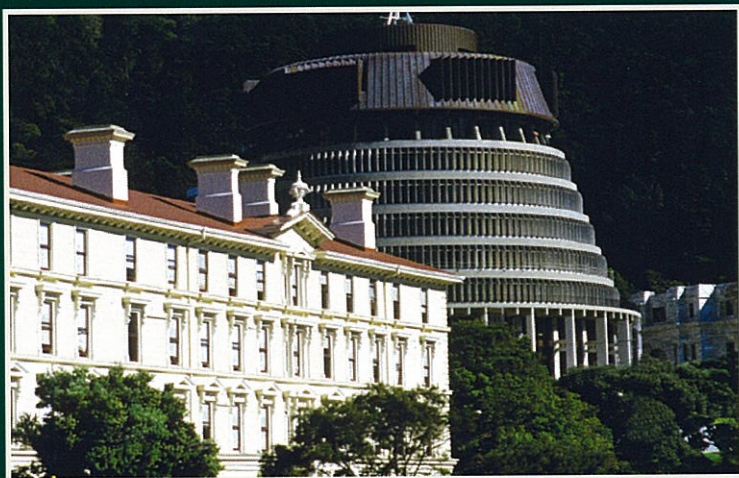


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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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JUDICIAL REVIEW OF THE EXECUTIVE — PRINCIPLED EXASPERATION

*David Mullan**

I Prologue

It is a very great honour to deliver the 2009 Lord Cooke of Thorndon Lecture. I am particularly conscious of the fact that I am the first graduate of the Victoria University of Wellington Law Faculty to have this privilege. It is also an intimidating challenge. In part, that is because of the eminence of the previous lecturers, but above all else, by reason of the stature of Lord Cooke especially as a public lawyer.

Dean Knight captures Lord Cooke's stature well in his recent article in the Victoria University of Wellington Law Review on Lord Cooke's contribution to administrative law.¹ There, he speaks of Lord Cooke's "great passion for administrative law",² before providing this assessment: "Lord Cooke has left behind a tremendous legacy through his work fashioning an indigenous administrative law for New Zealand".³ Knight also acknowledges Lord Cooke's "immense" contribution to Commonwealth administrative law.⁴

* Emeritus Professor of Law, Queen's University, Kingston, Ontario. This is a recreation of the oral version of the the Lord Cooke of Thorndon Lecture I delivered on 3 December 2009. Since then, there has been a considerable amount of jurisprudence and writing exploring a number of the themes on which I focused in the lecture. I have not attempted to incorporate anything like all of those developments. However, some are deployed though only where consistent with the theme and the tone of the original lecture. In other words, I have not attempted to change the essential nature and content of the material that I covered. I should also acknowledge the general contribution of David Stratas, now Justice David Stratas of the Federal Court of Appeal of Canada, to the preparation of this lecture. David and I jointly taught a course in advanced constitutional law for a number of years, and much of my thinking on this subject was shaped during that time. I should, however, state that many of my arguments and conclusions are ones with which, I suspect strongly, David would disagree profoundly.

1 Dean R Knight "Simple, Fair and Discretionary Administrative Law" (2008) 39 VUWLR 99.

2 Ibid, at 99.

3 Ibid, at 117.

4 Ibid.

I met Lord Cooke only twice: once at a rugby game at Athletic Park when he was in the company of John (subsequently Justice John) Jeffries, and once in the courtroom. The case was *Godber v Wellington City Council*.⁵ It was an application for judicial review involving a Town and Country Planning Act application for a change of use. The challenge was based on an assertion that both the City of Wellington and the applicants had failed to comply with various notice requirements. The response from both defendants was that the procedures not complied with were directory rather than mandatory and should not give rise to review given that there had been no significant prejudice and, that, in any event, the deficiencies had been cured by a subsequent appeal. The case was argued on 23 and 24 July 1970. Judgment was rendered on 17 August 1970. Roper J was not at all impressed by the defendants' arguments, and the application for judicial review was allowed. Lord Cooke represented the City of Wellington. I was junior to Tony Doogue for the applicants. This rare loss obviously did no harm to Lord Cooke's career, nor to Tony Doogue's, for that matter, as he too became a judge. I left New Zealand for Canada a week later never to return again as a resident of New Zealand, let alone front up as counsel in the New Zealand courts. Was there a causal connection?

Before commencing the substance of this lecture, I do, however, want to pay two further tributes. In the 1997 book of essays in honour of Lord Cooke, edited by Paul Rishworth, there were important contributions by both Professor Mike Taggart of the University of Auckland and Professor Sir David Williams, first full-time Vice-Chancellor of Cambridge University.⁶ They were also both participants at the 1986 University of Auckland conference at which Lord Cooke delivered his defining administrative law paper, "The Struggle for Simplicity in Administrative Law".⁷ In the past six months, both these giants of administrative law who had a close association with Lord Cooke and his work have died, and it is an appropriate occasion to remember their enduring contributions. Indeed, the writings of both as well as that of Lord Cooke provide a very useful framework for the paper that I am about to deliver and to which I now turn.

⁵ *Godber v Wellington City Council* [1971] NZLR 184 (SC).

⁶ Michael B Taggart "The Contribution of Lord Cooke to the Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 189; David GT Williams "Lord Cooke and Natural Justice" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) 177.

⁷ 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.

II Introduction

My focus in this paper is the role of the courts in reviewing the exercise of high executive powers. By that, I mean broadly the decisions of Cabinet, as well as ministers of the Crown, in the sense of exercises of statutory and other powers in which the Cabinet or a minister were engaged personally or that otherwise have the fingerprints of the minister or at least the permanent head of the relevant department or agency all over them.

The reasons for my concern are threefold. It is prompted in large measure by recent incursions by the Canadian courts into the domain of foreign policy. These cases also form part of a wider group of cases in which the concept of justiciability has been deployed as an argument or basis for denying access to judicial review. My interest has also been further fueled by the emergence of a growing debate in the academic literature about the legitimacy of judicial review of administrative (including executive) action and, in particular, whether it is subject to the same kind of critique that academics such as Jeremy Waldron and James Allan have brought to bear to the enterprise of judicial review of primary legislation in bills of rights regimes.⁸

At a doctrinal level, it is also a debate that can be framed by the writings of Lord Cooke, Sir David Williams and Mike Taggart. I will, therefore, start by posing at least part of the problem in those terms.

