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# Standing at the Divide: The Relationship Between Administrative Law and the Charter Post-Multani

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The polarized opinions of the majority and minority in the Supreme Court of Canada's decision, *Multani v. Commission scolaire Marguerite-Bourgeois*, set out competing philosophies of the relationship between administrative law and the law of the *Canadian Charter of Rights and Freedoms*. The majority distinguishes between judicial review under the *Charter* and judicial review in administrative law on the basis of the purpose intended to be achieved by the review in any given case. In contrast, the minority adopts a categorical distinction between *Charter* review and administrative review based on whether the government activity at issue involves law or administrative discretion.

The author argues that the purposive approach of the majority has the potential to rationalize the Supreme Court of Canada's *Charter* and administrative law jurisprudence, thereby laying the foundation for a conceptually coherent theory of public law in the post-*Charter* era. In contrast, the minority's categorical approach is ultimately unworkable given the difficulty of distinguishing between law and discretion in the modern administrative state. As an illustration, the author examines a particular jurisprudential trouble spot at the intersection of administrative and *Charter* law: the "prescribed by law" condition in section 1 of the *Charter*. The prescribed by law jurisprudence serves as a cautionary tale relating the conceptual flaws of a categorical approach to law and discretion. The categorical approach to administrative law and the *Charter* preferred by the minority in *Multani* would only perpetuate this ill-conceived distinction between law and discretion and allow it to infiltrate the Supreme Court of Canada's *Charter* jurisprudence more widely.

In order to realize the full potential of the majority decision, the author argues that it is necessary for the Court to acknowledge the variable relationship existing between law and discretion, as well as its implications for *Charter* review of decisions lying along the full length of the law/discretion spectrum.

Les opinions polarisées de la majorité et de la minorité dans l'arrêt *Multani c. Commission scolaire Marguerite-Bourgeois* de la Cour suprême du Canada mettent en lumière les philosophies qui s'opposent quant à la relation entre le droit administratif et le droit issu de la *Charte canadienne des droits et libertés*. La majorité distingue la révision judiciaire sous l'égide de la *Charte* de la révision judiciaire telle que conçue par le droit administratif en s'appuyant sur l'objectif de la révision dans chacun des cas. La minorité adopte l'opinion selon laquelle il existe une distinction catégorique entre les deux domaines, fondée sur la qualification de l'activité gouvernementale en litige comme impliquant le droit ou plutôt l'exercice d'une discrétion administrative.

L'auteur soutient que cette approche téléologique de la majorité a le potentiel de rationaliser la jurisprudence de la Cour suprême du Canada en matière de *Charte* et de droit administratif, contribuant ainsi à établir les fondements d'une théorie du droit public conceptuellement cohérente en cette ère post-*Charte*. Par contre, l'approche catégorique mise de l'avant par la minorité est ultimement irréalisable de par la difficulté à établir, dans un État administratif moderne, la distinction entre le droit et la discrétion. À titre d'illustration, l'auteur analyse un élément à l'intersection du droit administratif et de l'application de la *Charte* qui est l'objet d'une certaine controverse jurisprudentielle : la condition, à l'article 1 de la *Charte*, selon laquelle les droits ne peuvent être restreints «que par une règle de droit». La jurisprudence relative à cette condition sert de récit édifiant pour associer les lacunes conceptuelles de l'approche catégorique au droit et à la discrétion. L'approche catégorique défendue par la minorité dans *Multani* quant à la relation entre le droit administratif et la *Charte* ne contribuerait qu'à perpétuer la distinction mal fondée entre le droit et la discrétion et à permettre son infiltration de façon plus importante dans la jurisprudence de la *Charte* développée par la Cour suprême du Canada.

Dans le but de concrétiser le plein potentiel de la décision de la majorité, l'auteur soutient qu'il est nécessaire pour la Cour de reconnaître la relation variable entre le droit et la discrétion ainsi que ses conséquences possibles sur la révision en vertu de la *Charte* de certaines décisions qui se situent d'un bout à l'autre du spectre droit/discretion.

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To be cited as: (2008) 53 McGill L.J. 477

Mode de référence : (2008) 53 R.D. McGill 477

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## Introduction

The problem of how to deal with alleged violations of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> resulting from the exercise of administrative discretion has been a recurring theme in recent jurisprudence of the Supreme Court of Canada. When should judicial review of administrative action proceed on *Charter* principles and when should it proceed on administrative law principles? The most recent Court decision tackling this issue, *Multani v. Commission scolaire de Marguerite-Bourgeois*,<sup>2</sup> demonstrates that a consistent analytical framework for answering this question continues to elude the Court. Nor do the majority or minority in *Multani* appear to appreciate the broader implications of their opposing positions. However, the deep analytical divide between the majority and minority opinions may prove unexpectedly beneficial. The Court has synthesized many years of confusing and conflicting statements on this issue into two polarized approaches to the appropriate relationship between the *Charter* and administrative law. All that remains is to determine which is correct.

In this paper, I argue for what I refer to as the purposive approach of the majority opinion. This approach requires the court to examine the purpose of the judicial-review exercise before it in determining whether to proceed on *Charter* principles or administrative law principles. In *Multani*, the majority chose to apply a *Charter* analysis, because even though the case involved an administrative decision rather than a law, the primary issue was not whether the decision maker exceeded its statutory authority in making the decision, but whether the decision infringed freedom of religion. In other words, the primary purpose of judicial review was to determine compliance with the *Charter*.<sup>3</sup>

In contrast, the minority in *Multani* would have decided the case on administrative law principles since the alleged *Charter* violation resulted from an administrative decision rather than a law. I refer to this as a categorical approach to the relationship between the *Charter* and administrative law, since it would require courts to draw a categorical distinction between *Charter* disputes involving law and those involving administrative discretion.

In my view, a purposive approach to the relationship between the *Charter* and administrative law is the only feasible one in a complex administrative state, where it is often not possible to distinguish between governance through law and governance through discretion. The Supreme Court of Canada has already recognized this

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 S.C.R. 256, 264 D.L.R. (4th) 577 [*Multani*].

<sup>3</sup> The decision maker's authority was called into question only tangentially, since a decision violating the *Charter* necessarily meant that the decision maker had exceeded its jurisdiction.

difficulty in its administrative law jurisprudence. In administrative review, categories of governance are avoided in favour of a more sophisticated, variable concept of discretion.<sup>4</sup> A categorical approach to the broader relationship between administrative law and the *Charter* is ultimately inconsistent with that jurisprudence and would represent a giant step backward in the development of a cohesive post-*Charter* theory of public law.

The flaws of a categorical approach to the relationship between the *Charter* and administrative law are convincingly illustrated in a long line of jurisprudence interpreting the “prescribed by law” condition in section 1 of the *Charter*.<sup>5</sup> In those cases, the Supreme Court of Canada has already attempted but failed to draw a categorical distinction between law and discretion. I suggest that the incoherence of the categorical approach in the context of the prescribed by law jurisprudence demonstrates why a purposive relationship between the *Charter* and administrative law is preferable more generally.<sup>6</sup>

There are also broader reasons for favouring a purposive relationship between the *Charter* and administrative law. The majority’s approach in *Multani* remains faithful to the different functions that the *Charter* and administrative law doctrine were intended to play in the Canadian legal regime. The *Charter* was enacted to protect the fundamental social values shared by Canadians.<sup>7</sup> Administrative law, in contrast, ensures that these fundamental rights and freedoms are faithfully translated from their legislative context through their application by the institutions of government. The former is concerned with the content of a law or decision; the latter, with the process of decision making and the relationship between the decision and its legislative antecedent. As long as these different purposes are respected, I suggest that the

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<sup>4</sup> See e.g. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker* cited to S.C.R.]; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1 [*Suresh*]. I discuss these decisions in Part I.B, below.

<sup>5</sup> *Supra* note 1, s. 1.

<sup>6</sup> On the relationship between the *Charter* and administrative discretion generally, see June M. Ross, “Applying the *Charter* to Discretionary Authority” (1991) 29 *Alta. L. Rev.* 382; Sujit Choudhry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability” (2003) 41 *Osgoode Hall L.J.* 1; Lorne Sossin, “Discretion Unbound: Reconciling the *Charter* and Soft Law” (2003) 45 *Can. Pub. Admin.* 465; Geneviève Cartier, “The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law—The Case of Discretion” in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004) 61. The *Multani* decision has already begun to generate further discussion on the *Charter*’s relationship with administrative law. See David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues After *Multani*” (2006–07) 21 *N.J.C.L.* 127 [Mullan, “After *Multani*”].

<sup>7</sup> See e.g. the lofty language used to describe s. 15 in *Vriend v. Alberta*: “The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society” ([1998] 1 S.C.R. 493 at para. 67, 156 D.L.R. (4th) 385, Cory J.).

*Charter* and administrative law are highly compatible, and much of the confusion about the principles to be applied in cases of overlap disappears.

The paper is organized into three parts. In Part I, I introduce the variable concept of administrative discretion. I also describe how the Supreme Court of Canada's administrative law jurisprudence has evolved to accommodate cases of "weak" discretion, which involve an inextricable combination of law and discretion. In Part II, I use the example of the prescribed by law jurisprudence under section 1 of the *Charter* to demonstrate that a categorical distinction between law and discretion has proved conceptually inadequate to account for cases of weak discretion. I suggest that many of the prescribed by law cases might be reconciled through a purposive approach to the distinction between law and discretion. In Part III, I discuss the majority and minority opinions in *Multani* and argue that the opposing theories of the relationship between the *Charter* and administrative law offered therein are an extension of the same conceptual tension evident in the prescribed by law jurisprudence. I argue that the lessons of the prescribed by law jurisprudence, as well as the evolution of administrative law, are both compelling reasons to embrace the majority's purposive approach to the relationship between the *Charter* and administrative law.

## I. The Variable Concept of Discretion in Administrative Law

### A. The Law/Discretion Spectrum and "Weak Discretion"

Conceptually, law and discretion lie at opposite extremes of a broad spectrum of government activity. However, these outer extremes are purely hypothetical. Complete statutory certainty is impossible since language necessarily admits of some ambiguity. Plenary discretion is also impossible since discretion is always conferred in some context that must be taken into account in defining the scope of the discretion. It might even be said that law and discretion need each other. Law becomes meaningful in its application to real situations. And discretion without a legal foundation is tyranny.<sup>8</sup>

Theorists writing on the concept of discretion have long acknowledged its symbiotic relationship with law.<sup>9</sup> In describing discretion as the "hole" in a "doughnut" of restrictions, Ronald Dworkin recognized that the hole was not of

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<sup>8</sup> John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government*, ed. by Mark Goldie (London: J.M. Dent, 1993) ("[w]herever law ends, tyranny begins" at para. 202).

<sup>9</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 31-39; Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) at 15-21. See also D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at 20-33, 207-19; J.H. Grey, "Discretion in Administrative Law" (1979) 17 *Osgoode Hall L.J.* 107.

uniform size and shape.<sup>10</sup> He distinguished between weak and strong forms of discretion. “Weak” discretion was said to exist where an official is given the authority to make a decision but is required to apply prescribed standards. “Strong” discretion meant that the official is entitled to create his or her own standards. Dworkin used the example of a lieutenant ordering a sergeant to choose five men for patrol. The sergeant would be exercising weak discretion if the lieutenant were to require that he choose the five most experienced men. The sergeant would be exercising strong discretion if the lieutenant were to leave the criteria for making that choice up to the sergeant.<sup>11</sup>

D.J. Galligan argues for an infinitely variable concept of discretion, ranging seamlessly from “the wide assessments that may be involved in creating one’s own standards to the relatively narrow margins open in applying a reasonably clear standard.”<sup>12</sup> Whichever description is preferred, theorists consistently acknowledge that law and discretion cannot be relegated into conceptually distinct categories but necessarily exist in combination. I refer to this idea as a variable concept of discretion as distinguished from a categorical one.<sup>13</sup>

This variable concept of discretion is reflected in the myriad of legislative provisions governing our modern administrative state. The degree of discretion

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 31-33. Dworkin recognized the limited value of this example in law, since our constitution does not allow any administrative delegate to make a truly unfettered choice. Even if no express standards are prescribed, the purpose of the legislative scheme and the principles of law will always constrain the exercise of discretion (*ibid.* at 32-38).

