

## The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law

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Résumé de l'article

L'affaire *Roncarelli* demeure gravée dans les mémoires cinquante ans après sa rédaction, notamment grâce à l'affirmation par le juge Rand qu'« il n'y a rien de tel qu'une discrétion absolue et sans entraves ». Le juge Rand a défini la « discrétion sans entraves » comme étant la possibilité d'imposer une mesure pour n'importe quel motif ou raison qui puisse traverser l'esprit du décideur. Cet énoncé est compris comme signifiant que toute régulation publique exercée par la prise de décision discrétionnaire de cadres officiels connaît des limites juridiques, et que le rôle des tribunaux est de s'assurer que les décisions ne dépassent pas ces limites.

Dans cet essai, l'auteur explore plusieurs domaines de régulation publique au Canada qui sont demeurés « sans entraves ». Ces domaines comprennent des champs d'action gouvernementale qui sont réputés être non-justiciables, tels que les décisions touchant aux relations internationales ou la remise de distinctions. L'auteur fait valoir que ces domaines de discrétion « sans entraves » sont incompatibles avec le raisonnement de la Cour suprême du Canada dans l'affaire *Roncarelli*. Afin de terminer le projet inachevé de l'arrêt *Roncarelli*, l'auteur soutient que l'on devrait reconnaître que toute décision discrétionnaire doit comprendre des éléments justiciables incluant, au minimum, l'exigence de la bonne foi dans l'exercice du pouvoir public. L'auteur conclut en soulignant que si la reconnaissance du caractère justiciable du pouvoir discrétionnaire a pour objectif de modifier l'approche du droit public canadien, le projet de *Roncarelli* est tout aussi politique que juridique.

# THE UNFINISHED PROJECT OF *RONCARELLI V. DUPLESSIS*: JUSTICIABILITY, DISCRETION, AND THE LIMITS OF THE RULE OF LAW

*Lorne Sossin*\*

*Roncarelli* is remembered fifty years later particularly because of Justice Rand's now iconic statement that "there is no such thing as absolute and untrammelled discretion." Justice Rand defined "untrammelled discretion" as circumstances where action can be taken on any ground or for any reason that can be suggested to the mind of the decision maker. This statement has been understood to mean that all public regulation exercised through discretionary decision-making by executive officials has legal boundaries, and that the role of the courts is to ensure that decisions do not exceed those boundaries.

In this paper, the author explores several areas of public regulation in Canada that remain "untrammelled". These areas include realms of government action deemed to be non-justiciable, such as decisions involving foreign relations or the conferral of honours. The author argues that areas of untrammelled discretion are inconsistent with the Supreme Court of Canada's reasoning in *Roncarelli*. To complete the unfinished project of *Roncarelli*, the author argues that all discretionary decisions should be understood to have justiciable elements, which include, at a minimum, a requirement that public power be exercised in good faith. The author concludes by highlighting that while approaching all discretionary authority as justiciable is intended to alter the approach of Canadian public law, *Roncarelli*'s project is as much a political project as a legal one.

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Dans cet essai, l'auteur explore plusieurs domaines de régulation publique au Canada qui sont demeurés « sans entraves ». Ces domaines comprennent des champs d'action gouvernementale qui sont réputés être non-justiciables, tels que les décisions touchant aux relations internationales ou la remise de distinctions. L'auteur fait valoir que ces domaines de discrétion « sans entraves » sont incompatibles avec le raisonnement de la Cour suprême du Canada dans l'affaire *Roncarelli*. Afin de terminer le projet inachevé de l'arrêt *Roncarelli*, l'auteur soutient que l'on devrait reconnaître que toute décision discrétionnaire doit comprendre des éléments justiciables incluant, au minimum, l'exigence de la bonne foi dans l'exercice du pouvoir public. L'auteur conclut en soulignant que si la reconnaissance du caractère justiciable du pouvoir discrétionnaire a pour objectif de modifier l'approche du droit public canadien, le projet de *Roncarelli* est tout aussi politique que juridique.

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## Introduction

*Roncarelli v. Duplessis*<sup>1</sup> was a case about the limits of executive authority. Of all the reasons for which the case is remembered and discussed fifty years later, the most significant is Justice Rand's now iconic phrase: "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'."<sup>2</sup> Justice Rand defined "absolute and untrammelled discretion" as circumstances where an action can be taken on any ground or for any reason that can be suggested to the mind of the decision maker. The two enduring implications of *Roncarelli* are, first, that public regulation exercised through discretionary decision-making by executive officials has legal boundaries, and, second, that it falls to the courts through the mechanism of judicial review to elaborate those boundaries.<sup>3</sup> In short, *Roncarelli* made the courts' control of executive discretion emblematic of the rule of law.

Justice Rand might or might not be surprised to learn that fifty years after his statement was widely embraced there remain significant areas of absolute and untrammelled discretion in Canada. This is so, I suggest, because of the way in which Canadian courts have interpreted and applied the doctrine of justiciability. Courts have found important spheres of executive discretion to be non-justiciable, and, on this ground, have declined to impose legal constraints on the exercise of such discretion.

The purpose of this study is to explore the settings in which the exercise of public authority has been found to be non-justiciable, and to examine the relationship between justiciability and the rule of law as understood in *Roncarelli*. I argue that as long as justiciability is understood as totally exempting public discretionary decision-making from meaningful oversight, the project of *Roncarelli* remains unfinished.