In "The Struggle for Simplicity in Administrative Law", Lord Cooke now famously proclaimed that the role of the courts was to ensure that statutory and prerogative decisions have been taken in "accordance with law, fairly and reasonably".⁹ However, he explicitly exempted decisions involving national security, and seemed happy to live with the 1984 judgment of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)*.¹⁰ There, the House of Lords essentially held that it was for the government, not the courts, to decide whether national security overrode a union's rights to consultation with respect to major terms in employment conditions. At that point, Lord Cooke

8 See T Poole "Legitimacy, Rights and Judicial Review" (2005) 25 OJLS 697; T Poole "The Reformation of Administrative Law" [2009] CLJ 142; Paul Craig "Political Constitutionalism and Judicial Review" in Christopher Forsyth and others (eds) *Effective Judicial Review – A Cornerstone of Good Governance* (Oxford University Press, New York, 2010) 19; Jerry L Mashaw "Bureaucracy, Democracy and Judicial Review: The Uneasy Coexistence of Legal, Managerial and Political Accountability" in Robert F Durant and George C Edwards III (eds) *Handbook of American Bureaucracy* (Oxford University Press, Oxford, 2010)

9 Cooke, above n 7, at 5-6.

10 Ibid, at 6. See *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 (HL) [*GCHQ*].

said that he was content to leave it to David Williams to deal otherwise with the issue of justiciability.¹¹ However, later in his paper, Lord Cooke goes on to describe the concept of fairness as both a procedural and substantive constraint on administrative action, though significantly adding the following qualification: "which is not to say that from time to time it will not be found appropriate to place primary emphasis on *the inviolate aspects of Ministerial and administrative discretion*".¹²

When we move to David Williams' paper at the same conference to learn more about what is excluded in the name of justiciability, we encounter Lord Roskill's list of non-justiciable, prerogative powers from the *GCHQ* case: making of treaties, defence of the nation, prerogative of mercy, grant of honours, dissolution of Parliament and appointment of ministers.¹³ There is then a discussion of other authorities, most involving statutory powers in which the courts have eschewed engaging in judicial review either by explicit abnegation or by making the test for judicial review so difficult to meet as to in effect preclude it entirely in all but the most extreme cases.¹⁴ David Williams then suggests that justiciability is a concept that is in a constant state of flux, and that means any non-justiciability claims have to be "examined on a realistic and up-to-date basis".¹⁵ Drawing the line is "not easy":¹⁶

In the abstract it might be best to refrain "from hinting at even an approach to the outline of the shadow of an idea" at where the line might be drawn. In a concrete case of controversy much will depend on the experience and constitutional instinct of those who have to pronounce or adjudicate on issues of justiciability.

Professor Smillie, who wrote the introduction to the conference proceedings, was obviously not satisfied. He described Professor Williams as "somewhat overwhelmed by the difficulty of this task", and his general admonition that it all depended on the court's "good sense and timing" as "offer[ing] little real consolation and guidance".¹⁷

11 Cooke, above n 7, at 6

12 Ibid, at 11 (emphasis added).

13 DGT Williams "Justiciability and the Control of Discretionary Power" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s – Problems and Prospects* (Oxford University Press, Auckland, 1986) 103 at 104.

14 Ibid, at 105-110.

15 Ibid, at 121.

16 Ibid, quoting *R v Barnet and Camden Rent Tribunal, ex parte Frey Investments* [1972] 2 QB 342 at 367 per Edmund-Davies LJ.

17 JA Smillie "Introduction" in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s – Problems and Prospects* (Oxford University Press, Auckland, 1986) xi at xvi.

Let us then move forward 22 years to the last article that Mike Taggart wrote.¹⁸ In it, he is concerned primarily about the standard of review to be applied to administrative decision-making and distances himself from Lord Cooke and others.¹⁹ For Taggart, courts should engage in proportionality review only where rights enshrined in the New Zealand Bill of Rights Act 1990 or other fundamental rights are in play in decision-making; in all other cases (those that Taggart describes as the "public wrongs" category), the courts should continue to apply *Wednesbury*²⁰ unreasonableness or a highly deferential residual category of review. In this paper, it is not my purpose to enter that particular debate. However, in the article, Taggart provides a diagram depicting a "rainbow" spectrum of judicial review and at the right base of that rainbow is "non-justiciability".²¹ Yet, nowhere does he deal with the badges of non-justiciability.

III The Problem/Dilemma

These brief references to the work of Cooke, Williams and Taggart raise a number of questions:

- (1) In constructing general theories, did Lord Cooke and Mike Taggart take too little account of non-justiciability? Is it a concept of so little moment that their failure to engage with it at all or seriously is understandable and no threat to their arguments for an overall approach to judicial review of administrative action?
- (2) Does Sir David Williams mount a case for justiciability as a core component of any theory of judicial review by the sheer weight of the examples that he identifies of specific instances of non-justiciability and a range of other cases in which there were de facto or in effect applications of a non-justiciability principle?
- (3) Where for Lord Cooke and Mike Taggart did the limits of justiciability come into play and where precisely for Lord Cooke, outside of national security cases, was there an encounter with the inviolate aspects of administrative discretion, or is there a case to be made that all exercises of public power are justiciable and that there are no totally immune instances of executive or

18 Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ Law Review 423 ["Proportionality, Deference, *Wednesbury*"].

19 Contrary to Lord Cooke, Taggart was in favour of retaining *Wednesbury* unreasonableness for review of public wrongs (as opposed to decisions implicating fundamental rights, including those protected under the New Zealand Bill of Rights Act 1990, where he advocated proportionality review): contrast Cooke, above n 7, at 13-16,

20 A decision "so unreasonable that no reasonable authority could ever have come to it": *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229-230 per Lord Greene MR.

21 Taggart "Proportionality, Deference, *Wednesbury*", above n 18, at 452.

administrative discretion, a position that Lorne Sossin of the University of Toronto comes close to taking in a recent paper?²²

- (4) How is all of this affected by the democratic and functional legitimacy concerns deployed by Waldron and others in the context of judicial review of primary legislation under bills of rights?

I do not attempt to provide answers to all of these questions in this paper. Rather, I have two more modest objectives – to provide a more detailed context for thinking about these issues by reference to mostly recent Canadian case law, and to suggest some of the factors that might bear upon the ultimate resolution (or at least clarification) of them.

IV Giving Context

The occasion for Lorne Sossin's paper, "The Unfinished Project of *Roncarelli* – Justiciability, Discretion and the Rule of Law",²³ was a conference marking the 50th anniversary of the judgment of the Supreme Court of Canada in *Roncarelli v Duplessis* (*Roncarelli*).²⁴ This case involved the Premier of Quebec ordering the head of the provincial liquor commission to cancel Roncarelli's restaurant liquor licence forever. The reason for this unwarranted intervention in the operation of a statutory regime was that Roncarelli, a Jehovah's witness, had provided bail for numerous adherents to that religion who had been charged under various provincial laws aimed at suppressing aspects of the practice of their religion, such as door to door proselytizing and the distribution of literature.

This judgment still remains one of the most spectacular reaffirmations of the ability of the courts to deal with improper arrogations of power at the highest level of executive decision-making: In that instance, the Premier of Quebec, Maurice Duplessis. In short, it reaffirmed that prime ministers and premiers had no overarching, prerogative powers to tell administrative officials what to do, and, in so acting, to ignore limits of statutes.