<sup>12</sup> Galligan, *supra* note 9 at 14. For his part, American scholar Kenneth Davis focused on instances of strong discretion but also acknowledged that the full concept of discretion was more complex:

A decision as to what is desirable may include not only weighing desirability but also guessing about unknown facts and making a judgment about doubtful law, and the mind that makes the decision does not necessarily separate facts, law, and discretion. Furthermore, the term ‘discretion’ may or may not include the judgment that goes into finding facts from conflicting evidence and into interpreting unclear law; the usage is divided (*supra* note 9 at 4-5).

<sup>13</sup> The variable nature of discretion is more controversial in the judicial context. Some theorists differentiate between legal judgment, in which a judge chooses among plausible meanings to be given to an open-ended legislative standard on the facts before him or her, and judicial discretion, in which a judge chooses among different options left to him or her by an expressly worded legislative grant of authority. F.A.R. Bennion has suggested that these two concepts are as different as “a jaguar and a donkey” (*Understanding Common Law Legislation: Drafting and Interpretation* (Oxford: Oxford University Press, 2001) at 116). See also F.A.R. Bennion, “Distinguishing Judgment and Discretion” [2000] P.L. 368; F.A.R. Bennion, “Judgment and Discretion Revisited: Pedantry or Substance?” [2005] P.L. 707. Regardless of the viability of this distinction in the judicial context, it cannot apply in the administrative context. Both judgment and discretion, as described by Bennion, fall within the notion of weak or structured discretion in administrative law and, as a result, may require some degree of deference to the decision maker. Recent examples in Canadian law include *Ferroequus Railway v. Canadian National Railway* (2003 FCA 454, [2004] 2 F.C. 42, 313 N.R. 363) and *Dean v. Manitoba Public Insurance* (2006 MBCA 97, [2006] 12 W.W.R. 225, 208 Man. R. (2d) 31).

granted by a particular legislative provision may vary between almost no discretion and strong discretion in the Dworkinian sense, depending on the nature, extent, and precision of the standards to be applied, and the particular facts in issue. This is equally the case when *Charter* rights are at issue. The state may impact *Charter* rights through any combination of legal and discretionary power. Cases involving government action at the extremes of the spectrum, based on either a reasonably clear legal standard or wide discretionary power, are relatively easy to classify as one or the other. However, cases lying along the middle ground of the spectrum—cases of weak discretion—are more difficult. They involve broadly worded provisions that grant some degree of discretion to an administrative delegate but fall short of a conferral of broad discretionary authority. In these cases, the administrative delegate interprets his or her enabling provision to require the limitation of a *Charter* right or freedom, and acts accordingly. The greater the scope for interpretation left to the delegate, the more his or her role in applying the provision begins to resemble administrative discretion. In such cases, it is often impossible to make a principled decision as to whether the resulting rights limitation is located within the law or within the decision.

### **B. Weak Discretion in Administrative Law**

Administrative law jurisprudence was preoccupied with the variable relationship between law and discretion long before the *Charter* was introduced. The doctrine of *ultra vires* requires courts to ensure that the exercise of administrative discretion takes place within legal boundaries. A central problem in the evolution of administrative law has been to determine where these legal boundaries end and discretion begins.

At one time, administrative law did draw a categorical distinction between law and discretion. Administrative decisions involving law were judicially reviewable on a standard of correctness. Decisions involving discretion were only reversible by a court in rare cases of abuse.<sup>14</sup> In more difficult cases involving weak discretion, courts treated the decision as falling within one or the other category (most often law), or, alternatively, they divided the statutory grant of authority into its legal and discretionary components. In the latter case, the interpretation of statutory conditions

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<sup>14</sup> The traditional categorical approach to the judicial review of discretionary decisions was famously articulated by Rand J. in *Roncarelli v. Duplessis* ([1959] S.C.R. 121, 16 D.L.R. (2d) 689). Rand J. interpreted the *ultra vires* doctrine to preclude the exercise of discretion in bad faith or for improper purposes:

[N]o legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. “Discretion” necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption (*ibid.* at 140).

constraining the official's discretion was a preliminary matter of law on which the official's jurisdiction would depend. Unless the official was correct in the interpretation and application of these conditions, no jurisdiction to exercise his or her discretion ever arose and the courts would quash any resulting decision.<sup>15</sup>

The distinction between the interpretation of legal standards, reviewable on a standard of correctness, and the exercise of discretion, reversible only in cases of abuse, became murkier as the administrative state grew more complex. With the increased specialization and expertise of administrative tribunals, the Supreme Court of Canada came to recognize that the legislature sometimes intended for legal questions to be determined by those bodies rather than by the courts.<sup>16</sup> The Court provided a crucial insight into the relationship between law and discretion in 1979 with its decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*<sup>17</sup> It held that the Public Service Labour Relations Board was entitled to interpret statutory conditions contained in its enabling statute, as part of its broad power to supervise and administer the novel collective-bargaining regime created by the statute.<sup>18</sup> The traditionally distinct categories of legal interpretation and discretion began to converge.<sup>19</sup> This recognition that responsibility for both legal and discretionary decisions might reside in the same tribunal meant that a dichotomous standard of review for each type of decision no longer made sense.

Throughout the 1980s and 1990s, the Court developed the pragmatic and functional test as a means of determining the degree to which courts should review administrative decisions involving law (i.e., those lying closer to the law end of the law/discretion spectrum). The pragmatic and functional test required that a standard of review be chosen as a function of four variables: the presence or absence of a statutory provision negating the right of appeal; the relative expertise of the decision maker; the purpose of the provision and the legislation generally; and the nature of the question. Where these variables indicated a legislative intent to leave the

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<sup>15</sup> This divided approach is essentially what occurred in "preliminary or collateral matters" cases. See *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1; *Jacmain v. Canada (A.G.)*, [1978] 2 S.C.R. 15, 81 D.L.R. (3d) 1. This line of case law is also referred to as the "jurisdictional fact doctrine" (P.W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971) 9 Osgoode Hall L.J. 203).

<sup>16</sup> See e.g. *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336, 74 D.L.R. (4th) 449, Wilson J., concurring in the result. The Court also held that regulatory tribunals exercising broad public-interest jurisdiction should be accorded deference in the interpretation and application of nonjurisdictional provisions in their enabling statutes. See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385; *Canada (Combines Investigation Branch, Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1.

<sup>17</sup> [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417 [*C.U.P.E.* cited to S.C.R.].

<sup>18</sup> *Ibid.*

<sup>19</sup> Dickson J. for the Court noted in respect of the statutory provision in issue: "There is no one interpretation which can be said to be 'right'" (*ibid.* at 237).

interpretation of the enabling statute to the administrator, the courts deferred to that interpretation on a standard of patent unreasonableness or reasonableness simpliciter.<sup>20</sup>

In 1999, the Court in *Baker v. Canada (Minister of Citizenship and Immigration)* held that the same variable standard of review should be applied to discretionary decisions (i.e., decisions lying closer to the discretion end of the law/discretion spectrum).<sup>21</sup> *Baker* involved the broad discretionary power of the minister of citizenship and immigration under the *Immigration Act* to allow illegal residents to remain in Canada on “compassionate or humanitarian considerations.”<sup>22</sup> The minister accepted the recommendation of an immigration officer that insufficient “H&C” considerations existed in Ms. Baker’s case. Applying the pragmatic and functional analysis, the Court held that even though the minister’s decision was discretionary, it was reviewable on a standard of reasonableness. Justice L’Heureux-Dubé, writing for the majority, reasoned that there is no “rigid dichotomy” between discretionary and nondiscretionary decisions, and no “easy distinction” may be drawn between statutory interpretation and discretion.<sup>23</sup> *Baker* thus eliminated any persisting categorical distinction between law and discretion for the purposes of administrative law.<sup>24</sup>

The Court had the opportunity to apply this holistic approach to the law/discretion spectrum in *Suresh v. Canada (Minister of Citizenship and Immigration)*.<sup>25</sup> A unanimous Court applied the pragmatic and functional test to the review of a deportation order involving a complex blend of legal and discretionary elements. Paragraph 53(1)(b) of the *Immigration Act* gave the minister limited discretion to deport refugees in circumstances where they faced the possibility of torture.<sup>26</sup> This discretionary power was subject to two preliminary statutory conditions: first, the provision operated only in respect of a refugee whose “life or freedom would be threatened” if returned to his or her country; second, it was

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<sup>20</sup> For recent discussions of the development of the pragmatic and functional approach to judicial review in administrative law, see Lorne Sossin & Colleen M. Flood, “The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law” (2007) 57 U.T.L.J. 581; Philip Bryden, “Understanding the Standard of Review in Administrative Law” (2005) 54 U.N.B.L.J. 75.

<sup>21</sup> *Supra* note 4.

<sup>22</sup> R.S.C. 1985, c. I-2, s. 114(2), as rep. by *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 25(1).

<sup>23</sup> *Supra* note 4 at para. 54, L’Heureux-Dubé J.

<sup>24</sup> This aspect of the *Baker* decision (one of several having important implications for administrative law) is acknowledged by Laura Pottie & Lorne Sossin (“Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare” (2005) 38 U.B.C. L. Rev. 147 at 161) and Geneviève Cartier (*supra* note 6 at 73-74).

<sup>25</sup> *Supra* note 4.

<sup>26</sup> *Supra* note 22, s. 53(1)(b), as rep. by *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 274(a).

necessary for the minister to believe that the refugee constituted “a danger to the security of Canada.”<sup>27</sup> Only where both these statutory conditions were met was the ultimate balancing exercise between the risk to the refugee versus the risk to Canadian security left to the discretion of the minister.<sup>28</sup>

Prior to *C.U.P.E.*, the legal and discretionary components of the minister’s decision in *Suresh* would have been reviewed in a multi-stage process. The fulfillment of the two statutory conditions would have been viewed as preliminary issues of law, reviewable on a standard of correctness. Only if the court determined that the two conditions were correctly applied by the minister would the court defer to the minister’s discretion in making the final decision. But in *Suresh*, the Court refused to fragment the judicial-review exercise in this manner and, applying *Baker*, held that the minister was entitled to deference in her interpretation and application of the two statutory conditions to Mr. Suresh’s case.<sup>29</sup>

The post-*Baker* approach to judicial review in administrative law is a more accurate reflection of how administrative decisions are made in practice. It is highly unlikely that the minister in *Suresh* differentiated between the legal and discretionary elements of her authority. Even if she attempted to do so, it is difficult to see how they could be separated. In addition to the residual discretionary power expressly conferred by paragraph 53(1)(b) of the *Immigration Act*, the minister was also required to exercise some discretion in interpreting the open-textured language of the two preliminary conditions. What does it mean for a refugee to be under threat? What circumstances amount to a “danger” to Canadian security? Each of these questions involves its own particular mix of law and discretion—the second question lying somewhat closer to the discretion end of the spectrum since, unlike the first question, it requires only a reasonable belief on the part of the minister. Nor is it likely that the minister in *Suresh* considered there to be a clear demarcation between the preliminary matter of the conditions having been met and the eventual deportation decision. The strength of her convictions on each of the two conditions would necessarily have impacted her ultimate exercise of discretion.<sup>30</sup>

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* The provision also contained a further statutory condition, applying ss. 19(1)(e)-(f) of the *Immigration Act* (*ibid.*), that was not in issue on the facts in *Suresh* (*supra* note 4).

<sup>29</sup> The Court did discuss the minister’s decision under each of the two statutory conditions separately and, in this respect, the judicial-review exercise *was* fragmented. However, my point here is a different one. Although the two statutory conditions were analyzed separately, the discretionary and legal elements of each were fused in accordance with the reasoning in *Baker*. The Court accepted the variable relationship between law and discretion (*ibid.*).

<sup>30</sup> The Supreme Court of Canada clearly recognized this link between the statutory conditions and the minister’s residual discretion. It quoted the following passage from a similar House of Lords decision:

The question of whether the risk to national security is sufficient to justify the appellant’s deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a

As a whole, the provision at issue in *Suresh* is a classic example of weak discretion, in which law and discretion are combined in one indivisible grant of authority. Just as administrative officials are unlikely to be able to segregate the legal and discretionary elements in such grants of authority, so too are courts unlikely to be successful in restricting their review to legal errors occurring in the resulting decisions. The decision in *Suresh*, like *Baker* before it, was groundbreaking in that it recognized the true complexity of this kind of administrative decision making and rejected an artificial divide between law and discretion.<sup>31</sup>

Recent decisions indicate that the Court may be backsliding somewhat in its appreciation of the variable relationship between law and discretion. In *Dunsmuir v. New Brunswick*, the Court embarked on a mission to simplify the entire system of judicial review, dispensing with the patent unreasonableness standard and replacing the pragmatic and functional test with a new “standard of review analysis”.<sup>32</sup> The majority in *Dunsmuir* did not expressly address the relationship between law and discretion, but it is troubling that its analysis rested largely on categorical distinctions between “true questions of jurisdiction or *vires*”, questions of “general law”, other questions of law, and “questions of fact, discretion and policy”.<sup>33</sup> Early commentary on the decision suggests that the Court’s reach in *Dunsmuir* may have exceeded its grasp. Despite the Court’s professed intentions, the standard-of-review analysis may not have a substantial impact on the outcome of administrative-review exercises.<sup>34</sup> In

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question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee (*Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153 at para. 56, [2002] 1 All E.R. 122, Lord Hoffman, cited in *Suresh*, *ibid.* at para. 77).

