Oliver "The Underlying Values of Public and Private Law"]; Oliver *Common Values and the Public-Private Divide*, above n 80.

82 Oliver "The Underlying Values of Public and Private Law", above n 81, 251.

83 Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353, 395 referring to Michael Polanyi *The Logic of Liberty: Reflections and Rejoinders* (Routledge and Kegan Paul, London, 1951).

84 Fuller, above n 83, 395.

Fuller raised concerns about the amenability of polycentric situations to judicial adjudication. However, he acknowledged that polycentrism was often a matter of degree.⁸⁵

There are polycentric elements in almost all problems submitted to adjudication. A decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter. ... In lesser measure, concealed polycentric elements are probably present in almost all problems resolved by adjudication. It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.

Fuller's comments were not necessarily specific to public law, but there is no doubt that many – if not most – public law or governance decisions have a large degree of polycentrism.⁸⁶ This point has been emphasised by New Zealand's own Chief Justice, Dame Sian Elias. Dame Sian has highlighted the polycentric nature of judicial review, particularly the fact that "judicial review requires consideration of all relevant matters and deliberation and reasoning rather than the exercise of 'naked preferences'".⁸⁷

The polycentric nature of public law resonates strongly in the standards of review that apply to the decisions of public bodies. Appropriate deference is given to the expertise and choices of public bodies when it comes to complex, policy-laden decisions. The institutional incompetence of the courts to adjudicate on such matters is often noted and judicial restraint in these areas frequently championed. Similarly, some jurisdictions – particularly in Canada and the United States – have extended the principle of deference beyond factual or evaluative matters; the courts may, in appropriate cases, defer to a decision-maker's interpretation of a question of law if there is a rational

85 Fuller, above n 83, 397–398.

86 For a thorough discussion of the application of Fuller's work to administrative law, see John Allison "The Procedural Reason for Judicial Restraint" [1994] PL 452. Allison contends that: "Numerous administrative disputes are affected by the limits of adjudication as described by Fuller". See Fuller, above n 83, 460:

First, if government is characterised by its access to the public purse, a dispute involving the use of that purse affects alternative uses. Secondly, if government furthers collective goals, numerous citizens may be concerned with the furtherance of those goals. Thirdly, if government has a duty to show individuals equal concern and respect, the issue of concern for one individual affects other individuals. Fourthly, if government furthers a plurality of interests rather than an unequivocal public interest, administrative disputes will frequently involve that plurality. And, fifthly, if government is a means by which various groups trade effectively in benefits which offset continuing hardships, then a dispute involving one benefit affects the denial of another.

87 Sian Elias "'Hard Look' and the Judicial Function" (1996) 4 Waikato LR 1, 10. See also *Manuel v Superintendent of Hawkes Bay Regional Prison*, above n 67, paras 30, 34, where William Young J spoke of judicial review "necessarily involv[ing] a high level of evaluation" (para 34) and doubted that a habeas corpus application was "suited to refined analysis of nuanced administrative law arguments".

basis for their interpretation.⁸⁸ Regrettably, this principle has yet to find significant favour in Anglo–Australasian courts, who generally assert a monopoly over the "correct" interpretation of questions of law.⁸⁹ However, the increasing prevalence of the principle of deference means there will be inevitable pressure on the New Zealand courts to follow suit. Again, collateral attack distracts the courts away from this uniquely administrative law legal method. Collateral challenges are invariably based on allegations of an error of law or erroneous construction of a statutory power. This implicitly presupposes that there is one "correct" interpretation of the legal power or statute, an approach which may or may not be adopted by administrative law-savvy courts.

The imperatives underlying the concept of deference should not, however, simply be reserved to the substantive elements of administrative law and judicial review. So too, do they affect procedural matters and the choice of the appropriate forum.⁹⁰ The plurality of considerations and consequences relating to impugning an administrative instrument, decision or action may or may not be significant to mono-focused litigants. Their goal is clear: for private law litigants, compensation; for criminal defendants, a not-guilty verdict. The invalidation of an administrative decision is merely a necessary stepping stone to that ultimate goal. It might be asked: why is this problematic? The response is that administrative decisions are rarely, if ever, made for their own intrinsic value. There is an obvious reason why administrative law forms part of *public* law; administrative action has at its heart *the public*. While the overt manifestation of administrative law is typically litigation by aggrieved individuals, it is important not to forget the countervailing interests of the silent majority that underscore the actions of the administration. Even though usually not represented in these proceedings, the public has an interest in the outcome of challenges to administrative instruments, decisions or actions. Members of the public who share their train carriage with the impenitent smoker have an interest in the validity of the non-smoking bylaw. The citizens of Gore have an interest in the validity of the liquor ban in their main street. The residents of Rodney District have an interest in ensuring there are sufficient sewers to drain their waste water. The public generally has an interest in ensuring New Zealand's deer population is not depleted by poachers. Fellow soldiers and the citizens whom they protect have an interest in soldiers following orders from superiors.