For a New Zealand equivalent, one can look to the 1976 judgment in *Fitzgerald v Muldoon*, reaffirming that the Bill of Rights 1688 still lives, and that Prime Minister Robert Muldoon had no authority to suspend laws passed by Parliament.²⁵ That litigation arose out of the Prime Minister's

22 Lorne Sossin "The Unfinished Project of *Roncarelli* – Justiciability, Discretion and the Rule of Law" (paper presented to the conference, "The Heritage of *Roncarelli v Duplessis* – 1959-2009", jointly staged by the Faculties of Law of the University of Toronto and Sherbrooke University, North Hatley, 2009), forthcoming in (2010) McGill LJ.

23 Ibid.

24 *Roncarelli v Duplessis* [1959] SCR 121.

25 *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

announcement of the end of a national superannuation scheme, an announcement that was then acted upon, prior to the introduction, let alone enactment, of repealing legislation, by civil service officials responsible for the scheme's operation.

These were both famous victories but, in the end, were they but rare examples of a supremely confident and presidential style prime minister simply ignoring basic constitutional principles? In such egregious circumstances, surely we would expect no less of the courts? Nevertheless, there were aspects of each case that give rise to some concern. It took 13 years from the events in question for *Roncarelli* to secure final redress in the Supreme Court of Canada, by which time Duplessis' star was waning in Quebec.²⁶ In *Fitzgerald v Muldoon*, Wild CJ only issued a declaration, suspending the application for mandatory relief for six months.²⁷ Seen in that light, these cases may tell us little about the generality of review for abuse of discretion by high ministerial officials.

However, *Roncarelli* can be mined a little deeper. After all, Rand J, in the most-quoted of the majority judgments in that case, proclaimed that: "In public regulation *of this sort*, there is no such thing as untrammelled discretion".²⁸ He also asserted the amenability to judicial review of any use of power for reasons alien to the purposes of the statute.²⁹ Leaving aside a possible qualification to the generality of the first proposition in the use of the term "of this sort", Rand J appeared to be advancing these two principles as ones of universal application at least in the instance of statutory, as perhaps opposed to prerogative power. For Sossin, the failure of the Canadian courts to exhibit unwavering commitment to these objectives was "the unfinished project" of *Roncarelli*. The Supreme Court needed to revisit the law on justiciability and reaffirm that "no category of executive discretion lies outside the scope of judicial oversight, because *all* discretionary authority, irrespective of the subject matter is subject to legal boundaries".³⁰

26 The Supreme Court of Canada delivered judgment in *Roncarelli v Duplessis* on 26 January 1959. Maurice Duplessis died in office on 7 September 1959.

27 "[I]t would be an altogether unwarranted step to require the machinery of the New Zealand Superannuation Act 1974 now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months": *Fitzgerald v Muldoon*, above n 25, at 623.

28 *Roncarelli v Duplessis*, above n 24, at 140 per Rand J (emphasis added).

29 *Ibid.*

30 Sossin, above n 22, at 34.

V Abuse of Discretion – Review Principles

In general, the courts in Canada have adhered to the traditional common law principles of review of discretion. They recognise review for bad faith, acting for a wrongful purpose, failure to take account of relevant considerations, taking account of irrelevant factors and, as a reserve though rarely deployed category, *Wednesbury* unreasonableness. However, there have been recent developments of which Lord Cooke (but not Mike Taggart) presumably would have approved – an acknowledgment that review for abuse of discretion depends on a standard of review analysis,³¹ the product of which is either correctness review or unreasonableness review.³² In most instances of review for abuse of discretion, the standard would be the deferential one of unreasonableness.³³ However, it does seem to mean the disappearance from the judicial review lexicon of *Wednesbury* unreasonableness or the then current Canadian equivalent, "patent unreasonableness", in favour of a more intrusive residual category of unreasonableness.

Review for abuse of discretion has also been deployed in relation to high-level decision-making. Among the more dramatic recent examples has been *CUPE v Ontario (Minister of Labour)*.³⁴ This involved judicial review of a ministerial decision to appoint retired judges as interest arbitrators in Ontario's hospital sector. Even though this was a ministerial decision under a broad statutory power of appointment, the decision was set aside on the basis that it was contrary to the Court's broad sense of how the system had functioned up until then, a modality that the Court regarded as indicative of the purpose of and the limits on the discretionary power. Sectoral expertise and mutual acceptability to labour and management became limits on the discretionary power, and a failure to make decisions by reference to those considerations made the exercise of discretion "patently unreasonable",³⁵ in terms of the then current standard of review.³⁶

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

32 Following the elimination of a third and even more deferential standard of review, patent unreasonableness, in *Dunsmuir v New Brunswick* [2008] 1 SCR 190.

33 *Ibid.*, at [51].

34 *CUPE v Ontario (Minister of Labour)* 2003 SCC 29, [2003] 1 SCR 539.

35 *Ibid.*, at [158]-[185].

36 For trenchant criticism of this judgment on the basis that it went too far in reviewing the merits of a ministerial exercise of power, see Grant Huscroft "Judicial Review from *CUPE* to *CUPE*: Less is Not Always More" in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, Toronto, 2006) 296.

Mount Sinai Hospital v Quebec (Minister of Health and Social Services) provides another example.³⁷ There, two of the Supreme Court judges looked behind a ministerial refusal of licence to a hospital ostensibly taken on fiscal grounds, and set the decision aside on the basis that it was patently unreasonable in the circumstances and that the fiscal justification was a pretence. The other judges reviewed the Minister's decision on the basis that the hospital had acquired a vested right when a previous minister had promised the licence if the hospital relocated.

In *Lalonde v Ontario (Commission de restructuration des services de santé)*, the Court of Appeal for Ontario provided another dimension to "review for abuse of discretion" when it invoked one of the underlying principles of the Canadian Constitution, articulated in the *Quebec Secession Reference*,³⁸ as one of the reasons for setting aside a decision ordering a hospital to downsize dramatically.³⁹ The hospital in question was the only francophone hospital in the City of Ottawa, and the Court held that the decision, taken by a ministerially appointed restructuring commission, had failed to take sufficient account of the principle of the protection of minorities in exercising a broad statutory discretion.

Nevertheless, this willingness to scrutinize and set aside high level executive decision-making has not been universal. There also exist cases where there has been extreme constraint or even abnegation, as well as de facto holdings of non-justiciability. Thus, in *Thorne's Hardware Ltd v Canada*, the Supreme Court refused to interfere with a federal Cabinet decision to extend limits of St John Harbour by Order in Council.⁴⁰ In so doing, the Court held that decisions by the Cabinet based on public convenience and necessity were not reviewable in legal proceedings.⁴¹ It was neither the right nor the duty of the courts to probe the motives of what moved Cabinet.⁴²

Even when a case is predicated on an allegation of infringement of rights and freedoms protected by the Canadian Charter of Rights and Freedoms, there are potential obstacles to effective or full court

37 *Mount Sinai Hospital v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281.

38 *Reference re Secession of Quebec* [1998] 2 SCR 217. The four principles are federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.

39 *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001) 56 OR (3d) 505 (CA).

40 *Thorne's Hardware Ltd v Canada* [1983] 1 SCR 106.

41 *Ibid*, at 112.