<sup>31</sup> On the other hand, I heartily agree with those who have criticized *Suresh* for applying deference to a decision raising *Charter* issues. See David Mullan, “Deference from *Baker* to *Suresh* and Beyond—Interpreting the Conflicting Signals” in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004) 21 at 41-47 [Mullan, “Deference”]; David W. Elliott, “*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?” (2002) 65 Sask. L. Rev. 469-96.

<sup>32</sup> 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 63, 291 D.L.R. (4th) 577 [*Dunsmuir*].

<sup>33</sup> *Ibid.* at paras. 51-62. In particular, the majority’s discussion of “true questions of jurisdiction” (*ibid.* at para. 59) is redolent of the preliminary- or collateral-matters cases that the Court has been at such pains to leave behind. See David Mullan, “*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!” (2008) 21 Can. J. Admin. L. & Prac. 117 at 127-30 [Mullan, “Let’s Try Again”]. Deschamps J., in minority, is even more categorical in tone, stating bluntly that the case “does not concern a discretionary power” (*Dunsmuir*, *ibid.* at para. 165). In contrast, Binnie J., in minority, expressly reasserts the variable relationship between law and discretion by acknowledging that “administrative decisions generally call for the exercise of discretion” (*ibid.* at para. 146).

<sup>34</sup> Mullan, “Let’s Try Again”, *ibid.* at 135; Alice Woolley, “The Metaphysical Court: *Dunsmuir v. New Brunswick* and the Standard of Review” (2008) 21 Can. J. Admin. L. & Prac. 259; Lorne Sossin, “*Dunsmuir*: Plus ça change” (17 March 2008), online: The Court <<http://www.thecourt.ca/2008/03/17/dunsmuir---plus-ca-change/>>. Even Binnie J., in his minority opinion, analogized the majority

any event, no matter how *Dunsmuir* plays out, it is unlikely that the achievement of *Baker* will be undone. By extending the same standard-of-review framework to all decisions lying along the law/discretion spectrum, and by acknowledging that deference will sometimes be appropriate in cases of weak discretion, the Court has moved firmly beyond its old categorical approach to law and discretion.<sup>35</sup>

As discussed below, the Court has not yet integrated this advance in its understanding of administrative discretion into its *Charter* jurisprudence. In Part II, I examine a particular trouble spot in that jurisprudence: the interpretation and application of the “prescribed by law” condition in section 1 of the *Charter*. Here, the Court’s insistence on a categorical divide between law and discretion has led to a morass of confusing and conflicting decisions. This jurisprudence is not only conceptually inconsistent with the Court’s administrative law jurisprudence, but is also internally incoherent. For both these reasons, the prescribed by law cases offer a compelling argument for rejecting both a categorical distinction between law and discretion and a categorical approach to the broader relationship between the *Charter* and administrative law.

## II. Discretion Under the Charter: The Example of “Prescribed by Law”

Section 1 of the *Charter* requires that government action limiting a protected right or freedom be prescribed by law in order to be justified as reasonable in a free and democratic society.<sup>36</sup> This threshold test prevents courts from engaging in a balancing exercise between state interests and individual rights where a limitation of rights has not been legally authorized. In such cases, the limit is not prescribed by law and the court never reaches the *Oakes* test.<sup>37</sup> A *Charter* infringement is established and the court moves immediately to the issue of remedy.

Twenty-six years after the introduction of the *Charter*, the jurisprudence on the meaning of the prescribed by law condition remains underdeveloped and confused.<sup>38</sup>

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decision to “the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense” (*ibid.* at para. 139).

<sup>35</sup> See *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, 292 D.L.R. (4th) 193, 373 N.R. 339 (applying a reasonableness standard to the review of a discretionary extradition decision consistent with *Baker* and *Suresh*).

<sup>36</sup> *Supra* note 1, s. 1 (“[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

<sup>37</sup> The test for balancing individual rights with societal interests under s. 1 was first laid down by the Court in *R. v. Oakes* ([1986] 1 S.C.R. 103 at 135-42, 26 D.L.R. (4th) 200 [*Oakes* cited to S.C.R.]). This test requires that the Court evaluate the importance of the law’s objective and then weigh this objective against the means chosen by the government to achieve the objective.

<sup>38</sup> In spite of the significance of the prescribed by law condition, it has received much less judicial and academic attention than the remainder of s. 1 of the *Charter*. An important exception is Danielle

There is no clear consensus on how the courts should apply the condition in the case of a limitation of *Charter* rights caused by the exercise of administrative discretion. The prevailing approach is that a discretionary decision is prescribed by law for the purpose of section 1 when the decision is statutorily authorized. However, a minority view—that discretionary decisions are, by definition, never prescribed by law—persists.<sup>39</sup> A review of the early evolution of the prescribed by law condition is necessary in order to explain how this confusion came about.

### A. Early Prescribed by Law Cases and the Vagueness Doctrine

The prescribed by law condition seems to have been included within section 1 of the *Charter* in order to protect fundamental rule-of-law values, such as predictability and certainty in law.<sup>40</sup> A citizen should be in a position to anticipate the legal consequences of his or her actions. Laws must therefore be adequately accessible to the public and formulated with sufficient precision to prevent arbitrary enforcement. The prescribed by law condition is intended to prevent the government from justifying limitations of *Charter* rights unless these requirements are met.

Early in the *Charter*'s evolution, when most *Charter* challenges were aimed at legislative provisions, this rationale was fulfilled by the development of a “void for vagueness” doctrine modeled on the U.S. doctrine of the same name.<sup>41</sup> The Supreme Court of Canada held in *R. v. Nova Scotia Pharmaceutical Society* that a law meets

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Pinard, “Les seules règles de droit qui peuvent poser des limites aux droits et libertés constitutionnellement protégés et l’arrêt *Slaight Communications*” (1992) 1 N.J.C.L. 79. See also Lorraine Eisenstat Weinrib, “The Supreme Court of Canada and Section One of the *Charter*” (1988) 10 Sup. Ct. L. Rev. 469 at 472-78; Ross, *supra* note 6.

<sup>39</sup> There are Supreme Court of Canada decisions supporting both interpretations of the prescribed by law condition, though in some cases the support is not explicit. The prevailing view is reflected in *Slaight Communications Inc. v. Davidson* ([1989] 1 S.C.R. 1038 at 1080-81, 59 D.L.R. (4th) 416 [*Slaight* cited to S.C.R.]), *Ross v. New Brunswick School District No. 15* ([1996] 1 S.C.R. 825, 133 D.L.R. (4th) 1 [*Ross* cited to S.C.R.]), and, most recently, the majority opinion in *Multani* (*supra* note 2 at para. 22). The minority view can be located in *Trinity Western University v. British Columbia College of Teachers* (2001 SCC 31, [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1), *Chamberlain v. Surrey School District No. 36* (2002 SCC 86, [2002] 4 S.C.R. 710, 221 D.L.R. (4th) 156), and the minority opinion in *Multani* (*ibid.* at paras. 112-25).

<sup>40</sup> See Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 797-99 [Hogg, *Constitutional Law*]. See also Carol Rogerson, “The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness” in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 233 at 290-297. The legislative background of the prescribed by law condition is discussed by Pinard (*supra* note 38 at 83-97) and Timothy J. Christian (“The Limitation of Liberty: A Consideration of Section 1 of the *Charter of Rights and Freedoms*” [1982] U.B.C. L. Rev. Charter Edition 105 at 109-13).

<sup>41</sup> For an exhaustive analysis of the vagueness doctrine, both as protected under the prescribed by law condition as well as elsewhere under the *Charter*, see Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004). See also Jonathan Daniels, “Valid Despite Vagueness: The Relationship Between Vagueness and Shifting Objective” (1994) 58 Sask. L. Rev. 101.

the prescribed by law condition as long as it is sufficiently precise to offer an “intelligible” standard—one providing sufficient guidance for legal debate.<sup>42</sup> The standard is a forgiving one, favouring government flexibility over precision or certainty, and it has led to a reasonably consistent and rational body of jurisprudence if, perhaps, one that is unduly deferential to the legislature.<sup>43</sup> In *Pharmaceutical Society*, the Court applied the intelligible standard test to uphold a provision of the *Combines Investigation Act*<sup>44</sup> making it an offence to conspire to prevent or lessen competition “unduly”.<sup>45</sup> A more recent example of a vagueness analysis is *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*,<sup>46</sup> in which the Court upheld a provision of the *Criminal Code* allowing parents to use corrective force on children if “reasonable under the circumstances”.<sup>47</sup>

The vagueness cases involve statutory provisions closer to the law end of the law/discretion spectrum. In these statutory provisions, there is no express grant of authority to an administrative delegate to interpret or apply the provisions. However, vague language creates ambiguity in the meaning of legal standards, and some discretion by law-enforcement officials and courts is necessary in order to “actualize” law.<sup>48</sup> The vagueness doctrine is concerned with those legal standards that are so ambiguous that law-enforcement officials or the judiciary become *lawmakers* rather than law *interpreters*. The role of courts is to ascribe meaning to legal standards using interpretive principles, and to fix the point at which these principles are no longer sufficient to give meaning to the standards.

### **B. Prescribed by Law and Discretion**

The prescribed by law jurisprudence was complicated by the appearance of *Charter* challenges aimed at administrative decisions made under express legislative grants of discretion. These cases involved statutory provisions much closer to the discretion end of the law/discretion spectrum. At first, courts familiar with the vagueness doctrine focused on the legislative provision granting discretion. They

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<sup>42</sup> [1992] 2 S.C.R. 606 at 622, 625, 639, 642, 93 D.L.R. (4th) 35 [*Pharmaceutical Society* cited to S.C.R.]. The rationale for preventing vagueness also animates other *Charter* sections. A law may be too vague to comply with the principles of fundamental justice under s. 7 of the *Charter*. See *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 68-73, 44 D.L.R. (4th) 385, Dickson C.J.C. Also, a law that meets the prescribed by law condition under s. 1 may nevertheless be too vague to meet the minimal-impairment branch of the *Oakes* test. See *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 94-95, 82 D.L.R. (4th) 321 [*Osborne* cited to S.C.R.].

<sup>43</sup> See Ribeiro, *supra* note 41 at 102-109, 160.

<sup>44</sup> R.S.C. 1970, c. C-23, s. 32(1)(c).

<sup>45</sup> *Ibid.*, s. 45(1)(c), as re-en. by *Competition Act*, R.S.C. 1985, c. C-34, s. 45(1)(c); *Pharmaceutical Society*, *supra* note 42 at 615.

<sup>46</sup> 2004 SCC 4, [2004] 1 S.C.R. 76, 234 D.L.R. (4th) 257 [*Law Foundation*].

<sup>47</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 43.

<sup>48</sup> *Pharmaceutical Society*, *supra* note 42 at 638-40. See also *Law Foundation*, *supra* note 46 at paras. 15-18.

reasoned that if vague legal standards were problematic, the absence of any standards must be even more so. These courts failed to distinguish between vagueness and administrative discretion and attempted to apply a vagueness analysis to both.<sup>49</sup> This led them to conclude that section 1 of the *Charter* should never be available in cases involving administrative discretion, since legislative grants of discretion were, by definition, neither certain nor predictable.<sup>50</sup>

The Supreme Court of Canada gradually recognized, correctly in my view, that this approach is untenable given the importance of discretionary action in the modern administrative state.<sup>51</sup> But it was left with a dilemma: either legislative grants of discretion are prescribed by law, in which case the rule-of-law values underlying the prescribed by law condition are seemingly undermined; or they are not prescribed by law, in which case the government is required to forego the use of discretion in any state activity where *Charter* rights are conceivably at stake.