I advance the view that for the rule of law to be safeguarded, exercises of discretionary authority should be subject to oversight by courts, and that this imperative should take precedence over the doctrines of justicia-

<sup>1</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140, 16 D.L.R. (2d) 689 [*Roncarelli*].

<sup>2</sup> *Ibid.*

<sup>3</sup> In this paper, "executive discretion", "administrative discretion", and "discretionary public authority" will be used interchangeably to refer to settings where public officials have either (1) a power under statute or through a prerogative authority that they may exercise, or (2) a power that may be exercised in different ways. This analysis focuses on the exercise of authority by the executive branch, and therefore does not deal with the different dynamics that apply to constraints on the exercise of judicial discretion or the exercise of legislative discretion. Abuse of discretion may be distinguished from abuse of power, which was the specific concern raised in the context of *Roncarelli*. Rand J.'s judgment, however, has been adopted as a broader prohibition on abuse of discretion by subsequent courts. See e.g. *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, 226 D.L.R. (4th) 198 [*C.U.P.E.*] (the "Retired Judges Case" discussed at *infra* note 14 and accompanying text).

bility where the two principles cannot otherwise be reconciled. That courts should oversee *some* elements of discretionary authority does not mean that *all* elements of such authority should be subject to judicial review. Further, where courts decline to subject some elements of discretionary authority to judicial review, this does not mean that those decisions are immune to oversight. Other non-judicial actors—ranging from auditors general to ombudspersons, and from parliamentary committees to the ballot box—play a role in ensuring the accountability of discretionary decision-makers. Finally, the internal checks on executive discretion from published guidelines, to ministerial supervision, to the training, expertise, and professionalism of the public service are vital to building a culture of the rule of law from within.

This study will explore the boundary between legal and political accountability for the exercise of discretionary authority, and more particularly, will examine the distinction between the justiciable and non-justiciable aspects of discretionary authority. A general distinction, for example, between merits-based review, which looks to whether the exercise of authority was correct or reasonable, and an *ultra vires*-based review, which looks to whether the authority was exercised in good faith and for proper purposes, may be a sensible point of departure.

There are areas of government decision-making where courts lack the capacity and the legitimacy to engage in merits-based review, such as the conferral of the Order of Canada on individuals based on their contributions to Canadian society. While courts and the judicial process arguably are unsuited to reviewing the merits of a decision to confer or not confer the Order of Canada, the judiciary might still be well-suited to adjudicating allegations that the government acted in an *ultra vires* manner in exercising its authority—e.g., by withholding the Order on discriminatory grounds or conferring it in order to advance an ulterior agenda unrelated to the stated goals and mandate of the honour.<sup>4</sup>

In this way, I suggest that fulfilling the project of *Roncarelli* involves moving beyond the reasons of Justice Rand. Rather than asserting that there is simply no “untrammelled discretion” in public regulation of a particular sort (in this case, the statutorily defined authority over the granting and termination of licences), I argue that there should be no “untrammelled discretion” in any public decision-making, of *any* sort.

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<sup>4</sup> The recent controversy involving the awarding of the Order of Canada to abortion activist Henry Morgentaler represents a reminder of the importance of the conferral of honours. See Sarah Barmak & Richard Brennan, “‘I Deserve’ Order of Canada, Morgentaler Says” *The Toronto Star* (2 July 2008), online: [The Toronto Star](http://www.thestar.com) <<http://www.thestar.com>>; Janice Tibbetts, “Chief Justice Sheds Light on Morgentaler’s Order of Canada Appointment” *Ottawa Citizen* (16 August 2008), online: [Ottawa Citizen](http://www.ottawacitizen.com) <<http://www.ottawacitizen.com>>.

The analysis below is divided into three parts. In Part I, I discuss the relationship between the rule of law and the limits of judicial review over discretionary public authority. Part II focuses on the impact of the doctrines of justiciability on the legacy of *Roncarelli*. Part III and the Conclusion point the way to completing the unfinished project of *Roncarelli*.

## I. The Rule of Law and Discretionary Authority

Discretionary authority arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances. At its root, discretion is about power and judgment. Its relationship with law is often in tension. As Ronald Dworkin memorably observed, “Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.”<sup>5</sup> This often-cited “doughnut analogy” captures the conventional view of discretion. Two main assumptions are embedded in this view: that law is the primary instrument of social regulation, and that discretion is a residual category of law.<sup>6</sup> More recent scholarly analyses of discretion have begun to revisit and challenge this conventional view, re-evaluating discretionary authority and highlighting its progressive and dialogic potential.<sup>7</sup>

Discretionary authority ought to be seen as more than simply a sphere of potentially arbitrary power to be contained. Discretion is also bound up with the principle of deference to the experience and expertise of specialized administrative decision-makers. Discretionary authority, in other words, conveys the idea that the same power may be applied differently in different circumstances and that the official applying that power is best placed to tailor it to the circumstances. This leads to a distinctive framework for accountability. The relationship between discretionary authority and judicial oversight is therefore necessarily contextual and variable. In

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<sup>5</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 31.