42 Even in the realm of municipalities, the Supreme Court is unwilling to become involved in probing the motives of councillors. According to Binnie J, delivering the judgment of the Court in *Consortium Developments (Clearwater) Ltd v Sarnia (City)* [1998] 3 SCR 3 at [45], the motives of municipalities are "unknowable" except by what they enact. But see *Shell Canada Products Ltd v Vancouver (City)* [1994] 1 SCR 231.

scrutiny. *Operation Dismantle v Canada* (*Operation Dismantle*) involved a challenge to an agreement between Canada and the United States to allow United States' testing of cruise missiles potentially bearing nuclear warheads in Canadian airspace.⁴³ It was contended that, to the extent that this heightened the possibility of Canada being embroiled in a nuclear war, this decision violated s 7 of the Charter and the right of Canadians to "life, liberty and security of the person". The Supreme Court accepted that there was no United States-style "political questions doctrine" as such under Canadian law,⁴⁴ but, in striking out the statement of claim as disclosing no reasonable cause of action, the Court held that the allegations made by the plaintiffs "could [n]ever be sufficiently linked as a factual matter to the acknowledged duty of the government to respect s. 7 of the *Charter*".⁴⁵

As opposed to the concurring judgment of Wilson J,⁴⁶ the majority did not, however, base its finding on a lack of justiciability as such. Nonetheless, in his article, Sossin does go on to provide more recent examples of where the courts have explicitly based a refusal to intervene on non-justiciability.

The most notable of these, in part because of the notoriety of the applicant for relief and in part because of the Court of Appeal for Ontario's detailed consideration of the limits of justiciability, is *Black v Canada (Prime Minister) (Black)*.⁴⁷ This involved then Prime Minister Jean Chrétien's allegedly gratuitous advice to the Queen to deny newspaper mogul Conrad Black's passage to a peerage, on the basis of the Canadian government's position on the conferral of honours on Canadian citizens. Relying on *GCHQ* and his characterization of the actions of the Prime Minister as involving the exercise of the prerogative power with respect to honours, Laskin JA, for the Court, held that the Prime Minister's action was not reviewable in the context of a civil action for damages.⁴⁸ In so doing, he referred to the concurring judgment of Wilson J in *Operation Dismantle* and described the subject matter of the application for review as involving "moral and political considerations, which it is not within the province of the courts to assess".⁴⁹

43 *Operation Dismantle v Canada* [1985] 1 SCR 441.

44 *Ibid*, at [38] per Dickson CJ (delivering the judgment of the majority). See also *ibid*, at [55]-[67] per Wilson J (concurring in the result).

45 *Ibid*, at [38].

46 *Ibid*, at [51]-[54].

47 *Black v Canada (Prime Minister)* (2001) 54 OR (3d) 215 (CA).

48 *Ibid*, at [23] and [47]-[49].

49 *Ibid*, at [62], referring to *Operation Dismantle v Canada*, above n 43, at [52].

In this respect, there are parallels to be drawn between the judgment of Laskin JA and that of Richardson J, in his concurring judgment in the New Zealand Court of Appeal in *Ashby v Minister of Immigration*.⁵⁰ At issue there was the Minister's decision, taken under a discretionary statutory power, to issue temporary entry permits to the South African rugby team about to tour New Zealand. This was challenged on the basis that it involved a violation of New Zealand's obligations under an international treaty. In rejecting as non-justiciable the argument that the Minister was obliged to take the relevant treaty into account in exercising his discretion, Richardson J described it as a decision that had a "strongly political flavour".⁵¹ In support of this conclusion, he cited his own previous judgment in *CREEDNZ Inc v Governor General*:⁵²

The willingness of the Courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject-matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power. Thus the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene.

Nonetheless, in *Black*, Laskin JA did make it clear that the case should not be read as precluding the possibility of review of the exercise of prerogative powers, such as the decision to deny or revoke a passport.⁵³ Such decisions have "real adverse consequences".⁵⁴ In contrast, *Black* had "no important individual interest ... at stake",⁵⁵ let alone a right or even a legitimate expectation.⁵⁶

Among the subsequent examples that Sossin identifies of the Canadian courts dismissing applications for judicial review on the basis that the decision in issue was non-justiciable were a government decision to enter into a treaty with aboriginal peoples,⁵⁷ the validity of a treaty with another country,⁵⁸ an accused

⁵⁰ *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

⁵¹ *Ibid.*, at 231. Williams cites this judgment in Williams "Justiciability and the Control of Discretionary Power", above n 13, at 112.

⁵² *Ibid.*, at 230, citing *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 at 197-198 (CA).

⁵³ *Black v Canada (Prime Minister)*, above n 47, at [60].

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, at [61]-[62]. Sossin, above n 22, at 13 footnote 2 contrasts *Black v Canada (Prime Minister)* with *Chiasson v Canada* 2003 FCA 155, where the Federal Court of Appeal held that a challenge to the refusal of a Canadian honour was justiciable on the basis that the process had been codified in written instruments.

⁵⁷ *Cook v Canada (Minister of Aboriginal Relations and Reconciliation)* 2007 BCSC 1722.

aboriginal person's challenge to the assertion of Crown sovereignty in criminal matters,⁵⁹ a request for the recall of a diplomat,⁶⁰ a decision to send Canadian troops abroad on a combat mission,⁶¹ and an alleged government failure to respond to obligations under the Kyoto Protocol as incorporated into legislation.⁶²

However, I want to deal in more detail with three even more recent and controversial cases. The first of these is *Smith v Canada (Attorney General) (Smith)*.⁶³ This involved an executive decision to no longer seek clemency for a Canadian citizen on death row in a Montana prison. The Crown asserted that this decision resulted from a change in policy and, since it involved the right of Canada "to speak freely with a foreign state",⁶⁴ it came within the government's powers with respect to foreign policy, and, as such, was non-justiciable. It "involve[d] political and morality-based choices lacking a sufficient legal component to allow for judicial review".⁶⁵

In rejecting the Crown's argument that the matter was non-justiciable,⁶⁶ Barnes J held that there were in effect no categorical exclusions from justiciability in the sense of either the exercise of prerogative powers in general or the foreign policy power in particular. Moreover, he categorised the issue in this case as different from *Black*.⁶⁷ Here, specific individual rights were in play. While it was not the Federal Courts role to tell government how to conduct foreign policy, Smith was caught in a seeming transition from one policy to another. Indeed, there was confusing evidence as to what exactly was the new and current policy, a matter over which Barnes J was clearly exasperated. Given this confusion, the nature of the interest at stake, and Smith's legitimate expectations, not only was the issue justiciable but Smith was also entitled to a high level of procedural fairness. Even more significantly, Barnes J characterised the

58 *Ganis v Canada (Minister of Justice)* 2006 BCCA 543.

59 *R v Gibson* [2007] OJ No 3948 (QL).

60 *Capello v Canada (Minister of Foreign Affairs)* 2001 FCT 1350, affirmed by the Federal Court of Appeal in *Capello v Canada (Minister of Foreign Affairs)* 2003 FCA 295, [2004] 1 FCR D-24.