These examples demonstrate the problem with collateral attack: the proceedings in which collateral attack arises are typically bilateral in nature. Private claims for compensation involve one

88 See for example *Chevron USA Inc v National Resources Defense Council Inc* (1984) 467 US 837 and *CUPE v New Brunswick Liquor Corporations* [1979] 2 SCR 227. See the discussion in Joseph *Constitutional and Administrative Law in New Zealand*, above n 17, 20.3.6 and Michael Taggart "The Contribution of Lord Cooke to Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Rishworth (ed), above n 1, 189.

89 See for example *Bulk Gas Users Group Ltd v Attorney-General* [1983] NZLR 129 (CA); *Peters v Davison* [1999] 2 NZLR 164 (CA); Joseph *Constitutional and Administrative Law in New Zealand*, above n 17, 20.3.6.

90 See Allison, above n 86, for a detailed analysis of polycentrism on the procedural aspects of adjudication.

litigant suing the government or a public authority. Criminal law proceedings involve the government or other prosecuting authority taking action against an individual. These proceedings are not necessarily the most suitable forum for the determination of polycentric questions affecting numerous people. While the government or administration represented in the proceedings no doubt acts, to some extent, as the delegate for the wider public (as each does generally), there is increasingly movement towards other people who have an interest in the proceedings being represented directly. There has long been a practice of third parties who may be prejudiced by the invalidation of a decision being joined as parties to proceedings.⁹¹ More recently, interested parties are intervening in judicial review proceedings, partly because public law litigation increasingly has a "policy" or "cause" litigation element to it.⁹² These measures are to be commended. Not only do they ensure the courts are fully apprised of the implications of their potential decision, but they also bring a theme of natural justice to the proceeding.⁹³ Collateral attack, however, squeezes out these important features of public law litigation. The traditional means of accommodating collateral attack in other proceedings make no provision for these other voices to be heard.

Even more of a concern is that a collateral challenge can be made to a decision of a public authority that is not represented in the proceedings. Some recent examples include cases where bylaws or other administrative actions of local authorities have been invalidated in criminal prosecutions taken by the police,⁹⁴ and a case in which a habeas corpus application was brought against a prison superintendent where the application was largely based on the alleged invalidity of

91 See for example *Belgiorno-Nettis & Ors v Auckland City Council* [1998] NZRMA 550 (HC); *Deadman v Luxton* (4 May 1999) HC WN CP 71/99; *Wellington International Airport Ltd v Commerce Commission* (25 July 2002) HC WN CP151/02; and discussion in R A McGechan *McGechan on Procedure* (looseleaf, Brookers, Wellington, 1995) Vol 1, JA10.03(j) [*McGechan on Procedure*]. In *Deadman v Luxton*, Gendall J noted at paragraph 6:

It may often be the case that there is more scope for rights of others to be affected in judicial review proceedings, than in other types of 'plaintiff versus defendant' civil litigation, because frequently the challenge to the exercise of the statutory power or decision of a public body will have consequential effects upon others who obtained beneficial entitlements or expectations following upon the exercise of such power.

92 See for example *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC); *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC); *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA); *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC).

93 Although mentioned in the context of participation in resource management proceedings before local authorities, see the analogy made by Keith J in *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, para 54 (SC) between such participation and the natural justice protected by section 27 of the New Zealand Bill of Rights Act 1990. His Honour's summary of the purposes of such public participatory processes at paragraph 46 is also notable: "[F]irst, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, secondly, to enhance the quality of the decision-making."

94 *Police v Hall*, above n 58; *Police v Ngeru and Others*, above n 65; *R v Hutchinson*, above n 69.

actions of the parole board not represented before the court.⁹⁵ This concern is exacerbated by the recent fragmentation of the authority of the state. No longer is there a sole, monolithic governmental or administrative entity.⁹⁶ Public power is now shared amongst a host of entities: between a smaller executive-led governmental administration, a range of Crown entities and state owned enterprises, numerous sub-national entities such as local authorities and district health boards, and even some private entities.⁹⁷

It is only proper that the authority whose actions are challenged is represented so that it can take the necessary steps to repel the collateral challenge.⁹⁸ Again, while it is possible that a prosecuting authority like the police can defend the challenge on behalf of the impugned authority, this remains unsatisfactory; the impugned authority itself is usually better placed to provide the justification underlying the administrative action, both in evidence and submissions. Nowadays, validity of administrative action, including delegated legislation, seldom turns on the simple interpretation of legislation. The courts are increasingly subjecting administrative action to heightened scrutiny, and requiring greater degrees of justification.⁹⁹ Further, the judiciary has repeatedly encouraged the practice of submitting "Brandeis briefs", where sophisticated evidence relating to the social, administrative and financial implications of administrative action is provided to the court.¹⁰⁰ The courts will undoubtedly be better equipped to consider questions about the validity of an instrument, decision or action if its architect is present.