<sup>6</sup> Dworkin adopted a view well aligned with that of Rand J. in *Roncarelli* when he proposed that even where there are no explicit laws or rules that govern a decision, the constraining reach of the legal principles of the rule of law extends to cover the exercise of discretion. Therefore, Dworkin argued, there is really no such thing as absolute or unfettered discretion. Judicial decision-making is always constrained by legal principles. Dworkin’s conception of discretion, however, still rests upon its binary opposition to law.

<sup>7</sup> See e.g. Geneviève Cartier, *Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue* (S.J.D. Thesis, University of Toronto Faculty of Law, 2004) [unpublished]; Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) c. 3 (“Reframing Discretion”); Lorne Sossin, “An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law” (2002) 27 *Queen’s L.J.* 809; Joel F. Handler, “Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community” (1988) 35 *UCLA L. Rev.* 999.

other words, the factors appropriate to the exercise of discretion by an immigration officer may not be appropriate for the exercise of discretion by a labour arbitrator.

Judicial oversight of discretionary authority is thus best understood as a spectrum. This metaphor of a spectrum pervades administrative law and reflects the idea that few principles apply in the same way across the diverse venues for executive decision-making. For example, the Supreme Court of Canada invoked the notion of a spectrum to explain the standard of review to capture the idea that context will justify differing degrees of curial deference.<sup>8</sup> Similarly, the duty of fairness is also understood as a variable obligation, to be contextually determined on a spectrum from a maximum to a minimum degree of fairness.<sup>9</sup>

Justiciability, by contrast, typically is understood as an on/off switch: either a matter is justiciable or it is non-justiciable. I would suggest, however, at least in the context of discretionary authority, that justiciability is better understood as part of the broader spectrum of judicial oversight.<sup>10</sup> For example, when courts engaging in judicial review assert that their role is not to second-guess the wisdom of government policy but to ensure that discretion has been exercised within the constraints of the decision maker's jurisdiction, this amounts to a finding that while the merits of government policy choices may be non-justiciable, the motivations of the decision maker are justiciable. This concept applies broadly in existing jurisprudence, ranging from the standard of review case law under administrative law to the section 1 case law under the *Canadian Charter of Rights and Freedoms*.<sup>11</sup> For this reason, the approach I endorse would not represent a dramatic shift in the current standard of review jurisprudence where courts already subject discretionary public authority to judicial review on reasonableness grounds. Rather, as a refinement to the existing jurisprudence, I would argue in favour of extending the scope of this review of exercises of discretionary authority to a broader range of decisions.

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<sup>8</sup> See *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, 257 N.B.R. (2d) 207; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1. See also Lorne Sossin & Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 U.T.L.J. 581.

<sup>9</sup> See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21, 174 D.L.R. (4th) 193 [*Baker*].

<sup>10</sup> The idea of justiciability as a spectrum is not new. See e.g. *R. v. Gibson*, *infra* note 40.

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

Understood in this fashion, the ultra vires doctrine, the *Wednesbury* unreasonableness,<sup>12</sup> the more recent move to reasonableness review for discretion in Canada, and the *Canadian Charter* all represent elaborations of the relationship between discretion, deference, the rule of law, and justiciability. In *Baker*, Justice L’Heureux-Dubé described this relationship in the following terms:

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations. A general doctrine of “unreasonableness” has also sometimes been applied to discretionary decisions. In my opinion, these doctrines incorporate two central ideas—that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker’s jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law, in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms.<sup>13</sup>

*Baker*, in other words, reiterates that the rule of law frames the exercise of discretionary authority. This notion of bounded discretionary authority has been a consistent thread through Canadian public law since *Roncarelli*.

An example of the way in which *Roncarelli* continues to shape the administrative law response to discretion is captured in Justice Binnie’s majority reasons in *C.U.P.E.*, the “Retired Judges Case”.<sup>14</sup> This case involved a challenge to the Ontario Minister of Labour’s discretionary appointment of several retired judges to chair interest arbitration panels to resolve labour disputes in the health care sector. Justice Binnie wrote,

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<sup>12</sup> See *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation* (1947), [1948] K.B. 223, [1947] 2 All E.R. 680 (U.K.C.A.) (recognition by the U.K. courts that an unreasonable decision will be one that no reasonable decision-maker could reach).

<sup>13</sup> *Baker*, *supra* note 9 at para. 53 [references omitted].

<sup>14</sup> *C.U.P.E.*, *supra* note 3.



The decision in *Roncarelli*, despite the many factual differences, foreshadows, in part, the legal controversy in this case. There, as here, the governing statute conferred a broad discretion which the decision maker was accused of exercising to achieve an improper purpose. In that case, the improper purpose was to injure financially (by the cancellation of a liquor licence) a Montreal restaurateur whose activities in support of the Jehovah's Witnesses were regarded by the provincial government as troublesome. Here, the allegations of improper purpose behind the unions' challenge are that the Minister used his power of appointment to influence outcomes rather than process, to protect employers rather than patients, and, as stated by the Court of Appeal, to change the appointments process in a way "reasonably" seen by the unions as "an attempt to seize control of the bargaining process."