61 *Aleksic v Canada (Attorney General)* [2002] OJ No 2754 (Div Ct) (QL), *Blanco v Canada* 2003 FCT 263 and *Turp v Canada (Prime Minister)* 2003 FCT 301.

62 *Friends of the Earth v Canada (Governor in Council)* 2008 FC 1183.

63 *Smith v Canada (Attorney General)* 2009 FC 228.

64 *Ibid*, at [22].

65 *Ibid*, at [23].

66 *Ibid*, at [23]-[40]. Interestingly, Barnes J was also the judge in *Friends of the Earth v Canada (Governor in Council)*, above n 62.

67 *Ibid*, at [26]-[27].

government's decision to depart from its previous policy as "unlawful"⁶⁸ given the government's failure to establish the existence and terms of the new policy.

In so holding, Barnes J deployed *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs (Abassi)*,⁶⁹ a decision of the English and Wales Court of Appeal refusing, on the basis of non-justiciability, to require the British Foreign Office to take certain steps in relation to a British citizen detained by the United States in Guantanamo Bay.⁷⁰ In *Smith*, the Crown had relied on this case for the proposition that the courts should not interfere with the government's conduct of foreign affairs. However, Barnes J noted that the Court of Appeal in *Abassi* had made it clear that this did not preclude the assertion of a flawed process or even the contention that a particular decision was "irrational or contrary to legitimate expectation".⁷¹ He, therefore, ordered the government to continue to apply the "previous" policy and seek clemency for Smith.

While the government chose not to appeal Barnes J's judgment in *Smith*, it has been intransigent in its determination to resist any attempts by Omar Khadr, a Canadian citizen detained in Guantanamo Bay, to obtain any form of judicial order requiring the Canadian government to seek his repatriation to Canada.⁷²

As opposed to *Smith*, there was no actual policy in place with respect to the government's position on those detained in Guantanamo Bay. Rather, the decision to refuse Khadr's request that the government seek his repatriation was an individual one. On the other hand, in *Smith*, Barnes J did not find it necessary to deal with the argument that the government had violated Smith's rights to "life, liberty and security of the person" under s 7 of the Charter.⁷³ The application for relief in *Khadr v Canada (Prime Minister)* was predicated on the claim that the actions of the Canadian government had deprived Khadr of those rights. Indeed, all three courts agreed with that contention.⁷⁴ More particularly, in both the Federal Court of Appeal and the Supreme Court of Canada, the violation was established on the basis of agents of the

68 Ibid, at [58].

69 Ibid, [23]-[25].

70 *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598. See also *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279.

71 *Smith v Canada (Attorney General)*, above n 63, at [25].

72 See *Khadr v Canada (Prime Minister)* 2009 FC 405, [2010] 1 FCR 34 [*Khadr* (FC)], affirmed by *Canada (Prime Minister) v Khadr* 2009 FCA 246, [2010] 1 FCR 73 [*Khadr* (FCA)] and reversed in part by *Canada (Prime Minister) v Khadr* 2010 SCC 3, [2010] 1 SCR 44 [*Khadr* (SCC)].

73 *Smith v Canada (Attorney General)*, above n 63, at [50]-[57].

74 *Khadr* (FC), above n 72; *Khadr* (FCA), above n 72; *Khadr* (SCC), above n 72.

Canadian government actively participating with the United States government in the illegal interrogation of Khadr.⁷⁵ In this context, I will not explore this aspect of the case in any more detail save to raise the question whether Khadr's application for judicial review would have been doomed had he not been able to establish a violation of his s 7 Charter rights.

What is more germane to this paper, however, is the way in which the courts dealt with the government's claim that they had no entitlement to order the government to exercise its foreign policy power and request Khadr's repatriation. Both O'Reilly J at first instance and the majority of the Federal Court of Appeal linked the violations of Khadr's Charter rights to a continuing duty to protect Khadr from further abuse.⁷⁶ For both courts, the only effective or appropriate way of fulfilling that duty was for the government to seek Khadr's repatriation. In so doing, the courts rejected the argument that such an order would constitute an inappropriate interference with the government's conduct of foreign relations. Relying on *United States v Burns* (*Burns*), Evans JA and Sharlow JJA in the Federal Court of Appeal pointed out that the Supreme Court had already held that the conduct of foreign relations was subject to the Charter.⁷⁷ The involvement of the Canadian government in the illegal treatment of Khadr in violation of human rights law "opens up a different dimension".⁷⁸ The joint judgment also held that an order requiring the government to make such a request would not constitute "a serious intrusion into the Crown's responsibility for the conduct of Canada's foreign affairs".⁷⁹ In this regard, Evans and Sharlow JJA noted that, when pressed, counsel for the Crown did not make the claim that making such a request would damage Canada's relations with the United States.⁸⁰

75 *Khadr* (FCA), above n 72, at [46]-[52]; *Khadr* (SCC), above n 72, at [19]-[21].

76 *Khadr* (FC), above n 72, at [50]; *Khadr* (FCA), above n 72, at [56]-[57].

77 *Khadr* (FCA), above n 72, at [58]. In *United States v Burns*, the Supreme Court reviewed the exercise of the extradition power on the basis that the Minister's judgment to return Burns to the United States without securing an undertaking that the death penalty would not be sought violated Burns' s 7 Charter rights to "life, liberty and security of the person": *United States v Burns* 2001 SCC 7, [2001] 1 SCR 283.

78 *Khadr* (FCA), above n 72, at [58].

79 *Ibid*, at [59].

80 Nadon JA entered a vigorous dissent on this and other elements of the case. On the appropriateness of the remedy, his Honour stated: "Ordering Canada to request the repatriation of Mr. *Khadr* constitutes, in my view, a direct interference into Canada's conduct of its foreign affairs... . [H]ow Canada should conduct its foreign affairs, including the management of its relationship with the US and the determination of the means by which it should advance its position in regard to the protection of Canada's national interest and its fight against terrorism, should be left to the judgment of those who have been entrusted by the democratic process to manage those matters on behalf of the Canadian people." *Ibid*, at [106].

On further appeal, the Supreme Court of Canada was much more cautious. While affirming the Court of Appeal on the holding that the government had violated Khadr's Charter rights and that the effect of those wrongs still persisted, the Supreme Court was far more concerned about the argument that the remedy sought was inappropriate and impinged improperly on the government's discretion in the conduct of foreign relations.⁸¹ While conceding that mandatory remedies of this kind were sometimes (as in *Burns*) appropriate in matters implicating the conduct of foreign affairs,⁸² several factors coalesced here to indicate that the courts below had given:⁸³

... too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests.