95 See *Manuel v Superintendent of Hawkes Bay Regional Prison*, above n 67.

96 This point is also made by Fredman and Morris, above n 36, 69, 84. However, they argue that the "shifting boundaries of the State and the fragmented distribution of public power" require the abolition of the public-private divide.

97 See Joseph *Constitutional and Administrative Law in New Zealand*, above n 17, 20.4.3; Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, Auckland, 2004) ch 6; Michael Taggart "Public Utilities and Public Law" in P A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 214; and Michael Taggart "The Province of Administrative Law Determined?" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997) 1.

98 In the context of collateral challenges arising in habeas corpus applications, the Court of Appeal in *Manuel v Superintendent of Hawkes Bay Regional Prison*, above n 67, para 34, suggested the absence of the primary decision-maker whose actions were impugned was "not necessarily decisive" but might be a "significant (and perhaps controlling) factor".

99 See for example *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 (HC); *Wolf v Minister of Immigration* [2004] NZAR 414 (HC); *Progressive Enterprises Ltd v North Shore City Council* (15 June 2005) HC AK CIV-2004-404-7139; Philip A Joseph "The Demise of *Ultra Vires* – Judicial Review in the New Zealand Courts" [2001] PL 354.

100 See McGechan J's comments in *Gregory v Rangitikei District Council* [1995] 2 NZLR 208 (HC); Sir Ivor Richardson "Public Interest Litigation" (1995) 3 Waikato LR 1; Elias, above n 87. The term "Brandeis Brief" arose after Louis Brandeis (later Supreme Court justice), as counsel for State of Oregon in *Muller v Oregon* (1908) 208 US 412, submitted a report to the US Supreme Court providing social authorities on the issue of the impact of long working hours on women.

B Issues of Justiciability

In this context, I use the term justiciability in its broadest sense. Judicial review is not a magic panacea in all cases. The courts may decline to review a decision (often on a pre-emptory basis) because it is not amenable to review, because the plaintiff has failed to take advantage of alternative remedies, such as a specific appeal right, or because the plaintiff lacks the necessary standing. In some ways, these matters are simply different ways of expressing the discretionary nature of the courts' supervisory role.¹⁰¹

Questions of a decision's amenability to review become no less significant if the procedural context is a private law claim rather than judicial review. There is a strong tradition in public and administrative law of treating some types of decisions as falling outside the supervisory jurisdiction of the High Court. For example, the decision of the government to disband its air strike force was "par excellence a non-justiciable question", one that was "not susceptible of determination by any legal yardstick" and a matter "of government policy into which it [was] constitutionally improper for the Courts to go".¹⁰² These same sentiments would still apply even if the issue arose in the context of a contractual claim where the government had relied on its executive power to disband the air strike force to justify the cancellation of a contract for servicing the planes. Other examples of the courts' recognition of this principle include McGrath J's comments in *Attorney-General for England and Wales v R* about the propriety of New Zealand courts adjudicating in a domestic private law claim about the validity of actions of foreign officials¹⁰³ and Randerson J's recognition in

101 See below Part III C Discretionary Remedies and Possibility of the Same Outcome.

102 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA), para 28 Tipping J for the Court. See also, for example, the limits on the justiciability of decisions of state-owned enterprises noted by the Privy Council in *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385 (PC) and the reluctance of the High Court in *Marshall v The National Spiritual Assembly of the Baha'is of NZ Inc* [2003] 2 NZLR 205 (HC) to adjudicate on who succeeded to the role of the 17th Karmapa in Tibetan Buddhism.

103 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA). McGrath J said (at para 133):

[Because] the respondent was not in fact ordered by his superiors to sign the confidentiality contract, ... [i]t is accordingly unnecessary for me to decide whether Salmon J was right to hold they had acted for an improper purpose and invalidly by ordering him to sign. Had I had to face that issue, in my view, I would have had to address an important prior question as to whether it was open to the High Court of New Zealand to review the validity of an order being an official action of the Government of the United Kingdom.

McGrath J also raised (at para 135), but did not find it appropriate to determine, whether the Court should "in this context exercise ... 'judicial restraint or abstention' ... on the basis that the Courts of one jurisdiction should not sit in judgment on the acts of a foreign State within its own territory."