The exercise of a discretion, stated Rand J. in *Roncarelli*, "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration." Here, as in that case, it is alleged that the decision maker took into account irrelevant considerations (e.g., membership in the "class" of retired judges) and ignored pertinent considerations (e.g., relevant expertise and broad acceptability of a proposed chairperson in the labour relations community).<sup>15</sup>

Justice Binnie's observation was made in service of his view that a statute that empowered the minister of labour to appoint an interest arbitrator who "is, in the opinion of the minister, qualified to act,"<sup>16</sup> required the minister to abide by specific limits in exercising this discretion. Notwithstanding the expansive nature of statutory language, Justice Binnie, writing for the majority, held that the power to appoint was predicated on a set of factors that had to be considered by the minister and yet were not. In that case, such factors included the labour relations expertise of potential appointees, as well as independence, impartiality, and the general acceptance of potential appointees within the labour relations community.<sup>17</sup>

The Supreme Court of Canada has intervened at other times in discretionary settings where irrelevant factors were considered. For example, in *Oakwood Development Ltd. v. St. François Xavier (Rural Municipality of)*,<sup>18</sup> a similar issue of failing to consider relevant factors arose where a municipal council refused to consider an application for the subdivision of some land prone to flooding. Although the council had considered the flooding issue, it failed to consider the severity of the floods and excluded consideration of any possible solutions to the problem. Justice Wilson stated,

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<sup>15</sup> *Ibid.* at paras. 92-93 [references omitted], citing *Roncarelli*, *supra* note 1 at 140.

<sup>16</sup> *C.U.P.E.*, *supra* note 3 at para. 52, citing *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14, s. 6(5).

<sup>17</sup> *C.U.P.E.*, *supra* note 3 at para. 111.

<sup>18</sup> [1985] 2 S.C.R. 164, 20 D.L.R. (4th) 641 [cited to S.C.R.].

More specifically, was [the Council] entitled to consider the potential flooding problem and make it the ground of its decision to refuse approval of the subdivision? As Rand J. said in *Roncarelli v. Duplessis*, any discretionary administrative decision must “be based upon a weighing of considerations pertinent to the object of the administration”. For the reasons already given I am of the view that the Council was entitled to take the flooding problem into consideration. The issue does not, however, end there. As Lord Denning pointed out in *Baldwin & Francis Ltd. v. Patents Appeal Tribunal*, the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration. ... The respondent municipality, therefore, must be seen not only to have restricted its gaze to factors within its statutory mandate but must also be seen to have turned its mind to all the factors relevant to the proper fulfilment of its statutory decision-making function.<sup>19</sup>

This kind of analysis, in my view, is exactly what Justice Rand foreshadowed in his reasons in *Roncarelli*. A grant of statutory discretion may appear on its face to be virtually unfettered, but, in a legal system governed by the rule of law, all discretionary authority has limits. On this view, however broadly a grant of discretionary authority may be worded,<sup>20</sup> there ought to be no conception of the exercise of public authority entirely outside the reach of the rule of law.

In the *Reference Re Secession of Quebec*, the Supreme Court of Canada described the importance of the rule of law doctrine flowing from *Roncarelli* in similar terms:

The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, is “a fundamental postulate of our constitutional structure”. As we noted in the *Patriation Reference*, “[t]he ‘rule of law’ is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules

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<sup>19</sup> *Ibid.* at 174-75 [references omitted].

<sup>20</sup> One issue left open in *Roncarelli* itself is whether Parliament can, with express language, establish an unfettered discretion. Rand J. suggested in *Roncarelli* that this is possible when he stated, “[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” (*supra* note 1 at 140). Nevertheless, the logic underlying such a proposition is doubtful. Whatever the case might have been in 1959, if such a law were purportedly enacted today, it is likely that it would be read down to impose some limits on the exercise of discretion through the *Canadian Charter*. See e.g. *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416; *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. And in the absence of a Charter violation following from express language, an attempt to authorize unfettered discretion would likely either be read down or subject to a declaratory remedy that such statutory provisions were not consistent with the rule of law.

and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. *It provides a shield for individuals from arbitrary state action.*<sup>21</sup>

The principle of aversion to absolute discretion, as articulated by Justice Rand in *Roncarelli*, has now become axiomatic in Canadian public law. However, as I discuss below, the principles of justiciability as currently applied by Canadian courts may operate at cross-purposes with this ideal.

## II. The Dilemmas of Justiciability and the Legacy of *Roncarelli*

Justiciability reflects a common law set of doctrines addressing the circumstances under which a judge may decline jurisdiction over a dispute. It usually arises where there is a claim that a dispute is "not legal".<sup>22</sup> Such a dispute may be characterized as "purely political", or said to rest on determinations that are not subject to proof in a judicial process (e.g., spiritual convictions that can neither be proven nor disproven through the adversarial presentation of evidence).

Justiciability, as currently applied, may erode the rule of law as elaborated in *Roncarelli* because it exempts significant discretionary public authority from any judicial review.<sup>23</sup> Judicial review, I argue, is a necessary though not sufficient safeguard for the rule of law. Below, I discuss in more detail the relationship between the application of justiciability and these constraints on discretionary public authority.

The most significant exploration of non-justiciable categories of public authority may be found in the Ontario Court of Appeal's decision in *Black v. Chrétien*.<sup>24</sup> In that case, Conrad Black, then a Canadian citizen, had been nominated for appointment by the Queen as a peer. Then Prime

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<sup>21</sup> *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 70, 161 D.L.R. (4th) 385 [emphasis added, *Secession Reference*].