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<sup>49</sup> These two categories of prescribed by law cases are contrasted by Sopinka J. in *Osborne* (*supra* note 42 at 94) and are described under different subheadings in Hogg's *Constitutional Law* (*supra* note 40 at 799-803). However, the relationship between these two categories has not, to the author's knowledge, been subject to any significant judicial or academic commentary.

<sup>50</sup> See *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984), 45 O.R. (2d) 80, 5 D.L.R. (4th) 766 (C.A.), aff'g (1983), 41 O.R. (2d) 583, 147 D.L.R. (3d) 58 (Div. Ct.) [*Ontario Film* cited to O.R.]; *R. v. Therens*, [1985] 1 S.C.R. 613 at 621, 18 D.L.R. (4th) 655 [*Therens* cited to S.C.R.]; *R. v. Simmons*, [1988] 2 S.C.R. 495 at 531-32, 55 D.L.R. (4th) 673; *Luscher v. Canada* (*Deputy Minister, Revenue Canada*), [1985] 1 F.C. 85, (*sub nom. Re Luscher and Deputy Minister, Revenue Canada*) 17 D.L.R. (4th) 503 (Ont. C.A.); *International Fund for Animal Welfare v. Canada*, [1989] 1 F.C. 335 at 355, 45 C.C.C. (3d) 457 (Ont. C.A.); *R. v. Robson* (1985), 19 D.L.R. (4th) 112, [1988] 6 W.W.R. 519 (B.C.C.A.). This line of case law is more fully discussed by June Ross (*supra* note 6 at 399-404). These decisions were incorrectly decided as a result of the confusion between vagueness and discretion. For example, the Ontario Divisional Court in *Ontario Film* held that a provision granting a censorship board strong discretion to censor films was not prescribed by law because it was "vague, undefined, and totally discretionary" (*Re Ontario Film & Video Appreciation Society and Ontario Board of Censors*, (1983) 41 O.R. (2d) 583 at 592, 147 D.L.R. (3d) 58 (Div. Ct.)). This provision did not contain vague language in the sense that its meaning was unascertainable. Rather, the language was clear and precise, but its effect was to grant unqualified power to the board to "censor any film" and to "prohibit ... the exhibition of any film in Ontario" (*Theatres Act*, R.S.O. 1980, c. 498, ss. 3(2)(a)-(b)). It was the unconstrained scope of this grant of authority that motivated the courts' concern for predictability and enforcement discretion.

<sup>51</sup> See the reasoning of McLachlin J. (as she then was) in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 245, 77 D.L.R. (4th) 385 [*Committee for the Commonwealth* cited to S.C.R.]. See text accompanying note 83. Unfortunately, the early decisions confusing statutory vagueness and administrative discretion continue to complicate the prescribed by law jurisprudence. *Ontario Film* (*ibid.*) was cited approvingly by a unanimous panel of the Supreme Court of Canada in *Eldridge v. British Columbia (A.G.)* ([1997] 3 S.C.R. 624 at para. 30, 151 D.L.R. (4th) 577 [*Eldridge* cited to S.C.R.]). *Therens* (*ibid.*) was relied on by the majority of the Court in *R. v. Orbanski*; *R. v. Elias* (2005 SCC 37, [2005] 2 S.C.R. 3 at para. 36, (*sub nom. R. v. Elias*; *R. v. Orbanski*) 253 D.L.R. (4th) 385 [*Orbanski/Elias*]). In fact, these decisions were effectively overruled by *Slaight* (*supra* note 39), and it would be helpful for the Court to expressly acknowledge this event.

### C. The Categorical Law/Discretion Distinction in Slight

The Supreme Court of Canada tackled this dilemma in *Slight Communications Inc. v. Davidson*.<sup>52</sup> At issue was a provision of the *Canada Labour Code* conferring broad discretion on labour arbitrators to impose equitable remedies where an employee had been unfairly dismissed.<sup>53</sup> No other statutory standards explaining or constraining this remedial authority were contained in the *Code*. A labour arbitrator had exercised his discretion under this provision by ordering an employer to (1) give its unfairly dismissed employee a letter of reference containing specified text and (2) say nothing further about the employee. The employer alleged that this order violated its freedom of expression. The Court held that, in spite of the open-ended language of the enabling legislation, the prescribed by law condition was met where the adjudicator's order fell within the authority conferred on him by statute.

Chief Justice Lamer, writing for the majority on this issue, recognized that statutory vagueness and administrative discretion could not be equated in applying the prescribed by law condition. What was necessary was an analytical framework that would accommodate both. He accomplished this by requiring, as an initial step in any *Charter* case, that the court choose whether its analysis should be directed at a law or at an administrative decision made pursuant to the law (what June Ross describes as "facial review" and "as applied review", respectively).<sup>54</sup> Chief Justice Lamer explained the two-part framework as follows:

The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

—It is then necessary to subject the *legislation* to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

—It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society;

—if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;

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<sup>52</sup> *Ibid.*

<sup>53</sup> R.S.C. 1970, c. L-1, s. 61.5(9)(c) [*Code*].

<sup>54</sup> *Supra* note 6 at 414-18.

—if it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.<sup>55</sup>

Scenario two, as applied review, is possible because of the ultra vires doctrine in administrative law and the presumption of constitutionality. An administrative decision maker may not exceed its legislative authority, and legislation is presumed to comply with the *Charter*, so logically the decision maker may not violate the *Charter*.<sup>56</sup> Chief Justice Lamer explained:

The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.<sup>57</sup>

Chief Justice Lamer's reasoning equated the prescribed by law condition in administrative discretion cases with the ultra vires doctrine. His unstated presumption was that any discretionary decision proceeding to a *Charter* analysis would already have been determined to be statutorily authorized in administrative law under the applicable standard of review. In his view, this administrative law validity was sufficient to fulfill the prescribed by law condition. Therefore, in contrast to the vagueness cases—where the intelligible standard test had been developed to give meaning to the prescribed by law condition—there was no need to develop a *Charter*-specific prescribed by law analysis to address administrative discretion cases.<sup>58</sup>

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<sup>55</sup> *Slaight*, *supra* note 39 at 1079-80 [emphasis in original].

<sup>56</sup> *Ibid.* at 1077-78. Ross analyzes the decision in *Slaight* to adopt an “as applied” approach to discretion under the *Charter* (*supra* note 6 at 414-18).

<sup>57</sup> *Slaight*, *ibid.* at 1080-81. It was in this passage that Lamer J. implicitly acknowledged the conceptual distinction between statutory vagueness and administrative discretion and recognized that a different (and, in fact, diametrically opposed) analysis was required in the latter case. Although Lamer J. did not address the earlier case law on this point, his reasoning cannot stand alongside *Ontario Film* (*supra* note 50), and that line of cases was, as of this point, implicitly overruled. This is because, in the *Ontario Film* cases, the courts had essentially equated a legislative grant of strong discretion with vagueness (*ibid.*). In such a case, a strong grant of discretion meant that the court was less likely to be able to give meaning to the legislature's intentions and therefore, that the prescribed by law condition would not be met. In *Slaight*, in contrast, Lamer J. reasoned that the strong grant of discretion itself embodied the legislature's intentions and any decision made thereunder must meet the prescribed by law test. For a critique of this approach, see Pinard, *supra* note 38 at 110-36.

<sup>58</sup> This approach to discretion under the *Charter* was more firmly entrenched in the Court's unanimous decision in *Ross* (*supra* note 39). Again the issue was the analytical framework to be applied in determining whether a board's discretionary remedial order violated the *Charter*. La Forest J., writing for the Court, divided his analysis into two parts, first holding that the order was statutorily authorized under a provision granting strong discretionary power and thereafter addressing the constitutional validity of the order under *Charter* principles (*ibid.*). The prescribed by law condition was not explicitly addressed by the Court, presumably because that analysis was subsumed by the administrative law analysis. Just as in *Slaight*, *Ross* involved a strong discretionary power in neutral

The *Slaight* framework resolved the early difficulties in applying the prescribed by law condition to both vague laws and administrative discretion. Vague laws are dealt with under scenario one and administrative discretion under scenario two. Most importantly, the rule-of-law values of predictability and certainty are now met in both instances. They continue to be met in vague-law cases through the application of the intelligible-standard test. They are now also met in administrative discretion cases due to the Supreme Court of Canada's move in *Slaight* from an ex ante review of the statutory grant of discretion as an abstract norm, to an ex post facto review of the decision itself, made in the particular facts of the case. With this twist in perspective, predictability and certainty are assured—hindsight is 20/20.

The framework adopted in *Slaight* has other benefits. It succeeds in honouring the presumed legislative intent behind statutory grants of administrative discretion, and it corresponds more closely with the intelligible-standard test adopted for vague laws. In both cases, the section 1 analysis begins with a deferential attitude. Most cases will pass the prescribed by law threshold—either by meeting the intelligible-standard test or the statutory-authority test—and proceed to the *Oakes* test.<sup>59</sup> In this respect, the *Slaight* decision marked an important advance in the evolving relationship between the *Charter* and administrative law.

Unfortunately, the *Slaight* framework contains a fatal flaw. The framework requires a reliable means of distinguishing between *Charter* limits occurring as a result of law and as a result of discretion. According to *Slaight*, this distinction lies in determining whether or not the legislation in issue “confers, either expressly or by necessary implication, the power to infringe a protected right.”<sup>60</sup> If the law confers the power to limit *Charter* rights, then the limit is attributed to the law and the prescribed by law condition is met unless the law fails the intelligible-standard test. If instead the law confers an imprecise discretion, then the limit is attributed to the decision and the prescribed by law analysis turns on the statutory authority of the decision maker. The choice is either/or: either the *Charter* limit is contained in the law or it is contained in discretion.<sup>61</sup> The ultimate success or failure of a *Charter* challenge may hinge on how the challenge is categorized according to this preliminary distinction.

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language so that the Court's choice of scenario two under the *Slaight* framework was not controversial in the circumstances of the case (*ibid.*).

<sup>59</sup> See *Osborne*, *supra* note 42 at 95.

<sup>60</sup> *Supra* note 39 at 1080.

<sup>61</sup> *Ibid.* The language used by Lamer J. in articulating this preliminary distinction is problematic. It suggests that the question is whether the *power* to limit *Charter* rights is expressly or necessarily implicitly conferred by the law. Strictly speaking, even provisions conferring strong discretion in neutral language would meet this test since the power granted by such provisions is all the broader. But then it would not make sense to speak of a power to limit *Charter* rights being “necessarily implicit” in a law. Even in *Slaight*, the provision at issue expressly granted the power to limit the employer's freedom of expression. In subsequent decisions such as *Suresh* (*supra* note 4), the Court appears to have applied the test slightly differently in terms of whether the *Charter* limit is expressly

In spite of the potential importance of this preliminary distinction, it has frequently proved impossible to make. Where *Charter* limits occur through government action lying in the middle ground of the law/discretion spectrum, courts are unable to agree on the point at which law ends and discretion begins—the point at which they must set aside their legal tools of statutory interpretation and vagueness in deference to the administrator’s own interpretation of his or her authority. The elegant distinction between law and discretion, on which the *Slaight* framework depends, falls apart in practice since it fails to account for cases involving weak discretion.<sup>62</sup> The result has been persistent incoherence in the Supreme Court of Canada’s prescribed by law jurisprudence.

#### **D. Prescribed by Law and Weak Discretion**

Significant confusion results when the *Slaight* framework is applied to Charter cases involving weak discretion. This confusion is manifest in a group of three Supreme Court of Canada decisions involving similar facts but reasoned in three strikingly different ways. *R. v. Orbanski*; *R. v. Elias*, *R. v. Therens*, and *R. v. Thomsen* all involved police officers detaining motorists to determine whether or not they were intoxicated.<sup>63</sup> In all three instances, the officers failed to provide the motorists with the right to counsel. At issue was whether the limitation of this *Charter* right was prescribed by law. Different statutory provisions were involved, each varying in the degree of discretion left to the officers. In *Orbanski/Elias*, the provision gave police officers very broad discretionary power to stop motorists as part of the lawful execution of their duties.<sup>64</sup> Justice Charron, writing for the majority of the Court, relied on the relative breadth of the discretion conferred by the legislative scheme to conclude that the prescribed by law condition was met. The officer had clearly been acting within his statutory authority. She reasoned that the legislation of “exhaustive

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or necessarily *required* by the law. However, this characterization also fails to capture the true conceptual distinction between law and discretion.