Polynesian Spa Ltd v Osborne of the "marked reluctance [of the courts] to interfere with the exercise of a discretion to prosecute".¹⁰⁴

Similarly, an unexplained failure to rely on a statutory appeal right or other review process may be an impediment to invoking the general judicial review jurisdiction of the High Court.¹⁰⁵ For example, the Court of Appeal in *Norrie v Senate of the University of Auckland*¹⁰⁶ declined to review the exclusion of a student from a course of study at the University because the student had not exhausted his appeals – namely, review by the Visitor of the University.¹⁰⁷ There are sound reasons underlying this limitation. These alternative scrutiny mechanisms may be more suited to determining the issue, may themselves contain time limits and procedural requirements mandated by the legislature, and may more readily accommodate competing interests or interested parties. Overall, these mechanisms may provide a more suitable forum for resolving the essential complaint. And, in pragmatic terms, the High Court would become overwhelmed if each and every complaint of an erroneous administrative decision was brought directly to it. The English courts have, in my view, properly resisted collateral challenges that endeavour to circumvent these more suitable appeal and review procedures.¹⁰⁸

Although an important feature of administrative law, standing is unlikely to be a significant issue with collateral attack. New Zealand's courts have taken a liberal attitude towards standing. It is no longer a significant preliminary issue, but falls for consideration in the question of relief in the light of the gravity of any legal defect.¹⁰⁹ Of course, if a plaintiff has a genuine claim or defence against the administration that requires the invalidation of a particular action, standing should not be of any real concern.

104 *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC). For an example of the irresistibility of raising the improper exercise of prosecutorial discretion as a defence in collateral proceedings, see *Waverley Borough Council v Hilden* [1988] 1 All ER 807 (Ch).

105 See the discussion in Joseph *Constitutional and Administrative Law in New Zealand*, above n 17, 25.4.5.

106 *Norrie v Senate of the University of Auckland* [1984] 1 NZLR 129 (CA).

107 See also *Fraser v Robertson* [1991] 3 NZLR 257 (CA) (right of appeal to statutory appeal board). Similarly, the Court of Appeal in *Wislang v Medical Council of New Zealand* [2002] NZAR 573, para 31 (CA) Blanchard J for the Court (affirmed on appeal [2005] NZAR 670 (PC)) noted that judicial review will "be refused when the remedy of appeal is more appropriate". This, of course, is not absolute, see *Martin v Ryan* [1990] 2 NZLR 209 (HC).

108 See for example *R v Wicks*, above n 42.

109 See *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 (HL); *Environmental Defence Society Inc v South Pacific Aluminium (No 3)* [1981] 1 NZLR 216 (CA).

C *Discretionary Remedies and Possibility of the Same Outcome*

It is trite to say that judicial review remedies are inherently discretionary.¹¹⁰ As Lord Hailsham said in *London & Clydeside Estates Ltd v Aberdeen District Council*:¹¹¹

When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences on himself. ... At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority ... to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act.

The decision as to whether relief will be granted in a judicial review case depends on a range of factors. Some of the common reasons for declining relief include delay,¹¹² waiver or other disentitling conduct by the applicant, the gravity of the error, prejudice to third parties, the availability of alternative remedies, the mootness of the issue or the inevitability of the same outcome.¹¹³ This list of factors is non-exclusive. In cases of illegality or where the public body exceeds its jurisdiction, a refusal to grant relief will lead to the preservation of an illegal or ultra vires action.

110 Lord Cooke of Thorndon "The Discretionary Heart of Administrative Law" in Christopher Forsyth and Ivan Hare (eds) *The Golden Metwand and the Crooked Cord* (Clarendon Press, Oxford, 1998) 220; J L Caldwell "Discretionary Remedies in Administrative Law" (1986) 6 Otago LR 245.

111 *London & Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876, 883 (HL) Lord Hailsham LC.

112 See also the discussion of this point at Part III E Other Procedural Issues below.

113 See for example Joseph *Constitutional and Administrative Law in New Zealand*, above n 17, 973–983; Joseph and McHerron, above n 1, paras 144–160; Wade and Forsyth, above n 12, 688–699; Craig, above n 40, ch 24.

In addition, establishing some form of illegality may not dictate a different outcome. A court may direct decision-makers to reconsider their decisions, usually with instructions to take into account the court's wisdom on how the decision-makers can avoid the factors that lead to the original decisions being invalidated. This process of reconsideration may or may not, though, lead to a different substantive outcome. It is not uncommon for a decision-maker to reach the same decision. Similarly – although, regrettably, not yet fashionable in New Zealand – there is the suspended declaration of invalidity. The "collaborative" curial tool preserves the status quo in the interim, allows the decision-maker to cure or repair the defect in their decision, but sets a firm window for them to do so. Popular in constitutional challenges to legislation in North America, this remedy seeks to ensure that chaos does not ensue if a crucial decision is immediately invalidated or allows the democratic process to develop an appropriate solution that passes constitutional scrutiny, rather than forcing the courts to move outside their pure adjudicatory comfort zone.¹¹⁴