<sup>22</sup> Justiciability may also characterize disputes that are moot, not yet ripe, or are hypothetical, abstract, or academic. These areas of justiciability are beyond the scope of this article. On the scope of justiciability, see Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) c. 1 [Sossin, *Boundaries*]; Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy", Foreword, *The Supreme Court, 2001 Term*, (2002) 116 Harv. L. Rev. 16; Wayne McCormack, "The Justiciability Myth and the Concept of Law" (1986–87) 14 *Hastings Const. L.Q.* 595.

<sup>23</sup> At a minimum, rule of law grounds would include the traditional "abuse of discretion" constraints—namely, that no public authority can be exercised in bad faith, for improper purposes, or in an arbitrary fashion.

<sup>24</sup> *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.) [*Black* cited to O.R.].

Minister of Canada Jean Chrétien intervened with the Queen to block Black's peerage, citing a contravention of Canadian law. Chrétien invoked the obscure and inconsistently applied Nickle Resolution,<sup>25</sup> passed by the Canadian House of Commons in 1919, which requested that the King refrain from conferring titles on any of his Canadian subjects. Black sued Chrétien for damages on the grounds of abuse of power, misfeasance in public office, and negligence. He also sued the government of Canada for negligent misrepresentation.

The prime minister and Attorney General brought a motion to dismiss the claims (except the claim of negligent misrepresentation against the government) on two grounds: first, that the claims were not justiciable and therefore disclosed no reasonable cause of action; and, second, that the Quebec Superior Court had no jurisdiction to grant declaratory relief against the defendants because that jurisdiction lay exclusively with the federal court. The motions judge held that the superior court had jurisdiction to entertain Black's claims, which he then dismissed. He held that what was involved was an exercise of the Crown prerogative, which is non-reviewable in court. Black appealed on the issue of justiciability.

The Ontario Court of Appeal held that the impugned actions of the prime minister were non-justiciable. Justice Laskin, writing for the court, described justiciability in the following terms: "The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. Only those exercises of the prerogative that are justiciable are reviewable."<sup>26</sup>

Justice Laskin held that regardless of whether one characterized the prime minister's actions as communicating Canada's policy on honours to the Queen or as giving her advice on Black's peerage, the prime minister was exercising the prerogative power of the Crown relating to honours. Justice Laskin further held that the exercise of the honours prerogative, absent a Charter claim, is non-justiciable. The controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable, according to the Ontario Court of Appeal, is its subject matter. The exercise of the prerogative will be justiciable, or amenable to the judicial process, only if its subject matter affects the rights or the legitimate expectations of an individual. The exercise of the honours prerogative was described as "always beyond the review of courts,"<sup>27</sup> because no important individual interests are at stake and no one's rights are affected. No person, in other words, has a "right" to an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The discretion to

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<sup>25</sup> See Canada, *Journals of the House of Commons*, vol. 55 (22 May 1919) at 295.

<sup>26</sup> *Black*, *supra* note 24 at para. 50 [references omitted], citing *Ref Re C.A.P.*, *infra* note 73.

<sup>27</sup> *Black*, *supra* note 24 at para. 59.

confer or refuse to confer an honour, Justice Laskin concluded, is the kind of discretion that is not reviewable by the court.

I have argued elsewhere that the Ontario Court of Appeal's decision to characterize Black's allegations as non-justiciable was problematic.<sup>28</sup> By focusing on whether or not the affected party had a right to the benefit in question, the court, in my view, missed the ambition of Justice Rand's assertion in *Roncarelli*.

The rule of law operates not only to provide those with rights a mechanism to vindicate them, but also to constrain the exercise of arbitrary authority.<sup>29</sup> On this view, irrespective of whether the person affected by the exercise of discretion has a right or legitimate expectation to the benefit in question, no public official has the authority to make a decision that is arbitrary, improper, or in bad faith. Or, to put this point slightly differently, all those affected by discretionary decisions have a right to a decision made in good faith and for proper purposes. This constraint on arbitrary discretionary authority would apply equally to Prime Minister Chrétien as to a passport officer.

To return to *Black*, if Conrad Black could establish that Prime Minister Chrétien acted purely out of spite or a personal vendetta in communicating with the Queen, then, on my view, the rule of law requires that a court intervene. Justiciability addresses the capacity and legitimacy of the court to adjudicate a matter. It may well be that the subject matter of a dispute is ill suited to the adversarial process or to the kinds of evidence admissible in a court.<sup>30</sup> Thus, even where the merits of a discretionary decision are beyond review, oversight is both possible and necessary to ensure that discretion is not exercised in bad faith or for an improper purpose. As Justice Rand observed in his reasons in *Roncarelli*, "Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted."<sup>31</sup>

Following *Black*, the key question in relation to the justiciability of discretionary authority is whether the decision engages a person's rights or legitimate expectations. If one has neither a right to nor expectation of an honour, then the matter is non-justiciable. Where an honour *does* af-

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<sup>28</sup> Lorne Sossin, "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47 McGill L.J. 435.

<sup>29</sup> See *Secession Reference*, *supra* note 21.

<sup>30</sup> This does not, however, appear to have been the case in the dispute between Black and Chrétien, as Black's allegations related to specific conversations and correspondence, all of which could have been determined through the conventional presentation and cross-examination of evidence.