<sup>62</sup> The problems that later resulted from the categorical law/discretion distinction in *Slaight* (*ibid.*), were most likely not anticipated in *Slaight* nor in *Ross* (*supra* note 39), since the choice was not controversial on the facts of those cases. Both involved neutrally worded laws granting strong discretionary authority, so it was clear that the alleged *Charter* limit in each case was located within the decision rather than in the law. Subsequent cases involving strong discretion have also been decided relatively consistently. However, this has not always been the case. In *Eldridge*, the Court’s decision to locate the *Charter* limit within the government’s decision rather than within the law was unanimous, but the issue was contentious nonetheless since counsel for both parties had originally approached the case as raising an issue of law rather than discretion (*supra* note 51 at para. 23). This may be why the Court in *Eldridge* chose to leave open the issue of whether the prescribed by law condition was met (*ibid.* at para. 84).

<sup>63</sup> *Orbanski/Elias*, *supra* note 51; *Therens*, *supra* note 50; *R. v. Thomsen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411 [*Thomsen* cited to S.C.R.]. The latter two cases were decided before *Slaight*. However, they continue to be cited by the Supreme Court of Canada, and *Therens* was relied on by the majority in the more recent *Orbanski/Elias* decision (*ibid.*).

<sup>64</sup> *Highway Traffic Act*, S.M. 1985-86, c. 3, C.C.S.M. c. H60.

details” regarding police officers’ encounters with motorists was “impractical” in a scheme aimed at reducing drinking and driving.<sup>65</sup>

In contrast, the provisions at issue in *Therens* and *Thomsen* involved grants of weak discretion. Officers were required to comply with certain statutory conditions before demanding that a driver take a Breathalyzer test (in *Therens*), or requiring a motorist to provide a roadside breath sample (in *Thomsen*). In each case, the Court interpreted the statutory language to determine whether the officer’s failure to inform the driver of the right to counsel was “necessarily implied” by the enabling legislation. In *Therens*, the majority held the provision was sufficiently open-ended not to necessarily imply denial of counsel. Therefore, the officer’s conduct was not prescribed by law and section 1 was unavailable. The *Charter* challenge succeeded.<sup>66</sup> In *Thomsen*, slightly different wording led the Court to conclude that denial of counsel was necessarily implicit in the provision and the officer’s conduct was prescribed by law.<sup>67</sup> The Crown succeeded in justifying the law under section 1 and the *Charter* challenge failed.<sup>68</sup>

The different analyses applied in these three cases demonstrate how subtle nuances in language can impact the interpretation of grants of weak discretion, thereby skewing the prescribed by law analysis. *Orbanski/Elias* is easily explained under the *Slaight* framework as a scenario-two case, involving an imprecise grant of discretion. *Thomsen* fits the framework as a scenario-one case, in which the enabling provision necessarily implied the power to infringe the motorist’s right to counsel. However, *Therens* does not fit the *Slaight* framework. How could the relatively narrow grant of discretion in *Therens* fail to be prescribed by law where the much broader discretion in *Orbanski/Elias* succeeded? We are left with a curious matrix:

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<sup>65</sup> *Supra* note 51 at para. 43.

<sup>66</sup> S. 235(1) of the *Criminal Code* authorized the officer to demand “forthwith or as soon as practicable” that a driver take a breathalyzer test where the officer had “reasonable and probable grounds” to believe that an offence had been committed “within the preceding two hours” (R.S.C. 1970, c. C-34, s. 235(1), as am. by S.C. 1974-75-76, c. 93, s. 16(1) [*Criminal Code* 1970]). In *Therens*, Le Dain J., for the majority, found that the officer could have arranged for counsel and still have met the two-hour requirement in this provision (*supra* note 50 at 645).

<sup>67</sup> *Supra* note 63. Section 234.1 of the *Criminal Code* 1970 authorized the officer to require a motorist to provide a breath sample “forthwith” by means of a “road-side screening device” (*ibid.*, as am. by S.C. 1974-75-76, c. 93, s. 15). LeDain J. held, this time, that the words “road-side” and “forthwith” were inconsistent with the officer giving the motorist time to contact legal counsel (*Thomsen, ibid.* at 653).

<sup>68</sup> *Ibid.*

Table 1:

<i>Thomsen</i>	More constraints in enabling provision	Provision lying somewhat closer to law end of spectrum	Prescribed-by-law condition met
<i>Therens</i>	Few constraints in enabling provision	Provision lying in middle of law/discretion spectrum	Prescribed-by-law condition not met
<i>Orbanski/Elias</i>	Even fewer constraints in enabling provision	Provision lying much closer to discretion end of spectrum	Prescribed-by-law condition still met

This dichotomy might be explainable if the Court had decided that *Therens* and *Thomsen*, both decided pre-*Slaight*, were no longer of precedential value. But the Court continues to rely on these earlier decisions. The majority in *Orbanski/Elias* cited *Therens* and reasoned that the officer's conduct was prescribed by law because it was "necessarily implicit" in the operating requirements of the statute.<sup>69</sup> This is simply inaccurate. The officer's decision to deny the accused the right to counsel was not necessarily implicit in the provision in the sense commonly understood in a statutory-interpretation exercise. The limit was not precluded by the language of the provision but neither was it included; the officer's conduct was simply an exercise of discretion under neutral enabling legislation, as contemplated by scenario two of the *Slaight* framework.<sup>70</sup>

The inconsistency in these decisions is due to the fact that in each case the Court was required to make a categorical choice as to whether the *Charter* limit was contained within the law or within a discretionary decision, with a completely different prescribed by law analysis depending on the result. In *Therens* and *Thomsen*, both cases of weak discretion, the Court located the *Charter* limit within the law and, accordingly, conducted a statutory interpretation exercise of the standards contained

<sup>69</sup> *Supra* note 51 at para. 43.

<sup>70</sup> LeBel J., dissenting in *Orbanski/Elias*, made this same point, stating that

contrary to the situation in *Thomsen*, the power to request sobriety tests or to put questions to the driver regarding his or her consumption is found nowhere in the statutes, not even implicitly or by giving them a broad interpretation. The operational requirements are not used to interpret the statute but seem to merge into the content of and justification for the common law rule, which, according to the Crown's argument, already exists and would in any event authorize the action of the police officers on the street or at the roadside (*ibid.* at para. 79).

within the law, with no deference to the officer's preliminary interpretation of his or her own scope of authority. In *Orbanski/Elias*, the Court recognized the discretionary nature of the officer's decision and, although it purported to locate the *Charter* limit within the operating requirements of the law, the effect of the analysis was to accord full deference to the officer's own assessment of his authority. The point to recognize in this collection of cases is that the statutory grants of discretion in each differed only in degree, not in nature. Because the Court was constrained by an artificial bright-line boundary between law and discretion, it was unable to apply a consistent analysis taking all three cases into account.

The Court's failure to incorporate a variable conception of discretion in its prescribed by law jurisprudence has also led to inconsistent results and analytical confusion in more traditional administrative weak-discretion cases. The most egregious example is the decision of a deeply divided Court in *Committee for the Commonwealth v. Canada*.<sup>71</sup> At issue was the decision of an assistant manager of an airport to prohibit the applicant political organization from recruiting passersby in the airport. The assistant manager purported to act under section 7 of the *Government Airport Concession Operations Regulations*,<sup>72</sup> which prohibited any "business or undertaking" as well as "advertis[ing] or solicit[ation]" taking place in airports, except as authorized by the minister of transport.<sup>73</sup> Although framed as a prohibition, the provision for ministerial authorization effectively gave the minister broad discretion to regulate these activities. The *Regulations* did not specifically refer to political propaganda. However, the assistant manager relied on an internal directive that interpreted the *Regulations* to prohibit political-propaganda activities. The Court held that the applicant's freedom of expression had been violated and that the prescribed by law condition was not met in the circumstances. Unfortunately, the Court was divided in its approach to the prescribed by law issue and no clear majority decision was reached on this issue.

Justice L'Heureux-Dubé viewed the issue as one of vagueness in the language of the *Regulations* and concluded that the broad language failed to offer an "intelligible standard" allowing citizens to regulate their conduct. She disregarded the administrative process as a meaningful avenue for an individual to determine the scope of the prohibition. One might expect that a letter to the minister seeking an exemption under the *Regulations* would be sufficient for this purpose. Instead, Justice L'Heureux-Dubé's view was that the option of seeking ministerial approval only served to exacerbate the vagueness problem.<sup>74</sup> Her analysis therefore proceeded under

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<sup>71</sup> *Supra* note 51.

<sup>72</sup> S.O.R./79-373 [*Regulations*].

<sup>73</sup> *Ibid.*, s. 7.

<sup>74</sup> *Committee for the Commonwealth*, *supra* note 51 at 209-15. L'Heureux-Dubé J. added a final, brief paragraph indicating that the same conclusion applied to the policy of the government (*ibid.* at 215). The internal directive and the government's decision showed that the policy "was clearly that practically no form of expression would be permitted on the Dorval Airport premises" (*ibid.* at 224).

scenario one of the *Slaight* framework, but because of the vagueness of the provision, a statutory-interpretation exercise was impossible and the law was held to be unconstitutionally vague.

Justice L'Heureux-Dubé's reasoning turned on the fact that section 7 of the *Regulations* was phrased as a prohibition subject to ministerial exemptions, rather than as a positively worded conferral of regulatory power on the minister. This choice of language meant that the limit on freedom of expression was express on the face of the *Regulations*. She explained:

When a law can be read, in effect, as an attempt to eradicate all types of expression, and at the same time be read more narrowly to exclude only certain types of expression, the citizen does not know what to do. In all likelihood, the person will exercise caution.<sup>75</sup>

Justice L'Heureux-Dubé's vagueness analysis might well have proceeded differently in the case of a slightly altered provision, even one having exactly the same administrative effect. For example, compare the following two provisions: first, the real text of section 7 of the *Regulations*, and second, a hypothetical alternative:

7. ... except as authorized in writing by the Minister, no person shall
- (a) conduct any business or undertaking, commercial or otherwise, at an airport;
  - (b) advertise or solicit at an airport on his own behalf or on behalf of any person; ...<sup>76</sup>
7. An application to conduct any business or undertaking, commercial or otherwise, or to advertise or solicit on one's own behalf or on behalf of any person, shall be made to the Minister, who may allow such activities subject to any conditions that the Minister considers to be just and equitable.

The second provision would not limit freedom of expression per se but, instead, would confer discretion on the minister to regulate the business carried out in airports. This alternative wording bears closer resemblance to the provision at issue in *Slaight*.<sup>77</sup> Justice L'Heureux-Dubé's analysis in *Committee for the Commonwealth* can only be reconciled with *Slaight* if there is some meaningful distinction to be drawn between these two versions of section 7—if it is somehow significant that the first is worded restrictively, as a prohibition subject to exceptions, and the second is worded affirmatively. But in both cases, the scope of discretion accorded to the minister is exactly the same. And in both cases, the individual is required to engage in the administrative process before he or she can practically ascertain whether or not

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However, she chose not to rest her decision on this "as applied" approach but held instead that the *Regulation* itself failed the prescribed by law condition (*ibid.* at 225).

<sup>75</sup> *Ibid.* at 213.

<sup>76</sup> *Supra* note 72.

<sup>77</sup> *Code*, *supra* note 53.

his or her freedom of expression is to be limited. No logical distinction can be drawn between these two provisions.<sup>78</sup>

Justice L'Heureux-Dubé's reasoning demonstrates how difficult it is in practice to determine whether, or the extent to which, a legislative provision is intended to confer discretion onto an administrative delegate. Although there is no principled distinction between the language adopted in section 7 of the *Regulations* and the hypothetical alternative, the semantic difference may influence the determination of whether or not the provision is prescribed by law under section 1.