Remedial discretion and the possibility of the same outcome are some of the most defining features of administrative law and judicial review. As Forrest Gump's Momma used to say: "Life [is] like a box of chocolates. You never know what you're gonna get."¹¹⁵ So too for aggrieved public law litigants. Success in proving a legal defect may be a Pyrrhic victory. Ultimately, the litigant may not achieve their desired result of overturning (in perpetuity) the impugned instrument, decision or action. This demonstrates the problem. The bundling of the mechanics of public law into private law compresses this remedial discretion to the point of disappearance. If the decision is unlawful, it no longer provides a justification for the administration's subsequent action. Unlawfulness is only relevant as a necessary element in another cause of action or defence; whether the defect is grave or can be cured is immaterial. The basis for an allegation of criminality falls away if the instrument setting out the offence is invalidated; the charge of smoking on a train cannot succeed if the bylaw prohibiting smoking on trains is defective. The authorisation for interference with (usually) property rights falls away if the authorisation is quashed; the entry onto private land to construct a drain turns an authorised action into a trespass if the required notice to one of the landowners was not properly given. Representations made by officials may become

114 See for example Peter W Hogg *Constitutional Law of Canada* (looseleaf, Carswell, Scarborough, 1997) para 37.1(d); Kent Roach *Constitutional Remedies in Canada* (looseleaf, Canada Law Book, Aurora, 1994) 14–59. Some cases in which it has been used include *Re Manitoba Language Rights* [1985] 1 SCR 721; *R v Swain* [1991] 1 SCR 933; *Schachter v Canada* [1992] 2 SCR 679; *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624. For a discussion of some other remedial mechanisms which lessen the retrospective effect of the invalidation of an administrative act, see Enid Campbell "The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts" (2003) 29 Monash U LR 49.

115 *Forrest Gump* (Paramount Pictures, 1994), see Memorable Quotes From Forrest Gump <<http://www.imdb.com/title/tt0109830/quotes>> (last accessed 5 June 2006).

misrepresentations if the instruments or decisions on which they were based are overturned; the advice given to a potential purchaser of land that a certain use is permitted may then be treated as a negligent misstatement if the certificate of compliance on which that advice was based is quashed. The stripping away of the justification by resort to administrative law principles (and, indeed, the Bill of Rights) exposes the administration to claims in tort and neutralises charges of criminality.

The English courts have ruled that the fusion of public and private law questions means that private law claims flow immediately once an administrative instrument, decision or action is ruled to be invalid; there is no room for the intermediate consideration of the courts' discretion that would have been commonplace in judicial review proceedings.¹¹⁶ In my view, the neutering of the remedial discretion strikes a blow to the heart of administrative law and is wrong in policy and principle. The ability to fashion an appropriate remedy – which may or may not involve the immediate invalidation of a decision – is central to administrative law's judicial method. It allows the courts to carefully navigate the plurality of interests that are engaged in any particular case and the constitutional principles which underpin the notion of deference.

D Institutional Competence

As collateral challenges are likely to be common in the "inferior" courts and tribunals,¹¹⁷ such as the District Court, some argue that these courts do not have the institutional competence or skills to consider questions relating to the validity of administrative law instruments, decisions and actions. Personally, with respect to the District Court particularly, I do not strongly push the idea

116 See for example the comments of Scott J in *Waverley Borough Council v Hilden*, above n 104, 819: "A challenge to an administrative decision made in ordinary proceedings cannot be dealt with with the same flexibility [as in judicial review proceedings]. It either succeeds or fails." See the discussion of this point in Emery "The Vires Defence", above n 35, 325.

117 The term "inferior" is not, of course, used in the pejorative sense. In *Auckland District Court v Attorney-General* [1993] 2 NZLR 129, 133 (CA), Thomas J explained the difference between superior and inferior courts in the following terms (citations omitted):

The supervisory jurisdiction of the High Court has been secured since the 17th century. It is based on the fundamental premise that statutory (and some prerogative powers) can be validly exercised only within their true limits. It is the task of the High Court to determine those limits and it does so by the process of judicial review. But the High Court cannot review its own decisions; it must determine its own jurisdiction and, if it is responsible for any irregularity, the defect must be corrected by the Court itself or on appeal: see *Isaacs v Robertson*. It is in this sense that the High Court is described as a superior Court of general jurisdiction and other Courts and tribunals are described as 'inferior' or as Courts or tribunals of limited jurisdiction: see *R v Chancellor of St Edmundsbury and Ipswich Diocese*. As the superior Court of general jurisdiction, it is the High Court which is therefore responsible for determining the jurisdiction and legality of the decisions and conduct of the inferior Courts and tribunals.

that the superior courts have a monopoly on administrative law expertise. However, this objection has gained some traction. For example, the English Divisional Court in *Quietlynn* said:¹¹⁸

The law relating to judicial review has become increasingly more sophisticated in the past few decades, and in our view justices are not to be expected to have to assume the functions of the Divisional Court and consider the validity of decisions made by a local authority ... in the light of what is now a complex body of law.