In those circumstances, the courts below had overreached in making a mandatory order. Rather, in this instance, the appropriate course of action was for the Supreme Court simply to declare that the government had violated Khadr's constitutional rights and, in so doing, "provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*".⁸⁴

The final judgment to which I will refer is that of Zinn J in *Abdelrazik v Canada (Minister of Foreign Affairs)*.⁸⁵ Here, the Federal Court ordered the government to issue Abdelrazik with an emergency passport and to repatriate him to Canada. His passport had expired and he had been living in the Canadian embassy in the Sudan for over twelve months. During that time, the Canadian government had refused him a travel document presumably on the basis of allegations that he knew terrorists and suspected terrorists and that he was on the United Nations Security Council 1267 Committee list as an Al-Qaida associate and, therefore, subject to a prohibition on travelling.⁸⁶ He argued that the actions of the Canadian government violated his citizenship rights under s 6 of the Charter. In this instance, the Crown, while

81 *Khadr* (SCC), above n 72, at [21]-[26] (in a judgment "By the Court").

82 *Ibid*, at [41]-[42].

83 *Ibid*, at [39]. In particular, the fact that, as opposed to *Burns*, Khadr was not presently under Canadian control, there were serious questions as to the effectiveness of any request. The impact of such a request on Canadian-United States relations was uncertain, and, more generally, the evidentiary record as to the considerations bearing upon the government's actions in this matter was inadequate: *Ibid*, at [43]-[44].

84 *Ibid*, at [47].

85 *Abdelrazik v Canada (Minister of Foreign Affairs)* 2009 FC 580.

86 SC Res 1267, S/RES/1267 (1999)

resisting the application for relief, did not invoke the doctrine of justiciability. In finding that Abdelrazik was entitled to the relief sought, Zinn J found not only that the actions of the government violated his s 6 Charter rights but also that the Minister had abused the discretion conferred by the Canadian Passport Order by not following the processes laid down in that subordinate legislation for denying a citizen the right to re-enter Canada. In so holding, Zinn J stated:⁸⁷

While it is not the function of the judiciary to second guess or to substitute its opinion for that of the Minister, when no basis is provided for the opinion, the Court cannot find that the refusal was required and justified given the significant breach of the *Charter* that refusing a passport to a Canadian citizen entails.

Encapsulating the overall thrust of this case law and particularly the recent jurisprudence is not an easy exercise, but I venture to suggest the following propositions:

- (1) For justiciability purposes, little now hinges on whether the source of the executive's power is statutory rather than the prerogative; it is the subject, not the source of the power, that is important or critical.
- (2) In part, the willingness of the courts to engage in review of certain species of executive power will, however, be conditioned by the extent to which the particular power has been structured by policies and guidelines, whether prerogative or statutory in origin.
- (3) Where individual rights are affected (and particularly those protected by the Canadian Charter), there can be no blanket finding of a complete lack of justiciability.
- (4) To what extent there is room for respect for the role of executive remains problematic particularly when Canadian Charter and New Zealand Bill of Rights Act 1990 rights and freedoms are engaged.
- (5) Where individual rights are implicated in the exercise of prerogative or broad executive powers under statute, the courts will not only be concerned with whether the challenged exercise of power comes within the reach of the prerogative or statutory provision, but also with adherence to appropriate procedures and, possibly, in extreme cases, the rationality of the exercise of power.
- (6) However, where the exercise of prerogative or broad executive powers moves away from individual decisions affecting rights to those based on broader policy concerns with moral and political dimensions and even involving the according of privileges to individuals, justiciability

⁸⁷ Ibid, at [155].

may still be invoked at least in terms of review of the actual merits of the exercise of those powers.

- (7) Even in the world of statutory powers, broad policy-making functions will not be readily examined. How precisely that is justified has, however, become a problem at least in Canada with the emergence of a generalised minimum of unreasonableness review for all forms of statutory decision. This raises the question whether justiciability will on occasion remain a barrier to even deferential merits review in the case of statutory as well as prerogative powers.
- (8) Concerns about justiciability can also be reflected at the remedial stage of review proceedings in the sense that the courts may qualify the relief sought, and, in particular, decline to issue mandatory orders against the executive branch but rather make bare declarations.

More generally, at least from a Canadian perspective, the recent jurisprudence is indicative of two important trends – first, the evolution of a much more nuanced and variegated approach to issues of justiciability, and, secondly, a greater willingness, at least where important individual rights are at stake, to require the government to account for its actions in the form of process, by providing reference to the policy basis on which particular decisions have been taken, and justification in the form of either archival reasons or explanation to the court on judicial review. In short, there is an apparently greater level of accountability to the courts as well as a body of jurisprudence that will be useful on a going forward basis in a way that was not contemplated by Sir David Williams in 1986.

VI Legitimacy of Enhanced Judicial Scrutiny of High Executive Powers

Assuming that I am accurate and that there has been some increase in the willingness of the courts (at least in Canada) to scrutinize the exercise of high executive powers and a diminution in the reach of the non-justiciability doctrine, there remains the question of justification. Is this just another sign of inappropriate judicial imperialism or are there appropriately grounded constitutional and structural bases for this phenomenon?

As earlier citations make clear, the courts' reluctance to engage with high executive powers is generally premised on two assumptions: the existence of a divide between law and politics and an associated sense of the illegitimacy of the courts engaging with the political world, as well as perceptions of practical or functional limits on the institutional competence of the courts to evaluate the merits of decisions taken at that level. In the case of prerogative powers, there is also the lingering sense that historically, under the common law constitution, scrutiny of such "royal" residual powers was off-limits to the courts.

To the extent that the first of these arguments is posited on the anti-democratic nature of judicial review of high executive decision-making in the form of Cabinet and ministers of the Crown, Jeremy Waldron's article, "The Core of the Case against Judicial Review", provides a useful starting point for discussion.⁸⁸ His concern in that article is to make the case against judicial review of primary legislation principally on the basis of provisions in bills of rights. However, he does make a footnote reference to judicial review of the exercise of executive powers, and one sentence in that footnote is telling. After stating that more thought needs to go into the matter with reference to the institutional and political features of modern democracies, he continues:⁸⁹

After all, the executive has some electoral credentials of its own with which to oppose decisionmaking by judges. But, it is almost universally accepted that the executive's elective credentials are subject to the principle of the rule of law, and, as a result, that officials may properly be required by courts to act in accord with legal authority.

Obviously, Waldron was not about to commit himself at that point. However, some insights can be gained by referring to one of the essential premises on which Waldron bases his argument against court enforced bills of rights. That premise is the existence of "democratic institutions in reasonably good working order".⁹⁰ What does that mean in the case of the executive branch of government in the exercise of prerogative or statutory powers? The traditional answers would be those of regular accountability of the government of which the members of the executive are accountable to the public in general elections, and the individual accountability of those members to the legislature for the performance of their responsibilities.

It is trite to say that, at least in high executive decision-making involving individual rights, those mechanisms have long been of questionable effectiveness. That fails to take account of the extent to which, at least in Canada, governments are increasingly marginalizing the voice of the opposition and backbenchers, failing to live up to the law and spirit of freedom of information legislation, muzzling accountability offices, and according far greater roles to unelected, partisan appointees from outside the public service in both the formulation of policy and the day to day functioning of government.

While this evolutionary distortion of the historical sense of parliamentary institutions may not, in Waldron's terms, mean that Canada's democratic institutions are in disarray, it does at least suggest that the democracy-based claims of the executive to immunity from court supervision have severely diminished

88 Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346.