The arbitrariness of the *Slaight* framework is further demonstrated in the divergent analyses adopted by Chief Justice Lamer and Justice McLachlin in *Committee for the Commonwealth*.<sup>79</sup> Chief Justice Lamer effectively chose scenario two under the *Slaight* framework. He decided that section 7 was capable of a sensible construction but, in his view, the provision did not give the minister the power to prohibit non-commercial undertakings such as the political propaganda activities of the plaintiffs.<sup>80</sup> Therefore, the assistant manager had exceeded his statutory authority by applying the directives and his decision was not prescribed by law.<sup>81</sup>

In her reasons, Justice McLachlin took yet a third approach to the prescribed by law analysis. She interpreted section 7 of the *Regulations* more broadly than did Chief Justice Lamer, but unlike Justice L'Heureux Dubé, she did not find the provision to be unconstitutionally vague. Instead, she shifted to an administrative discretion analysis and away from section 7 altogether. In this sense, she also

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<sup>78</sup> This same semantic distinction likely explains the incorrect reasoning in the *Ontario Film* decision (*supra* note 50). David Mullan has attempted to reconcile the *Charter* cases involving administrative discretion by distinguishing between cases involving discretionary provisions that "trad[e] explicitly in *Charter* rights and freedoms" and those involving more neutrally worded discretionary provisions. See "The *Charter* and Administrative Law" (The Isaac Pitblado Lectures, delivered at The University of Winnipeg, 23 November 2002), in *The Charter: Twenty Years and Beyond* (Winnipeg: The Fort Garry, 2002), c. X at X-24 to X-27). In my view, this distinction describes the problem rather than providing its solution. As the example above illustrates, a slight change in wording can be effective to mask an intended *Charter* limit, causing functionally similar provisions to be analyzed differently under the prescribed by law condition.

<sup>79</sup> *Supra* note 51.

<sup>80</sup> *Ibid.* at 159-64. Lamer C.J.C. applied the presumption of constitutionality in support of this narrow interpretation. He essentially read down the *Regulations* (*supra* note 72) to bring them in line with the *Charter*. The technique of reading down is more commonly used to remedy *Charter* violations held to be unjustifiable under s. 1 of the *Charter*. Lamer C.J.C. used it to prevent a s. 1 analysis from taking place. This is circular reasoning: "s. 7 of the *Regulations* is deemed to be constitutional, therefore the minister's decision does not fall under s. 7, therefore the decision is not constitutional."

<sup>81</sup> *Ibid.* at 164. Although Lamer C.J.C. did not adopt the language of administrative jurisdictional error, it can be inferred from his reasons that he applied a correctness standard of review and concluded that the assistant manager's decision was ultra vires. In other words, both the minister's own interpretation of the provision as set out in the directive and the assistant manager's decision to apply the directive were irrelevant to his analysis.

effectively chose scenario two under the *Slaight* framework.<sup>82</sup> However, Justice McLachlin found that the assistant manager had been acting within his discretionary authority and this was sufficient to meet the prescribed by law test. She concluded with a warning against interpreting the prescribed by law condition too strictly:

From a practical point of view, it would be wrong to limit the application of s. 1 to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under s. 1. In my view, such a technical approach does not accord with the spirit of the *Charter* and would make it unduly difficult to justify limits on rights and freedoms which may be reasonable and, indeed, necessary.<sup>83</sup>

We are left with the availability of a section 1 justification depending on this highly arbitrary choice of whether the case involves law or discretion. Because Justice L'Heureux-Dubé located the *Charter* limit in the law, her prescribed by law analysis proceeded very differently than did Chief Justice Lamer's analysis. Although both judges concluded that the prescribed by law test was not met on the facts, this consistent outcome was merely fortuitous. Like Chief Justice Lamer, Justice McLachlin located the *Charter* limit in the assistant manager's discretion. However, her reasoning led to the opposite result. The grant of authority in *Committee for the Commonwealth* was a classic example of weak discretion constrained by statutory conditions that must be interpreted and applied by administrators in order to give effect to the provision. As a result of the *Slaight* framework and its categorical distinction between law and discretion, the Court vacillated between viewing this power as either pure law or pure discretion, with no option in between and with a deeply divided outcome as a result.<sup>84</sup>

This same problem has continued to plague the Court in more recent *Charter* cases involving weak discretion, albeit in a remedial context. The *Slaight* framework has created such confusion that plaintiffs have learned to plead that both a particular administrative decision *as well as* the underlying enabling legislation have infringed their *Charter* rights.<sup>85</sup> In this way, both analytical options are engaged and there is no

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<sup>82</sup> *Ibid.* at 244. McLachlin J.'s reasoning is consistent with scenario two under the *Slaight* framework, although she chose to focus on the discretionary authority granted to the Crown as property owner under the *Civil Code of Quebec*, rather than the discretionary grant of authority under s. 7 of the *Charter*. It may be that McLachlin J. was reluctant to interpret s. 7 as a statutory grant of discretion simply because it was worded on its face as a prohibition subject to an administrative exception rather than as a direct grant of discretion. As I argue above, this is a distinction without a difference but one leading to very different outcomes on the prescribed by law analysis.

<sup>83</sup> *Ibid.* at 245.

<sup>84</sup> Marc Ribeiro also identifies *Committee for the Commonwealth* (*ibid.*) as an example of the problematic tendency of courts to confuse vagueness and discretion. However, Ribeiro himself adopts an oversimplified concept of discretion by describing this case as involving "no norms at all" (*supra* note 41 at 128).

<sup>85</sup> This was the case both in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (2000 SCC 69, [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193 [*Little Sisters*]) and *Suresh* (*supra* note 4). Before *Little Sisters*, the choice of whether to locate an alleged limit on *Charter* rights in a law or a

need for the Court to make a choice under the *Slaight* framework for the purpose of applying the prescribed by law condition. However, the same choice arises again, later on in the *Charter* analysis, when the time comes to grant a remedy. Here again, the Court remains deeply divided.<sup>86</sup>

### **E. A Purposive Approach to the Prescribed by Law Condition**

The incoherence of the prescribed by law jurisprudence illustrates how the categorical distinction between law and discretion required by the *Slaight* framework breaks down in any case where the exercise of weak discretion results in an alleged limitation of *Charter* rights. The problem is that a conceptual demarcation between law and discretion is simply not possible, except at the extremes of the law/discretion spectrum. All limitations of *Charter* rights necessarily occur as a result of some combination of legal authority and discretionary application. This is why vague law has periodically been confused with administrative discretion. In one sense, laws conferring broad administrative discretion *are* vaguely worded, and in turn, vague laws allow for broad law-enforcement discretion.

However, it remains essential to distinguish between law and discretion for the purpose of *Charter* review, both in order to carry out the prescribed by law analysis in section 1, as well as at several other stages in the *Charter* analysis. This is because the theory behind the judicial review of *Charter* limits in law is incompatible with the theory behind the review of administrative discretion.

In the case of a vaguely worded law, the court proceeds on the theory that the legislature intends to create meaningful standards for regulating conduct. Because language is inherently imprecise, the intended meaning of these standards may be lost when they are translated into legislative form. In other words, vague laws represent legislative failure, and the court's role is to apply the principles of statutory interpretation to discover lost legislative intent or, where this is not possible, to strike

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discretionary decision seems to have been made most often by plaintiff's counsel in framing the pleadings, and courts had often simply followed counsels' lead. This seems to have been the case before the lower courts in *Eldridge*, for example. The constitutional questions stated on appeal to the Supreme Court of Canada made no reference to the possibility that the *Charter* limit was contained in the government's discretionary decision rather than in the enabling legislation (*supra* note 51 at para. 17). The Court ultimately held otherwise.

<sup>86</sup> In *Little Sisters*, the Court was split six to three over the issue of whether the *Charter* remedy should be limited to the specific decisions found to have caused the *Charter* infringement, or whether the underlying legislation should be struck down (*ibid.*). In *Suresh*, the Court directed its *Charter* analysis at both the legislation and the minister's decision, but it defined the remedial issue solely in terms of the minister's decision (*supra* note 4 at para. 25). Furthermore, the Court's two-pronged analysis in *Suresh* led into contradiction. On the one hand, the Court held it appropriate to accord deference to the minister's decision (*ibid.* at paras. 39, 41). On the other hand, by undertaking its own interpretation of the legislation in the abstract, the Court essentially repudiated the minister's discretionary role in carrying out this interpretive exercise on an "as applied" basis (*ibid.* at paras. 80-99).

the law down under the vagueness doctrine.<sup>87</sup> The focus of this exercise is whether or not the enabling provision can be given a sensible construction in the abstract. In this sense, it is a forward-looking exercise. No consideration is given to how the law has been interpreted and applied by the delegate charged with its application.

When a court is faced with an express conferral of administrative discretion, the theory of the court is that the legislature purposively left the provision open-ended. The legislature intended to leave some role in the creation of standards to the delegate, whether because of a desire for flexibility, technical expertise, or some other reason.<sup>88</sup> There is no legislative failure in this case but, rather, an intentional delegation, and the role of the court is to determine the exact scope of the delegate's authority. This will involve a statutory interpretation exercise, but unlike the case of law, this interpretive role may involve some degree of deference to the delegate's preliminary decision under the principles of administrative law. Furthermore, the law is interpreted in the specific context of the decision taken by the delegate. In other words, the court engages in a backward-looking exercise with the benefit of a real-life example.

The different theories about vague laws and administrative discretion have important implications for *Charter* review. I have noted that one such implication is remedial. In cases involving an express grant of administrative discretion, the court must make an initial choice whether to direct its analysis at the law granting discretionary authority (facial review) or at the decision made under the law (as applied review).<sup>89</sup> If the *Charter* analysis is applied to the legislation itself, a finding of infringement renders the law of no force and effect under section 52 of the *Constitution Act, 1867*.<sup>90</sup> If, however, the analysis is applied to the discretionary decision, the resulting remedy may be directed at the decision with the legislation remaining intact.<sup>91</sup> Of course, the constitutional remedy available in the case of an unconstitutionally vague law is necessarily directed at the law itself.

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<sup>87</sup> Of course, the presumption that legislative intent exists is often a fiction. Legislators may equally choose to use open-textured language in order to leave flexibility in the interpretation of a provision. See e.g. La Forest J.'s dissent in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference Re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* ([1997] 3 S.C.R. 3 at 181, 156 Nfld. & P.E.I.R. 1) and John Willis' delightfully pragmatic description of legislative intent in "Statute Interpretation in a Nutshell" (1938) 16 Can. Bar Rev. 1 at 3-4). The fiction of legislative intent has been considered necessary in order to provide constitutional legitimacy to the judiciary in ascribing meaning to statutory law.

<sup>88</sup> One of my S.J.D. colleagues, Kristen Rundle, has astutely described the difference thus: statutory interpretation works toward uniformity in the application of a rule, whereas discretion is an acknowledgement of variety in the application of a rule.

<sup>89</sup> See text accompanying note 54.

<sup>90</sup> (U.K.), 30 & 31 Vict., c. 3, s. 52, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>91</sup> For a discussion of the remedial issues arising from the distinction between *Charter* limits in law and those in discretionary decisions, see Rogerson, *supra* note 40; Ross, *supra* note 6. Choudhry & Roach have argued that the remedy of striking down legislation under s. 52(1) of the *Constitution Act*,

We have seen that the distinction in how courts approach vague laws and administrative discretion under the *Charter* is also crucial in applying the prescribed by law condition. Here, the distinction leads to diametrically opposite results. In the case of a vague law, the presumed legislative intent is to prevent vagueness in meaning. Therefore, the more detailed is the language contained in the provision, the more likely it is that the law will meet the intelligible standard test and, accordingly, be prescribed by law. However, if the court characterizes the same case as one involving administrative discretion, the presumed legislative intent is to allow the delegate to act within the boundaries of his or her statutory authority. Therefore, the more detail contained in the provision, the more constrained is the grant of discretion, and the *less* likely it is that the decision will be prescribed by law.

The conceptual distinction between vagueness and administrative discretion becomes muddled in weak-discretion cases, where legislative intent is not clear. Here, the legislature essentially hedges its bets by granting some degree of statutory authority to a delegate to interpret the law but stopping short of an express conferral of discretion. In these cases, it becomes difficult to determine whether the legislature intended the meaning of the law to be determined by the judiciary or by the delegate. Courts are left with no clear direction on the extent to which they are to apply a straight statutory-interpretation analysis to the law and the extent to which they must defer to the delegate's own interpretation.

How, then, does one differentiate between *Charter* limits in law and in discretion for the purpose of *Charter* review? A line must be drawn somewhere along the law/discretion spectrum, so that *Charter* limits on one side may be reviewed as law and those on the other side may be reviewed as discretion. The question becomes how best to draw this line given the reality that law and discretion will blend into one another in the middle ground.

In my view, the best approach is one that attempts to keep faith with the different purpose fulfilled by the prescribed by law analysis in each context. Where the legislature has chosen to delegate a decision-making function to an administrative official, then regardless of the particular mix of statutory standards and discretion contained in the enabling legislation, the purpose of the prescribed by law analysis is to ensure that the decision maker acts within the scope of his or her authority. This is an entirely different role from that played by the prescribed by law analysis in the context of a law for which the court seeks to ascribe meaning to legal standards. If these different purposes of the prescribed by law analysis are kept in mind, then the court's initial choice between reviewing a *Charter* limit as law or as discretion becomes somewhat more predictable.