Emery noted other examples of where superior courts have "look[ed] askance at the prospect of inferior court or tribunals grappling with the complexities of the contemporary law of ultra vires".¹¹⁹ Similarly, Anthony Tanney suggests that the following principles, amongst others, underlie the procedural exclusivity doctrine adopted by the House of Lords in *O'Reilly v Mackman*: "to ensure that cases are channelled towards a cadre of judges with expertise in at least the general principles of administrative law", "to limit the number of judges hearing administrative law cases to ensure that the discretion inherent in the public law jurisdiction of the court is exercised consistently" and "to maximise the control of the higher courts over public law litigation".¹²⁰

While these concerns are essentially temporal and could be cured through experience gained by inferior courts and tribunals considering administrative law issues, a more fundamental, conceptual problem may not. If Taggart's relative theory of invalidity is accepted over Wade's theory of legal relativity, then the District Court may lack the necessary constitutive powers to invalidate administrative law instruments, decisions or actions. That is, the idea that the role of the court is to retrospectively invalidate an otherwise conclusively valid decision (rather than merely declaring invalid an already invalid decision which has to that point in time been treated as valid) presupposes that the District Court has the necessary power to do so. Taggart himself notes that his theory "eliminates the conceptual underpinning of collateral challenge" because the district courts do not have these inherent powers.¹²¹ However, he argues for the retention of

118 *Quietlynn*, above n 43, 1046 (Webster J); compare *Brady*, above n 62. Lord Irvine in *Boddington*, above n 38, 214 noted the argument that collateral challenges were undesirable because of the "difficulties for magistrates in having to deal with complicated points of administrative law and the dangers of inconsistent decisions" had "some weight", but suggested it may have been overstated. It must be noted, however, that the doubting of this argument must inevitably be based on the reiteration by the House of Lords of ultra vires as the fundamental basis for judicial review (which remains contested). The adoption of the more nuanced and inevitably complicated conception of judicial review based in common law theory, institutional respect and deference augments the arguments about the complexity of administrative law.

119 Emery "The Vires Defence", above n 35, 320.

120 Anthony Tanney "Procedural Exclusivity in Administrative Law" [1994] PL 51, 53.

121 Taggart "Rival Theories of Invalidity in Administrative Law", above n 17, 93.

collateral attack "as a matter of historical fact and pragmatic policy", even though this may "not [be] intellectually satisfying".¹²² Despite Taggart's impassioned plea for the adoption of "one theory of invalidity of administrative law, and only one",¹²³ that day has not yet come.¹²⁴ Nor do I seek to nail my colours to one particular mast for the purposes of this present discussion. Wade's theory readily accommodates the principle of collateral challenge in inferior courts. To the extent that Taggart's theory does not, I, like him, suggest that it may be accommodated simply as a matter of pressing policy and pragmatism.

E Other Procedural Issues

Judicial review has some procedural features that mark it out from proceedings in the private law or criminal courts. These procedural features may not be absolute "bottom-lines" and departure from them in any individual case may not amount to a fundamental violation of principle, but the adoption of an alternative mechanism may lead to a person obtaining some tactical advantage – at the expense of the public authority and the wider public – without an individualised assessment of the propriety of so doing.

First, there is the question of undue delay. Unlike England,¹²⁵ New Zealand's formal judicial procedure is not overly rigid. There is no limitation period or requirement to obtain leave to commence proceedings. However, judicial review, both under the New Zealand common law and the Judicature Amendment Act 1972, is intended to be undertaken in a speedy fashion; (undue) delay in instigating proceedings may disentitle relief.¹²⁶ Again, invocation of an alternative procedure should not lead to this principle being circumvented. The English courts have generally

122 Taggart "Rival Theories of Invalidity in Administrative Law", above n 17, 93.

123 Taggart "Rival Theories of Invalidity in Administrative Law", above n 17, 90 (emphasis in the original).

124 Note Fisher J's contribution to this endeavour in *Martin v Ryan* [1990] 2 NZLR 209, 237 (HC):

"... I think that in most, if not all, cases the judgment of a Court acting by way of judicial review to impeach an earlier decision is more usefully regarded as constitutive than declaratory. I would prefer to describe the usual case as the positive act of "retrospective invalidation" rather than the passive act of merely recognising an absence of legal consequence which has always prevailed. I respectfully agree with the thrust of Professor Taggart's paper "Rival Theories of Invalidity" referred to earlier, although I prefer the less opaque label "retrospective invalidation" to "the relative theory of invalidity".