89 Ibid, at 1354 footnote 21.

90 Ibid, at 1360.

weight. And that is before two other considerations are factored into the equation – the historical and constitutional sense (save perhaps in the case of residual prerogative powers) that the exercise of delegated executive power is subject not only to the scrutiny of Parliament, but also rule of law-based review by the courts and the actual existence in Canada of a strong, judicially enforceable bill of rights. While both of these considerations may be no more than facts, and not normative arguments for judicial review of high-level executive decision-making, they are nonetheless elements of the Canadian form of democracy and constitutional reality that have as much of a claim as traditional forms of ministerial accountability to recognition as a component of the Canadian polity.

Another of the four premises on which Waldron builds his arguments against judicial review of legislation based on a strong bill of rights is a commitment on the part of most members of the society and most of its officials to the protection of individual rights and especially minority rights.⁹¹ Once again, it is hard to make the case that, in today's New Zealand and Canada, that does not represent the general values of the population and its officials. However, it is also true that, in times of crisis or on issues of national security, that commitment has in the past become somewhat diluted to say the least.⁹² This may be particularly true of official conduct (including decisions taken at the highest of executive levels), and where the timely and effective operation of whatever parliamentary or other democratic accountability mechanisms are in place may well be imperilled. In that context, the courts, with all their warts, can indeed operate as surrogate accountability mechanisms.

Waldron's positing of his arguments against judicial review of legislation on the assumption of a society committed to the protection of minorities more importantly seems to assume a constitutional regime where in fact the rights of minorities are respected both in practice and as a matter of law. In other words, in the hierarchy of constitutional values, parliamentary sovereignty and democratic preferences ultimately must be premised on a respect for minority rights and, perhaps, ultimately give way in the face of violations of those rights. In this context, I need not go into the detailed arguments or justifications that are available in support of that position. Suffice it to say that, for many theorists, this is treated as an essential component of any democracy built on the rule of law.⁹³ Moreover, at least in a Canadian setting,

91 Ibid.

92 The most commonly cited Canadian example remains the measures taken against Japanese Canadians during World War II under emergency legislation, orders in council that were sustained by the Supreme Court of Canada: *Reference re Persons of Japanese Race* [1946] 1 SCR 248, affirmed by the Judicial Committee of the Privy Council in *Co-Operative Committee for Japanese Canadians v Canada (Attorney General)* [1947] AC 87 (PC).

93 See David Dyzenhaus "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 *Queen's LJ* 445.

respect for minority rights is not only one of the underlying principles of the Canadian Constitution, identified in the *Quebec Secession Reference*,⁹⁴ but also an explicit component of the Canadian Charter of Rights and Freedoms.⁹⁵ At the very least, that speaks to the need for a scrutiny or review mechanism (most obviously in the form of judicial review) when there is a collision between rights and other values that the executive feels impelled to further particularly in times of emergency or, more generally, in the interests of national security.

Even in the context of rights-based claims against the executive, these arguments for judicial review of the high executive, beyond the realm of keeping the executive within the outer reaches of its strict legal authority and extending to evaluation of the actual merits of decision-making, are by no means clinching. In large measure, the judiciary is still a non-representative group of legally-qualified citizens which is being asked to respond to claims made by discrete elements of the citizenry who, in Waldron's terms, are operating in a domain not constrained by the "principles of political equality" and who are trying to achieve ends that they have not been able to secure through the political process.⁹⁶ In short, by changing the mode of discourse, they are hoping to achieve results that were never feasible through normal participatory channels.

Aside from the assumptions that makes about the ability of citizens to achieve access to the political process on an ongoing basis both generally and in relation to particular issues, if transferred to the context of judicial review of high executive power,⁹⁷ the claims of political discourse and accommodation are by no means necessarily superior to those of legal discourse, at least in the case of claims based on existing legal entitlements.⁹⁸ Even more pertinently, particularly under regimes such as both Canada (with its strong bill of rights) and New Zealand (with its weaker New Zealand Bill of Rights Act 1990), the traditional deep cleavage between political and legal discourse and analysis has diminished significantly,

94 *Reference re Secession of Quebec*, above n 38.

95 In particular, the Constitution Act 1982, s 15 (the equality provision), s 16 (official language recognition), s 23 (minority language education rights) and s 35 (recognition of existing aboriginal and treaty rights).

96 Waldron, above n 88, at 1395.

97 Waldron might not necessarily extend the claim to that context.

98 As opposed to situations where the rights are contested within the polity. Compare David Dyzenhaus "Are Legislatures Good at Morality? Or Better at it than the Courts?" (2009) 7 *IJCL* 46 and Jeremy Waldron "Refining the Question about Judges' Moral Capacity" (2009) 7 *IJCL* 69.

particularly in regimes where courts are regularly called upon to determine whether government action is demonstrably justifiable in a free and democratic society.⁹⁹

Of course, some scholars, such as James Allan, regard this situation with abhorrence. The shop has been given away.¹⁰⁰ Nevertheless, it has meant the emergence of a judiciary of which there are far more expectations. Being a legal technocrat is no longer sufficient. The ability to engage in significant aspects of policy analysis has become an essential qualification particularly at the higher levels of the judiciary. Moreover, that call is at its strongest when the task of the judiciary is to act as the referee of rights-based claims against the perceived exigencies of the national interest, and where normal democratic processes tend not to be operating optimally, at least in the balancing of individual rights against other interests.

Associated with increased exposure to policy analysis and choice in certain contexts has also come an evolution in the evidential and procedural bases of public law litigation. Today's public law world is one in which interveners (admittedly the judicial equivalent of lobbyists) frequently play a critical role in presenting information to reviewing courts, where expert policy witnesses are often welcomed, where counsel frequently have significant professional exposure to policy analysis and argumentation, and where most appellate level courts have research facilities (in the form of clerks and judicial assistants) that approximate those of the legislatures. Moreover, all of this leaves out of account that, in the world of rights protection (and particularly constitutionally protected rights), normal political policy discourse is by no means necessarily appropriate or pre-eminent.

It is also of significance that, even in what I have described as the expanded world of judicial review of high executive powers, courts remain conscious of the limits of their functional and constitutional responsibilities. Indeed, some, such as Thomas Poole,¹⁰¹ are concerned that, at least in the domain of review of the exercise of prerogative powers in rights protection cases, the courts have not come to terms sufficiently with the dictates of the rule of law. For Poole, the current position of the courts of England and Wales with respect to the review of the exercise of prerogative powers is characterised by a gap between "rhetoric and reality, principle and result".¹⁰² While the prerogative has been brought within the umbrella

99 Canadian Charter of Rights and Freedoms, s 1; New Zealand Bill of Rights Act 1990, s 5.

100 Starting with papers such as James Allan "Bills of Rights and Judicial Power: A Liberal's Quandary" (1996) 16 OJLS 337.