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1867 should be available even where a *Charter* violation results from a discretionary decision (*supra* note 6 at 18-22). Pottie & Sossin propose that soft-law instruments be given legal status for the purpose of *Charter* scrutiny, again in order to make s. 52(1) available to remedy such cases (*supra* note 24). See also Sossin, *supra* note 6.

Under a purposive approach to the prescribed by law condition, the initial question to be asked in a *Charter* case is whether the law at issue was intended to be interpreted by the court, or whether it was intended, preliminarily at least, to be interpreted and applied by an administrative delegate. If the former, then the law meets the prescribed by law condition so long as it is not unconstitutionally vague according to the intelligible standard test. If the latter, then the prescribed by law condition becomes an issue of statutory authority in administrative law.

Only where the legislature has intended for statutory standards to be conclusively interpreted by the courts should the analysis be one of vagueness. When an administrative delegate is granted any degree of administrative discretion, no matter how constrained by statutory standards, the prescribed by law analysis is one for administrative law. The focus must be on the administrative decision itself rather than the legislative provision, and the issue for the court is whether or not the decision was statutorily authorized. This determination will require a statutory interpretation of the enabling provision and any standards set out therein. But this exercise must be conducted through the lens of the standard-of-review analysis so that an appropriate degree of deference is applied to the administrator's own interpretation and application of the law.

The standard-of-review analysis was developed specifically because the legislature sometimes intends that deference be given to its delegate's interpretation and application of his or her enabling statute. Practically speaking, most cases of administrative discretion never reach the courts, and most individuals whose lives are affected by administrative activity never have the benefit of a judicial interpretation of enabling legislation. For those individuals, the delegate's own interpretation of the legislation *is* the law. Where that decision results in a limitation of *Charter* rights, then the prescribed by law analysis must focus on that decision.

Of course, this purposive approach to the distinction between law and discretion can never entirely eliminate the problem of weak discretion. At the heart of the distinction remains the problem of identifying legislative intent. Legislative intent itself becomes indeterminable in the middle ground of the law/discretion spectrum. However, by adopting a purposive approach, courts at least lay bare the theory hidden under the categorical *Slaight* framework, so that the appropriate prescribed by law analysis becomes much clearer. The application of a purposive approach to the weak-discretion cases discussed above is relatively straightforward. *Ontario Film, Committee for the Commonwealth, Suresh*, and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* were all administrative discretion cases because the legislation in each case expressly designated an administrative delegate charged with applying the legislative scheme.<sup>92</sup> In contrast, decisions such as *Irwin Toy Ltd. v.*

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<sup>92</sup> *Ontario Film*, *supra* note 50; *Committee for the Commonwealth*, *supra* note 51; *Little Sisters*, *supra* note 85). I would also argue that the three police cases, *Therens* (*supra* note 50), *Thomsen* (*supra* note 63), and *Orbanski/Elias* (*supra* note 51) were best analyzed as administrative discretion

*Quebec (A.G.)*<sup>93</sup> and *Osborne* involved legislation setting out statutory standards without any express delegation of the responsibility to apply them.<sup>94</sup> These were best dealt with as *Charter* limits involving law.

A purposive approach to the prescribed by law analysis would likely result in a greater number of weak discretion cases being treated as *Charter* limits involving discretion rather than *Charter* limits in law. In other words, the effect would be to shift the analytical dividing line between law and discretion toward the law end of the spectrum so that more cases would fall within the discretion side of the boundary. The prescribed by law analysis in these cases would then turn on an administrative law inquiry about statutory authority, with some degree of judicial deference applied. In my view, the result would be to fine-tune the balance between judicial and executive power, making it commensurate with the realities of the twenty-first-century administrative state.<sup>95</sup>

Some administrative law scholars have argued in favour of shifting the boundary between law and discretion in the opposite direction, by expanding the notion of law to include cases falling along the middle ground of the spectrum. For example, Lorne Sossin argues that soft-law instruments used to structure discretionary decision making should themselves be subject to *Charter* scrutiny.<sup>96</sup> The possibility of striking down infringing soft law instruments would be helpful, particularly in social-welfare cases, which too often go unremedied.

Although Sossin's proposal is aimed specifically at the issue of remedy, it would also assist in rationalizing the prescribed by law jurisprudence by clearly allocating into the law category those weak-discretion cases involving policy guidelines. However, this would be a partial solution at best. Ultimately, Sossin's proposal remains a categorical approach, albeit one with redefined categories. The question would eventually arise: where does soft law end and discretion begin? The addition

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cases. In contrast to a more typical law-enforcement decision, the decisions by the police officers in *Therens*, *Thomsen*, and *Orbanski/Elias* were not merely decisions to refer a matter to be decided by another authority. These were true administrative discretionary decisions in the sense that the legislation delegated primary decision-making authority to the officers.

<sup>93</sup> [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

<sup>94</sup> *Ibid.*; *Osborne*, *supra* note 42.

<sup>95</sup> I refer here to the perennial debate among administrative law theorists about the role of deference in the judicial review of government action. The prevailing position is one of "deference as respect" rather than "deference as submission", which roughly translates to relatively less deference, particularly where human rights are engaged. See David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart, 1997) 279; Mullan, "Deference", *supra* note 31. The analytical shift I am proposing in the prescribed by law analysis would require a relatively minor but conceptually important step in the opposite direction. In *Suresh*, for example, the prescribed by law analysis would turn on the reasonableness of the minister's deportation order in relation to her statutory authority, rather than on the intelligibility of the enabling provision in the abstract. The extension of deference to the prescribed by law inquiry in such cases should not typically affect the availability of a s. 1 justification.

<sup>96</sup> Sossin, *supra* note 6 at 479-83; Pottie & Sossin, *supra* note 24.

of soft law to the possible locations for situating *Charter* limits actually illustrates the weakness of the categorical approach. Sossin discusses the example of *Little Sisters*, where the majority of the Court located the *Charter* limit in the discretionary decisions of customs officers. In contrast, the minority would have located the *Charter* limit in the enabling customs legislation. Sujit Choudhry & Kent Roach have argued in favour of the minority approach.<sup>97</sup> Sossin would have located the *Charter* limit in the guidelines.<sup>98</sup> The controversy itself demonstrates that there is no longer a clear consensus on what constitutes law. This problem is not limited to the *Charter* context, but is a more fundamental problem of administrative law theory and, I suggest, should be addressed within this theoretical framework.<sup>99</sup>

The example of prescribed by law jurisprudence informs our understanding of the relationship between the *Charter* and administrative law more generally. A categorical approach to this relationship will not succeed in harmonizing the principles of Canadian public law any more than it has succeeded within the prescribed by law context. The *Multani* decision demonstrates that the categorical approach continues to be favoured by a minority of the Supreme Court of Canada. Furthermore, it is not clear that the majority appreciates the broader implications of its purposive approach. I now turn to a discussion of *Multani* and to my argument that the majority's purposive approach, if consistently applied to administrative decisions along the law/discretion spectrum, would succeed in rationalizing the conceptual relationship between the *Charter* and administrative law.

### III. A Purposive Relationship Between the *Charter* and Administrative Law

There are a number of points in addition to the prescribed by law condition at which *Charter* review and administrative law review may overlap. *Multani* turned on another point of intersection—the analysis to be applied in determining whether a discretionary decision does, in fact, limit a *Charter* right.<sup>100</sup> *Multani* involved a school board's discretionary decision to prohibit a Sikh student from wearing his kirpan, a ceremonial dagger, to school. The law governing the school board did not address the issue of weapons, ceremonial or otherwise, but there was no question that the board's decision was authorized under its jurisdiction to approve “rules of conduct” and “safety measures”.<sup>101</sup> The student and his family challenged the decision as an

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<sup>97</sup> *Supra* note 6.

<sup>98</sup> *Supra* note 6.

<sup>99</sup> This issue is one focus of my current doctoral work.

<sup>100</sup> *Supra* note 2

<sup>101</sup> The law at issue in *Multani* (*ibid.*) was s. 76 of Quebec's *Education Act*, which provides in part, “The governing board is responsible for approving the rules of conduct and the safety measures proposed by the principal” (R.S.Q. c. I-13-3, s. 76). The board's *Code de vie* approved pursuant to this provision prohibited the carrying of weapons or dangerous objects. The *Code de vie* appears to have

infringement of his freedom of religion. The Supreme Court of Canada was unanimous in allowing the challenge and striking down the board's decision but was sharply divided on the analytical framework to be applied in reaching this result.<sup>102</sup>

Justice Charron, writing for a five-member majority of the Court, held that even though the case involved an administrative decision rather than a law, a *Charter* analysis rather than an administrative law analysis should be adopted in determining whether or not the *Charter* violation was established. The central issue in the case was whether or not the board's decision complied with the requirements of the *Charter*. As such, it was inappropriate to apply an administrative law standard of review in determining this issue. Justice Charron warned against constitutional law standards being "dissolved into ... administrative law standards."<sup>103</sup>

Justices Deschamps and Abella wrote a minority opinion taking an entirely different analytical path to the same conclusion. They determined that an administrative law review should be conducted instead of a *Charter* review because the instrument being assessed by the Court was an administrative decision rather than a "norm of general application",<sup>104</sup> such as "a law, regulation, or other similar rule of general application."<sup>105</sup> In their view, laws cannot be equated with decisions, and an administrative law analysis is important in the case of the latter in order to prevent the erosion of the specific analytical tools developed by the Court in response to administrative decision making. The minority would have chosen a standard of review of reasonableness, but would have applied this standard to hold that the board's decision to disregard the student's freedom of religion was unreasonable in the circumstances. According to the minority, the deferential standard of review applied in reviewing the board's decision stood in place of a section 1 analysis under the *Charter*.

The opposing analytical paths chosen by the majority and minority judges in *Multani* have brought to a head the long-standing need for a coherent theory governing the relationship between the *Charter* and administrative law. The minority opinion makes it clear that any such theory must recognize and accommodate the conceptual tension existing between law and discretion.

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been a non-binding 'soft law' instrument. See Sossin, *supra* note 6 at 466-67; Pottie & Sossin, *supra* note 24.

<sup>102</sup> The majority decision applying a constitutional analysis was written by Charron J. and adopted by McLachlin C.J.C., and Bastarache, Binnie, and Fish JJ. (*ibid.* at paras. 1-83). Deschamps, Abella, and LeBel JJ. concurred in the result but wrote two separate minority reasons. Deschamps and Abella JJ. would have applied an administrative law analysis to reach the same decision (*ibid.* at paras. 84-139). LeBel J. essentially agreed with the majority that a constitutional analysis was appropriate but would have tweaked the *Oakes* test slightly in cases involving administrative decisions (*ibid.* at paras. 140-55).

<sup>103</sup> *Ibid.* at para. 16.

<sup>104</sup> *Ibid.* at para. 103.

<sup>105</sup> *Ibid.* at para. 85.

The two possibilities offered by the majority and minority judges encapsulate the same purposive and categorical approaches discussed in relation to the prescribed by law condition. Although not expressly described as such, Justice Charron's decision to apply a *Charter* analysis to the issue of infringement was based on a purposive approach to the relationship between the *Charter* and administrative law. In her view, the role of *Charter* review is to define the scope of the protection of rights and freedoms guaranteed by the *Charter*.<sup>106</sup> The role of administrative law review is to determine whether or not administrative decision makers have acted within the jurisdiction set out in their enabling legislation.<sup>107</sup> The analysis to be applied depends on the primary reason why the judicial-review exercise is before the Court.<sup>108</sup>

In contrast, the minority opinion posited a categorical relationship between the *Charter* and administrative law, which would turn on the type of government activity at issue. In their opinion, the analysis developed under the *Charter* is intended only to address norms or rules of general application. Administrative law is intended to address individual adjudicative decisions. Therefore, where an alleged limitation of *Charter* rights is at issue, the applicable analysis should depend on whether the limit results from a law or from an administrative decision.<sup>109</sup>

The minority's categorical approach should appear familiar. It relies on the same bright-line distinction between law and discretion that has proved so disastrous in the prescribed by law context, and it is unworkable here for the same reason.<sup>110</sup> In fact, the minority itself had difficulty articulating the categorical distinction on which it relied. It is unclear, for example, whether the minority would have included non-binding policy instruments within the definition of "law".<sup>111</sup> Justices Deschamps and Abella suggested in their conclusion that, had a provision of the *Code de vie*, the school's code of conduct, been challenged by the applicant, a section 1 analysis would have been appropriate.<sup>112</sup> Assuming that the *Code de vie* was a policy instrument, the minority is suggesting that soft law should have legal status for *Charter* purposes, a position that is contrary to the Court's decision in *Little Sisters*.<sup>113</sup> Whether or not this is what the minority intended, the point is that some ambiguity is already apparent. Soft law lies somewhere along the law/discretion spectrum and is categorically neither one, nor the other.