125 Emery describes the argument for procedural exclusivity in England based on the strict judicial review procedure as the "lock-out" argument: see Carl Emery "Public Law or Private Law? – The Limits of Procedural Reform" [1995] PL 456.

126 See for example *Turner v Allison* [1971] NZLR 833 (CA); Joseph *Constitutional and Administrative Law in New Zealand*, above n 17, 25.4.1.

disallowed collateral challenges that undermine their procedural standards.¹²⁷ However, the New Zealand courts do not appear to have turned their minds explicitly to this issue. An example where this may have been appropriate is *Sugrue*, where private law proceedings were filed one day before the six-year civil limitation period expired. If the actions of the Wild Animal Control Officer were challenged in judicial review proceedings such a long time after the impugned incident, delay would likely have been disentitling.¹²⁸

Secondly, there is the question of evidence. The default position is that evidence in judicial review proceedings is by way of affidavit evidence.¹²⁹ Cross-examination is only permitted with leave, and then is reserved for the rarest of cases.¹³⁰ Administrative law questions are legal issues to be determined by a judge alone.¹³¹ In some cases, the burden of proof may differ.¹³²

127 Part 54 of the Civil Procedure Rules 1998 (previously, order 53 of the Rules of the Supreme Court 1965) requires plaintiffs to obtain leave or permission to commence judicial review proceedings and must do so "promptly and in any event within three months" from when the cause of action arose. See further S A De Smith, Harry Woolf and Jeffrey J Jowell *Principles of Judicial Review* (Sweet & Maxwell, London, 1999) 561; Wade and Forsyth, above n 12, 647. However, contrast the suggestion in *Rhondda Cynon Taff County Borough Council v Watkins* [2003] 1 WLR 1864 (CA) that delay in raising an issue of invalidity as a defence should not prevent the defence.

128 *Sugrue*, above n 9, para 57 Blanchard J for the Court. The Court of Appeal expressed some concern about the inadequacy of aspects of the evidence when given at trial some 11 years after the event.

129 *McGechan on Procedure*, above n 91, vol 1, JA9.06.

130 See *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA); *McGechan on Procedure*, above n 91, JA9.07.

131 The objection to any deviation from this approach was noted in *R v Wicks* (1995) 93 LGR 396 (CA) Keane J for the Court:

The practical considerations ... are also persuasive. Whether before justices or before a Crown Court judge or jury, if an allegation were raised that the decision to issue an enforcement notice was ultra vires, the practical problems of such an issue being determined in either of those processes would be formidable. If the allegation were one of *Wednesbury* unreasonableness or failing to take account of relevant considerations, it might well require a considerable amount of evidence about the relevant planning policy context, since the discretion as to whether an enforcement notice should be issued or not will have been influenced by policy considerations. That may involve an examination of the relevant development plan for the area and even national planning policy guidance. ... For these matters to be dealt with by expert evidence and cross examination before a jury, or even before a Crown Court judge sitting alone, is not appropriate. The same would be true of most ultra vires bases of challenge. On the other hand, such arguments are the everyday concern of the Crown Office list judges, who deal with judicial review applications."

132 For example, in *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616, para 70 (CA), Blanchard J for the Court noted that the onus lay on the public body to justify the detention in habeas corpus proceedings; in contrast, if the same point was considered in judicial review proceedings, the onus lay with the detainee.

The unqualified adoption of collateral challenge in private law and criminal proceedings potentially allows these procedural features to be circumvented. These objections, while not earth-shattering in their own right, would be further chinks in the armour of administrative law.

IV COLLATERAL ATTACK: TOWARDS A PRINCIPLED APPROACH

I do not want to be regarded as a doomsayer when it comes to collateral attack; my identification of the deleterious effects of collateral attack is merely intended to indicate some caution about the oversimplification of the doctrine. I am not advocating it be euthanized. My plea is simply that the question of whether collateral attack should be permitted in any individual case be assessed in a more principled and nuanced manner and, if it is permitted, for the public law character of the questions before the court to be accommodated in whatever forum they arise. In particular, first, I am not suggesting a return to the English approach that has been the subject of some criticism for its complicated rigidity. Secondly, and more importantly, I am suggesting that any accommodation can largely be achieved through existing legal mechanisms available in the alternative proceedings (be they civil or criminal) and by minor modification to judicial method. I therefore propose the following touchstones, which seek to synthesize these concerns and ameliorate their effects:

- (a) *The courts ought to give explicit consideration to the appropriateness of a collateral challenge in each case.*

Whether the potential difficulties of allowing a collateral challenge arise in any case will depend on the particular circumstances, not necessarily according to the broad classification of the types of invalidity raised or private law rights claimed.