<sup>31</sup> *Roncarelli*, *supra* note 1 at 140.

fect someone profoundly, however, courts have deployed creative distinctions to ensure judicial oversight.<sup>32</sup> In my view, justiciability ought to turn on whether legal boundaries to discretionary authority need to be elaborated, not on whether the affected party had a right or an expectation at issue.

There is, to use the framework of Justice Rand, a context and a perspective within which all public decision-making must conform. Another (and, in my view, preferable) way of looking at this issue is to see a general right on the part of all members of the public to have executive discretionary authority exercised impartially, in good faith, and for proper purposes. This latter approach is similar to the principle that all members of the public have a right to an independent and non-partisan public service. The challenge in many settings of discretionary authority is simply that there may be no directly affected person reasonably able or willing to contest such a decision in court. There may well be other individuals or organizations, however, who would be willing and able to do so. To the extent that there may be issues of standing if a person or organization not directly affected by the decision wishes to challenge the exercise of discretionary authority, these can be addressed by analogy to the existing doctrine of public interest standing.<sup>33</sup> In other words, an allegation of abuse

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<sup>32</sup> See e.g. *Chiasson v. Canada*, 2003 FCA 155, 226 D.L.R. (4th) 351, 303 N.R. 54 [*Chiasson*]. *Chiasson* involved a challenge to the decision by the Honours and Awards Directorate of the Chancellery of Honours (an office of the Governor General) to refuse to consider Richard Chiasson's father for a Canadian Bravery Decoration for his part in a rescue of American sailors at Louisburg, Nova Scotia in 1943. The Canadian Bravery Decorations Committee had established a policy that only incidents occurring less than two years prior to the date of submission would be considered. Chiasson was some fifty-five years too late. Chiasson objected to the imposition of the two-year rule as being ultra vires the committee's powers, in light of the fact that it was not included anywhere in the regulations under which the committee operates. Relying upon *Black*, the Crown claimed that the committee was exercising the royal prerogative of granting honours, which was nonjusticiable. Strayer J.A. for the Federal Court of Appeal, distinguished the case from Laskin J.A.'s reasoning in *Black* on the basis that written instruments were available in this case to control the power being exercised (*Chiasson*, *supra* at para. 8). He noted that a matter is usually considered justiciable if there are objective legal criteria to apply or facts to be determined to resolve the dispute. Strayer J.A. held that on the facts of this case, the regulations could arguably provide criteria for determining whether the process they outline has been followed and whether the committee has exceeded its jurisdiction. Moreover, the regulations can create a legitimate expectation that the procedure in question will be followed (*ibid.* at para. 9).

<sup>33</sup> See the following trilogy: *Thorson v. Canada (A.G.)* (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil* (1975), [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588. See also *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321. For an application of the public interest standing doctrine to analogous circumstances, see *Harris v. Canada*, [2000] 4 F.C. 37, 187 D.L.R. (4th) 419 (C.A.). Harris launched a class action on behalf of himself and all taxpayers required to file returns pursuant to s. 150 of the *Income Tax Act* (R.S.C. 1985 (5th Supp.), c. 1). He was

of discretion ought to be considered by a court whether or not a directly affected person can demonstrate that their rights or expectations were jeopardized by the decision.

The principle I advance above may well extend beyond what Justice Rand elaborated in *Roncarelli*. Since Roncarelli clearly did have an expectation interest in his tavern's liquor licence, the question of the importance of that interest in framing the legal constraints on executive discretion did not arise. Further, Justice Rand's qualification to the claim that there is no such thing as absolute and untrammelled discretion in "public regulation of *this* sort"<sup>34</sup> could be read as implying that in the context of public regulation of some *other* sort, absolute or untrammelled discretion may be tolerated.

If Justice Rand meant to suggest that executive discretion of some other sort lay beyond judicial oversight, we do not have any clear description of what types of discretion he had in mind. It is worth noting the irony, however, in the fact that Justice Rand was in a position to offer his judgment in *Roncarelli* precisely because of one of the most significant spheres of untrammelled discretion in our legal system—that of judicial appointment. I emphasize this connection in an earlier critique of Canada's discretionary judicial appointment system:

*Roncarelli*, therefore, reflects the "Rand Paradox". The judge most credited with subjecting executive authority to the rule of law was himself appointed to the Supreme Court in an exercise of unchecked and unreviewable executive authority—that is, the authority of the federal executive to appoint judges to the Supreme Court, and to all federally appointed trial and appellate courts. The rule of law in Canada, in other words, is supervised by judges appointed according to a process that effectively lies beyond the reach of the rule of law.<sup>35</sup>

Discretionary authority over judicial appointments also serves as an example of a setting where it is difficult to imagine circumstances in which someone directly affected would ever be in a position to challenge it. Those who receive an appointment have no reasons to challenge this exercise of discretionary authority, and those passed over for an appointment are not provided reasons as a basis for such a challenge. Arguably, however, there is no setting where the rule of law is more crucial to safeguard, or where an abuse of discretion could have more pernicious consequences to judicial independence and public confidence in the administration of justice. In my view, the exercise of the government's discretion to

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granted standing to challenge the discretionary application of a tax status on a third party, private family trust.

<sup>34</sup> *Roncarelli*, *supra* note 1 at 140 [emphasis added].