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<sup>106</sup> *Ibid.* at para. 16.

<sup>107</sup> *Ibid.* at paras. 18-19.

<sup>108</sup> Of course, one may lead to the other, since an administrative decision that violates a *Charter* right and is not justified under s. 1 will, for that reason alone, be statutorily unauthorized.

<sup>109</sup> *Multani*, *supra* note 2 at para. 128.

<sup>110</sup> The minority's reference to *Therens* (*supra* note 50) and to articles dealing with statutory vagueness also suggests that it confuses administrative discretion with statutory vagueness, although this confusion is not clear from the reasons (*ibid.* at paras. 114-17).

<sup>111</sup> See e.g. *ibid.* at paras. 85, 103, 112.

<sup>112</sup> *Ibid.* at para. 138.

<sup>113</sup> This position would, however, be in line with the approach argued for by Sossin (*supra* note 6).

If the minority intended to restrict the definition of law to legally enforceable instruments in line with the Court's holding in *Little Sisters*, then it would have drawn the analytical boundary between law and discretion very close to the law end of the spectrum. In any case where a law contemplates some residual discretionary authority to be exercised by a delegate, no matter how minor, a section 1 analysis would be replaced by administrative law review. This approach would leave relatively few *Charter* cases to be dealt with under the *Oakes* balancing test, and it strikes a false chord when considered alongside the more expansive view of the *Charter* expressed by the Court in other contexts.

The problem with the minority's reasoning is not only *where* they would draw the line between law and discretion but, also *how* they would define this distinction:

An administrative body determines an individual's rights in relation to a particular issue. A decision or order made by such a body is not a law or regulation, but is instead the result of a process provided for by statute and by the principles of administrative law in a given case. A law or regulation, on the other hand, is enacted or made by the legislature or by a body to which powers are delegated. The norm so established is not limited to a specific case. It is general in scope.<sup>114</sup>

Elsewhere, the minority described administrative law review as "microcosmic" and limited to the needs of individuals. In contrast, *Charter* review is based on "societal interests".<sup>115</sup>

These are each surprisingly simplistic descriptions of our modern administrative state, which ignore the coexistence of law and discretion. The minority would presumably draw an analytical boundary somewhere along the law/discretion spectrum based on the quantity, rather than the quality, of interests at stake. Only collective interests would benefit from directly engaging *Charter* values. But again, this point is not conceptually determinable. How would *Suresh* have been dealt with under this reasoning? Strictly speaking, the case involved a discretionary decision affecting an individual's interest in avoiding deportation. However, the law granting this authority, by imposing key statutory conditions, constrained the minister's discretion to such an extent that, in deciding the case, the Court focused almost exclusively on the law itself. Are the interests at stake here individual or collective?

Another interesting testing ground for the minority approach is the *Orbanski/Elias* decision. There, the Court located the *Charter* limit within the law but in effect recognized the need for police to exercise discretion in carrying out their duties.<sup>116</sup> Again, it is impossible to say whether the interests at stake were individual or collective. The variable relationship between law and discretion makes a bright-line distinction between collective norms and individual application nonsensical.

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<sup>114</sup> *Multani*, *supra* note 2 at para. 112.

<sup>115</sup> *Ibid.* at para. 132.

<sup>116</sup> *Supra* note 51.

The minority warns against blurring the distinction between the principles of constitutional justification and the principles of administrative law. However, this is exactly what occurs when a categorical distinction is drawn between law and discretion, rather than focusing on the purpose of the judicial-review exercise taking place.<sup>117</sup> The purpose of the *Charter* is to scrutinize the content of a law or decision in order to protect fundamental values. The purpose of administrative law is to scrutinize the relationship between a government decision and its legislative antecedent in order to protect democratic accountability. Where a decision affecting fundamental rights or freedoms is made by someone other than the legislature, it is the task of administrative law to ensure that it was statutorily authorized. Once this is established, then the identity of the decision maker should no longer matter for the purpose of the rights analysis under the *Charter*. As Justice Charron explained:

[I]t is of little importance to Gurbaj Singh—who wants to exercise his freedom of religion—whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule.<sup>118</sup>

This purposive relationship between the concerns of the *Charter* and administrative law is implicit throughout the majority decision. *Charter* review is intended to identify rights violations, aside from the form of government activity responsible. Administrative law review is intended to determine whether statutory delegates are acting within the scope of their authority, aside from the impact of this action on *Charter* rights.

Unfortunately, the issue of statutory authority did not arise in *Multani*; thus, we do not yet have the benefit of seeing Justice Charron's framework applied in a factual context. Furthermore, regardless of the strong majority achieved in the *Multani* decision, there is good reason to be concerned that the majority has not fully appreciated the implications of its decision for future cases involving the exercise of weak discretion. For example, although the majority referred to the *Slaight* decision several times with approval, it failed to appreciate that *Slaight* is inconsistent with its analysis in an important respect. Recall that *Slaight* was also a relatively straightforward case involving broad discretionary power. Both Justice Lamer and Chief Justice Dickson, for the majority in *Slaight*, instinctively applied a purposive approach in those circumstances by addressing the arbitrator's statutory authority on an administrative law analysis before turning to the *Charter* analysis.<sup>119</sup> However, we have seen that *Slaight* simultaneously calls for a categorical methodology to be applied to weak discretion cases where it is not clear whether an administrative decision or legislation is at issue.<sup>120</sup> The upshot is that the Court has provided consistent precedent for the application of a purposive approach to alleged *Charter*

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<sup>117</sup> *Multani*, *supra* note 2 at para. 85.

<sup>118</sup> *Ibid.* at para. 21.

<sup>119</sup> *Supra* note 39 at 1076-78, Lamer J.; *ibid.* at 1047-48, Dickson C.J.C.

<sup>120</sup> See Part II.C, above.

limits involving strong discretion. But it has not yet taken the next logical step of extending this approach to the burgeoning range of midpoints existing along the spectrum between law and discretion.

Notwithstanding this lingering confusion, if the majority approach in *Multani* were applied consistently to *Charter* cases involving administrative decisions throughout the law/discretion spectrum, I suggest that it would resolve much of the existing analytic confusion in the relationship between administrative law and the *Charter*. However, there are additional obstacles to overcome. Some administrative law scholars seemingly reject a purposive relationship between administrative law and the *Charter*. For example, David Mullan suggests that the majority approach in *Multani* may leave administrative law with an insufficient role to play in reviewing *Charter* violations.<sup>121</sup> I disagree for the reason expressed by Justice Charron in her quote above. The rights-based analysis intended by the *Charter* should not depend on administrative formalities, such as whether the alleged infringement is a matter of law or discretion, particularly as these are often inextricably intertwined.

In addition, instead of undermining administrative law, a purposive relationship between the *Charter* and administrative law actually operates to preserve the domain of administrative law from incursions by the *Charter*. A clear appreciation for the role of administrative law in protecting democratic accountability would obviate attempts to have the *Charter* fill this purpose. For example, Choudhry & Roach argue that *Charter* violations carried out by discretionary decision makers should be remedied by striking down the enabling legislation rather than merely the decision.<sup>122</sup> Their view is that only in this way can government be forced to enact clear legislative provisions prohibiting discriminatory action on the part of its delegates. I share the desire to prevent a situation where governments may “‘go underground’ and implement many of their constitutionally controversial measures through discretionary decision making, out of sight of the democratic process.”<sup>123</sup> However, I disagree that the *Charter* was intended to be the primary vehicle for fulfilling this purpose. This problem calls into question the sufficiency of statutory authority as a means of controlling discretionary power—a concern that lies at the heart of administrative law. As Justice Charron stated in *Multani*, we must be on guard to prevent confusion between the fundamental rights and freedoms guaranteed by the *Charter* and “mere” administrative law principles.<sup>124</sup>

Martha Jackman also looks to the *Charter* to address what is properly a concern for administrative law.<sup>125</sup> Jackman argues that the *Oakes* test in section 1 of the

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<sup>121</sup> Mullan, “After *Multani*”, *supra* note 6.

<sup>122</sup> *Supra* note 6.

<sup>123</sup> *Ibid.* at 7.

<sup>124</sup> *Multani*, *supra* note 2 at para. 16. LeBel J. echoed this caution in his minority opinion (*ibid.* at para. 151).

<sup>125</sup> Martha Jackman, “Protecting Rights and Promoting Democracy: Judicial Review under Section 1 of the *Charter*” (1996) 34 *Osgoode Hall L.J.* 661.

*Charter* should be applied to promote democratic values. More deference should be applied to the section 1 justification exercise when the government has proved that it decided on a *Charter* limit only after significant consideration of the policy trade-offs at issue. Jackman extends this argument to cases involving *Charter* limits expressly contained in legislative provisions, in addition to those clearly contained in discretionary decisions.<sup>126</sup>

I suggest that, like Choudhry & Roach, Jackman asks too much from the *Charter* and, correspondingly, expects too little from administrative law. The democratic values at play where a *Charter* limit is contained in a law are fundamentally different from those at play where a *Charter* limit is contained in a discretionary decision. In the latter case, administrative law exists for the very purpose of protecting democratic accountability. Whether or not administrative law principles are successful for this purpose may be questioned, but this debate is one properly addressed within administrative law itself, rather than being usurped by an extension of *Charter* doctrine.

## Conclusion

Twenty-six years ago, the introduction of the *Charter* significantly expanded the role of the judiciary in reviewing both legislative and administrative action. Ever since, the *Charter* has exerted a powerful pull over any case that calls either into question. But the charismatic presence of the *Charter* should not be permitted to obscure the very different tensions at play in supervising the relationship between those legislative and administrative actors. The variable relationship between law and discretion is one of those tensions.

Administrative law is already tasked with developing an effective means of controlling the exercise of administrative discretion. This was the very project of the Court in the *Baker* decision. There is no reason not to make use of this analytical approach in applying the *Charter*. Administrative law and the *Charter* serve very separate functions in our legal system.

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<sup>126</sup> Jackman treats *Egan v. Canada* ([1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [*Egan*]) and *Eldridge* (*supra* note 51) as examples of cases in which the Court failed to pay adequate attention to democratic values in applying the *Oakes* test (*ibid.*). These cases simply cannot be equated. *Egan* involved a clear legislative provision adopted by Parliament (*ibid.*). Whether or not the circumstances of same-sex couples at issue in that case were directly or carefully considered in the legislative debates, the provision was passed and became law, thereby gaining a certain degree of democratic legitimacy. In contrast, *Eldridge* involved a discretionary decision made by a ministry official without any legislative or regulatory framework but with significant consequences for hearing-impaired patients within British Columbia's public health system (*ibid.*). The arguably arbitrary circumstances in which that decision was made raise significant administrative law concerns about democratic legitimacy in addition to the *Charter* issues addressed by the Supreme Court of Canada.

The majority in *Multani* took the first step toward recognizing these different functions and allowing administrative law concerns to be addressed within their proper forum. It is ironic that the majority preserved this territory for administrative law in the course of reasons that otherwise downplayed the role of administrative law in the *Charter* analysis. Conversely, the minority purported to protect the sophisticated analytical tools of administrative law while effectively eradicating them in favour of an outdated bright-line distinction between law and discretion. Chief Justice Dickson acknowledged in *Slaight* that it would take time and the example of particular cases to work out the precise relationship between administrative and *Charter* review.<sup>127</sup> Thus far, the Supreme Court of Canada seems to have been feeling its way without fully appreciating the variable relationship between law and discretion and its significance, not only for the prescribed by law condition, but for the conceptual coherence of public law as a whole.

The bright spot in this analytical confusion is that the Court's synthesis of years of confusing and conflicting jurisprudence into two polarized opinions has made the choice between a purposive and a categorical approach to the relationship between the *Charter* and administrative law that much clearer. The lesson of the prescribed by law jurisprudence, aligned against the naïveté of the minority's understanding of administrative decision making, will hopefully sound the death knell once and for all on a categorical relationship between the *Charter* and administrative law.

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<sup>127</sup> *Supra* note 39 at 1049