- (b) *Public authorities and other parties with an interest in the validity of the administrative instrument, decision or action should be entitled to participate in the proceedings.*

The relevant authority whose instrument, decision or action is challenged should be joined into the proceedings. Where the administrative law issue is inherently polycentric or has the potential to affect a number of people or groups, those parties with an interest in the public law questions should be formally represented in the proceedings, either as defendants or interveners.¹³³ Joinder of other parties will not usually be necessary in the case of an individualised decision in relation to a particular person.

¹³³ To the extent that the criminal procedure rules do not provide for joinder or interveners, this could arguably be achieved by reliance on the courts' inherent power to regulate their own procedure: see *Watson v Clarke and Lawlor* [1990] 1 NZLR 715 (HC); *Department of Social-Welfare v Stewart* [1990] 1 NZLR 697 (HC); and discussion in Hon Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington, Crimes Act, 1994) ch 4.3.03 (last updated 31 August 2005). If the joinder of other parties would be likely to unduly delay or complicate the criminal proceedings such that the defendant's fair trial rights are unduly prejudiced, staying the proceedings until a direct challenge has been heard may be preferable.

- (c) *In cases where questions of justiciability arise, the courts ought to consider whether the instrument, decision or action is amenable to review and, if necessary, decline to entertain any challenge.*

This includes when it is more appropriate for invalidity to be considered through a more specific and appropriate appeal mechanism. Alternatively, the availability of other remedies may fall for consideration in the discretionary assessment of relief and whether the decision should be invalidated.

- (d) *Where discretionary remedies are likely to have an instrumental effect on the outcome in judicial review proceedings, the courts ought to accommodate such considerations into the collateral proceedings.*

A finding of a legal defect should not necessarily have a flow-on effect for the purposes of the consequential claim or defence. An intermediate inquiry into other discretionary factors which may weigh against formal invalidation should be undertaken. In particular, the more nuanced approach to a finding of invalidity suggested in *Brady v Northland Regional Council*¹³⁴ should be preferred over the automatic approach recommended in *R v Crown Court at Reading, ex parte Hutchinson*.¹³⁵

If necessary and appropriate, this may require the reconsideration of the decision by the decision-maker (perhaps in combination with a suspended declaration of invalidity), the consequential action or defence being stayed until that has been completed. Whether the claim or defence succeeds will depend on whether the aspect of the administrative law decision material to the claim or defence ultimately survives.

- (e) *To the extent possible, administrative law questions should be heard in a manner consistent with the procedure for judicial review.*

Evidence relating to the point should be given by way of affidavit, with cross-examination saved for the rarest of cases. The issue should be considered by a judge alone, preferably separately from the other questions that arise in the proceedings. Reliance on rule 418 of the High Court Rules or rule 418 of the District Court Rules to separate the public law and private law questions – presently adopted by some litigants – is also to be recommended. This will allow public law issues to be considered as a preliminary question, with consequential private law questions being parked until after that question has been determined.

134 *Brady*, above n 62.

135 *Hutchinson*, above n 43.

- (f) *If, for any reason, the accommodation of administrative law principles in alternative proceedings is not possible or desirable, a direct challenge should be required.*

In such cases, the collateral proceedings can be stayed to allow a direct challenge to the decision by way of judicial review.¹³⁶ Naturally, this will allow other interested parties to participate in the judicial review proceedings, and for the public law questions to be determined in the usual manner. An alternative possibility is for the administrative law question to be "referred" to the High Court for determination of the administrative law questions.¹³⁷ Of course, collateral attack should be declined when the alleged invalidity of the instrument, decision or action does not materially affect the questions to be determined in the proceedings in which the collateral attack arises.

In my view, the adoption of these touchstones will help ameliorate any collateral damage to administrative law's unique character, while still ensuring that people are able to challenge the invalidity of administrative instruments, decisions or actions as and when they arise in civil and criminal proceedings.

¹³⁶ This possibility was noted by Cooke J in *Reid v Rowley* [1977] 2 NZLR 472, 483 (CA).

¹³⁷ For a full discussion of this proposed "reference procedure", see Emery "The Vires Defence", above n 35, 344; and Emery "Collateral Attack", above n 21, 667. To the extent that New Zealand's present procedural codes do not accommodate such a reference procedure, they ought to be amended to provide for it. Section 45B of the District Courts Act 1947 and rule 419 of the District Courts Rules 1992, which allow a question of law to be removed to the High Court, may provide useful starting points. Similarly, section 43 of the District Courts Act 1947 allows the entire proceedings to be removed into the High Court.