<sup>35</sup> Lorne Sossin, "Judicial Appointment, Democratic Aspirations, and the Culture of Accountability" (2008) 58 U.N.B.L.J. 11 at 11.

appoint or not to appoint someone to the judiciary should be seen as a justiciable decision as a matter of law. However, if that is the extent of the oversight over such decisions, the rule of law cannot be safeguarded in a meaningful way. In this sense, justiciability should be seen as a point of departure for rule of law accountability, albeit an incomplete and sometimes inadequate response to the challenge. Fulfilling the project of *Roncarelli* may well require the development of shared values within judicial and executive perspectives on discretionary authority. In settings such as judicial appointments where judicial review is unlikely to arise, reliance on the executive may be greater.

It will fall, in other words, to institutional mechanisms developed within the executive branch to enhance accountability. To take the example of judicial appointments, the government could adopt a practice of transparency and justification, which would make partisan or arbitrary appointments far less likely.<sup>36</sup> Such institutional measures will depend on political leadership. In this sense, judicial review represents a necessary but not sufficient point of departure. The application of justiciability doctrines as an on-off switch of legal accountability for discretionary authority may erode the rule of law, precisely because political institutions tend to take seriously as “rule of law” issues those matters that courts have identified as such.

As I discuss below, however, there remain significant areas of executive discretion in Canada that continue to be seen as non-justiciable and, as such, beyond legal accountability. I now examine some of these areas to highlight the dilemmas posed by the justiciability jurisprudence. This discussion is not intended to be exhaustive, but rather illustrative.

### *A. The Acquisition and Exercise of Sovereignty*

The exercise of state sovereignty is an example of a setting in which executive discretion has been understood as non-justiciable. In this section, I discuss two cases involving challenges to Canadian sovereignty by aboriginal litigants that illustrate this principle.

First, the courts have found that executive decisions to enter into treaties with aboriginal groups are not justiciable. In *Cook v. Canada (Minister of Aboriginal Relations & Reconciliation)*,<sup>37</sup> two groups of petitioners sought to prevent British Columbia’s Minister of Aboriginal Relations and Reconciliation from signing *The Tsawwassen First Nation Final Agreement* until such time as consultations were completed with the Semiahmoo First Nation and the Sencot'en Alliance, respectively. The petitioners claimed that their groups had overlapping claims with the Tsawwassen

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<sup>36</sup> For discussion of this approach, see *ibid.*

<sup>37</sup> 2007 BCSC 1722, [2008] 7 W.W.R. 672, 80 B.C.L.R. (4th) 138.



First Nation and that the honour of the Crown required it to consult with the petitioners and to accommodate their interests prior to signing the agreement. Substantively, they argued that the duty to consult does not mean that the Crown must consult and accommodate every potential overlapping claim before agreeing to the terms of a treaty.<sup>38</sup> Ultimately, Justice Garson held for the petitioners, following the reasoning in *Black*. She acknowledged that exercises of Crown prerogative powers were subject to a duty of fairness where a decision affects the rights of individuals.<sup>39</sup>

Second, courts have also held that Crown sovereignty in criminal law matters is non-justiciable. The case of *R. v. Gibson* involved an application by the Crown to quash an application made by an individual member of the Akwesane First Nation for an order prohibiting the Ontario Court of Justice from hearing a preliminary inquiry in his case.<sup>40</sup> Gibson challenged the jurisdiction of the Crown to hold him criminally responsible for an assault causing bodily harm and robbery that was alleged to have taken place in a Canadian Tire parking lot in Caledonia.<sup>41</sup> Gibson put forward two arguments: (1) that the Crown had no jurisdiction over him as an aboriginal person and member of the Akwesane First Nation; and alternatively, (2) that his treaty rights prevail over the *Criminal Code* under the rubric of subsection 35(1) of the *Constitution*.<sup>42</sup> The court summarily dismissed Gibson's application, holding, *inter alia*, that the sovereignty of the Crown in criminal law matters has been consistently considered non-justiciable.<sup>43</sup> With respect to the first argument, Justice Whitten adopted the reasoning in *Black*, noting that the justiciability of the Crown's prerogative lies on a spectrum at one end of which lie matters of "high policy", which are immune from judicial review.<sup>44</sup> Justice Whitten further noted that attacks upon the sovereignty of the Crown as an attempt to circumvent criminal proceedings have been dealt with many

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<sup>38</sup> *Ibid.* at para. 13.

<sup>39</sup> *Ibid.* at para. 50.

<sup>40</sup> [2007] O.J. No. 3948 (Sup. Ct. J.) (QL) [*Gibson*].

<sup>41</sup> *Ibid.* at para. 3.

<sup>42</sup> *Ibid.* at para. 6; *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).

<sup>43</sup> *Gibson*, *supra* note 40 at para. 12. The court also noted as an aside that the treaty in question, the *Nanfan Treaty* (17 August 1701, signed by the Hon. John Nanfan) "does not on its language appear to reserve sovereignty in the matters of criminal law to the Mohawks" (*Gibson*, *supra* note 40 at para. 24).