101 Thomas Poole "Judicial Review at the Margins: Law, Power, and Prerogative" (2010) UTLJ 81 (in which he pays particular attention to *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61). See also Thomas Poole "Courts and Conditions of Uncertainty in 'Times of Crisis'" [2008] PL 234.

102 Poole "Judicial Review at the Margins: Law, Power, and Prerogative", above n 101, at 103.

of common law judicial review, this is but part of a two-step process that is not appropriately choreographed.¹⁰³ The snare and delusion of the first step or the threshold becomes apparent with the second step where "the exercise of that review is light touch in the extreme".¹⁰⁴

Seen in another light, the second step in the dance, one of limited or restrained review, is not necessarily inappropriate. After all, in the common law of judicial review in both New Zealand and Canada, the notion of restraint is a critical element, particularly in the review of the merits of discretionary powers of all kinds. In current New Zealand law, this is characterised by the continued perpetuation of the notion that review for abuse of discretion outside of the recognised legal error grounds (such as failure to take account of relevant factors) should thereafter be confined as to the merits to traditional and residual *Wednesbury* unreasonableness review.¹⁰⁵ Similarly, in Canada, review of the merits of broad discretions was until recently conducted on the basis of the most deferential of the three recognised standards of review: patent unreasonableness.¹⁰⁶ Even with the disappearance of that standard and the adoption of a single deferential standard of reasonableness, there is no real evidence of greater judicial willingness to review executive decision-making by reference to that seemingly less deferential standard.¹⁰⁷

When judicial review of prerogative and previously non-justiciable powers are brought within the tent of judicial review, it is not surprising that, by and large, review of those powers should be conducted at the most deferential end of the review spectrum. Particularly in the case of general policy-making functions, that posture at least in part depends on recognition of the prerogatives of the political and executive realm as well as the functional limitations of the courts as reviewers of policy.

This is not to claim that there are no tensions or that Poole goes too far in his concerns about the limited nature of judicial review of prerogative powers. Obviously, a point of principle is reached in

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ For a more detailed account of the New Zealand law, see Taggart "Proportionality, Deference, *Wednesbury*", above n 18, 441-449; Dean Knight "A Murky Methodology: Standards of Review in Administrative Law" in Claudia Geiringer and Dean Knight (eds) *Seeing the Whole World: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 180 at 182-199.

¹⁰⁶ See *CUPE v Ontario (Minister of Labour)*, above n 34. Indeed, this was even sometimes so when the discretionary power in issue engaged the Charter rights and freedoms of the applicant. In relation to the factual components of a judgment with national security dimensions to make a removal order against a landed immigrant, see *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 at [32] and, more generally, at [32]-[39].

¹⁰⁷ See *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FCA 255 at [25].

situations where a rights-based claim (especially one based on the Canadian Charter or the New Zealand Bill of Rights Act 1990) intersects with a traditional category of unreviewable prerogative power such as the conduct of foreign policy. In that domain, as the subsequent history of *Khadr* tends to suggest,¹⁰⁸ remedial compromises (in the form of declaratory relief as opposed to mandatory orders to the executive branch) may be only a band-aid solution, simply delaying the grasping of the nettle (to mix metaphors perhaps inappropriately). There also remains the problem of the gap that not only Poole identifies but which is also implicit in Lord Cooke's ambivalent treatment of the place of the prerogative in his judicial review scheme. In a world of judicial review subject to overarching or purportedly all-embracing principles such as a requirement that all decisions by public authorities be taken in accordance with "law, fairly and reasonably" (Cooke) or where there are two standards of review, correctness and reasonableness (Canada), is there any room for asserting complete non-justiciability with respect to the merits of high executive decisions even in the instance of broadly-based policy decisions?

Obviously, there is still work to be done. However, for the most part that work has to do with considering whether the courts, particularly in rights-protection cases, have gone sufficiently far in the normalisation of the review of high executive powers derived from both the prerogative and statute. The arguments for retrenchment or withdrawal to previous strongholds have little leverage either constitutionally or from the perspective of institutional competencies in Canada or, I suspect strongly, in New Zealand, despite what may well be a more optimally functioning and healthy set of democratic institutions, as reflected particularly in the New Zealand electoral system and the operations of Parliament, including an apparently vibrant Parliamentary committee system where the rule of law matters.

108 In February 2010, the Canadian government responded to the Supreme Court of Canada judgment by asking the United States government to exclude from Khadr's trial any Canadian-collected evidence: Sarah Boesveld "Ottawa asks U.S. to omit evidence in Khadr case" *Globe and Mail* (Canada, 17 February 2010) <www.theglobeandmail.com>. Not only did *Khadr's* Canadian lawyers regard this as an inadequate response within the legal framework provided by the Supreme Court but they also commenced an application for judicial review challenging the failure of the government to accord procedural fairness to Khadr before responding to the Supreme Court judgment. Zinn J of the Federal Court allowed that application and declared that the government had indeed violated Khadr's rights to procedural fairness. He also gave the government seven days in which to remedy that defect and provide Khadr with a list of remedies that it believed to be appropriate for the cure or amelioration of the violation of Khadr's Charter rights, that list of remedies then providing the basis for a "hearing" on the question. In so ordering, Zinn J retained jurisdiction over the matter as well as the capacity to direct a particular form of remedy should the parties not agree: *Khadr v Canada (Prime Minister)* 2010 FC 715. The government immediately appealed that order, and Blais CJ of the Federal Court of Appeal issued a stay of the order pending the outcome of the appeal. According to Blais CJ, "if we enforce the Federal Court's judgment, the executive's capacity to decide and execute Canada's international and diplomatic duties would be restrained and somehow usurped by the monitoring capacity of the court": *Canada (Prime Minister) v Khadr* 2010 FCA 199 at [32].

VII Conclusions

In democracies committed to the valuing of individual rights through their adherence to international treaties, their own national human rights instruments and common law traditions, judicial review of high executive action, particularly when individual rights are affected, responds to that imperative and provides an important form of antidote when highly ranked officials behave badly. Rather than being characterised as anti-democratic and having to be justified from that perspective, judicial review of high executive power has credentials as part of the essential components of a complex, multi-faceted, sophisticated and interwoven set of democratic institutions notwithstanding the "non-representative" character of those who exercise the power of judicial review.

To appropriate the language of Thomas Poole, this is one lesson we can learn from an era in which these problems have become more apparent and urgent by reason of being "play[ed] out within the politics of security and fear".¹⁰⁹ At the end of the day, Lord Cooke perhaps did not pay as much attention to the prerogative and justiciability as he might have done in developing his overarching principle of judicial review of administrative action. It has proved not to be a rarely encountered backwater of judicial review left to be dealt with by Sir David Williams. Nonetheless, bringing it within the mainstream of judicial review and asking how it can be accommodated as part of an overarching regime committed to review on the basis of conformity with the law, fairness and reasonableness is to further the cause of democracy operating under the imperatives of the constitution and the rule of law. And, I venture to suggest that Lord Cooke would have approved.

¹⁰⁹ Poole "Judicial Review at the Margins: Law, Power, and Prerogative", above n 101, at 108.