<sup>44</sup> *Ibid.* at para. 11.

times before, and that each time, the courts have declined to adjudicate challenges to the acquisition of sovereign jurisdiction by Canada.<sup>45</sup>

These cases demonstrate types of authority that might be ill-suited to judicial review because courts lack the legitimacy to limit the sovereignty of the Crown. While there are good reasons to limit the scope of the judicial role in resolving disputes about sovereignty—particularly that the courts derive their authority from the same wellspring of sovereignty often impugned in these challenges—should sovereignty be available as a cloak behind which government may act with impunity? This question takes on added bite in the context of foreign relations where the reference to “high policy” has had even broader sweep.

### *B. Foreign Relations*

Similar to issues engaging the sovereignty of the Crown, the cases below illustrate how the conduct of foreign affairs has been held to be a matter of “high policy” and, as such, immune from judicial review as a category.

In the case of *Copello v. Canada (Minister of Foreign Affairs)*, the applicant, a diplomat serving with the Italian Foreign Ministry in Ottawa, sought an order quashing a request made of the Republic of Italy by Canada’s Minister of Foreign Affairs and International Trade that Copello be recalled.<sup>46</sup> This request came about as a result of two reports made of allegedly unacceptable behaviour on Copello’s part and his threat of a civil suit against one of the complainants. His attempts to gain an audience with either the minister or the Chief of Protocol in order to clarify his position with respect to the two incidents were unsuccessful. In his judgment, Justice Heneghan held that the acceptance and expulsion of diplomatic agents is not justiciable as it is an element of the royal prerogative covering the conduct of diplomatic relations.<sup>47</sup>

Following Justice Laskin’s focus on a subject matter test as a threshold of justiciability in *Black*, Justice Heneghan approached the question of whether the rights or legitimate expectations of an individual were affected by the exercise of the prerogative.<sup>48</sup> His reasoning was that since Copello held no independent rights or expectations under the framework

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<sup>45</sup> See *R. v. Francis* (2007), 85 O.R. (3d) 45, [2007] 3 C.N.L.R. 294 (Sup. Ct. J.); *R. v. David*, [2000] O.T.C. 120, 45 W.C.B. (2d) 471 (Sup. Ct. J.); *RO: RI: WI: IO v. Canada (A.G.)*, 2007 ONCA 100, 155 A.C.W.S. (3d) 324.

<sup>46</sup> 2001 FCT 1350, [2002] 3 F.C. 24, 213 F.T.R. 272 [*Copello*], aff’d 2003 FCA 295, 308 N.R. 175, 3 Admin. L.R. (4th) 214.

<sup>47</sup> *Copello*, supra note 46 at para. 71.

<sup>48</sup> *Black*, supra note 24 at para. 51.

of the *Vienna Convention on Diplomatic Relations*<sup>49</sup> (and since the relevant articles of the convention had not been brought into domestic Canadian law demonstrating an intention to keep the issue outside the legal arena), the minister's request lay inside the realm of the Crown prerogative in the conduct of foreign affairs, and thus outside the sphere of judicial oversight.

In *Ganis v. Canada (Minister of Justice)*,<sup>50</sup> the British Columbia Court of Appeal considered an application under section 57 of the *Extradition Act*<sup>51</sup> for judicial review of the minister of justice's surrender order in favour of the Czech Republic. Ganis had been convicted *in absentia* by a Czech court for being unlawfully at large after failing to return to prison following a temporary leave of absence for good behaviour.<sup>52</sup> He had been serving a prison sentence for the Czech offence of trade or dealing in women, which is analogous to the Canadian offence of procuring.<sup>53</sup> Among the arguments he put forward in seeking to quash the surrender order, Ganis questioned the validity of the treaty pursuant to which the Czech Republic was seeking surrender. In his decision, Chief Justice Finch held that the existence of a treaty was not a justiciable issue. As treaty making falls within the realm of foreign affairs, it falls within the sphere of subject matter that is not amenable to adjudication.<sup>54</sup>

Decisions to send troops abroad or to engage in military intervention comprise another sphere of discretionary public authority that has featured arguments regarding justiciability. *Aleksic v. Canada (A.G.)*, for example, involved an action against Canada for damages and a remedy under the *Canadian Charter* resulting from her participation in a bombardment of Yugoslavia in the spring of 1999.<sup>55</sup> The fifty-seven plaintiffs in the case attributed a variety of allegedly tortious acts to the Crown and a breach of their Charter right to life, liberty, and security of the person. The Attorney General brought a motion to strike the statement of claim arguing that the claim was not justiciable, and thus that the statement did not disclose any reasonable cause of action. Justice Heeney, writing for the majority of the court, agreed. Applying the subject-matter test from *Black*, Justice Heeney held that the decision to participate in the bombardment of Yugoslavia was closely analogous to a declaration of war,

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<sup>49</sup> 18 April 1961, 500 U.N.T.S. 95, Can. T.S. 1966 No. 29, art. 9 (entered into force 24 April 1964).

<sup>50</sup> 2006 BCCA 543, 233 B.C.A.C. 243, 216 C.C.C. (3d) 337 [*Ganis*].

<sup>51</sup> S.C. 1999, c. 18.

<sup>52</sup> For the analogous Canadian offence, see *Criminal Code*, R.S.C. 1985, c. C-46, s. 145(1)(b).

<sup>53</sup> See *ibid.*, s. 212.

<sup>54</sup> *Ganis*, *supra* note 50 at para. 20.

<sup>55</sup> (2002), 215 D.L.R. (4th) 720, 165 O.A.C. 253 (Sup. Ct. J.) [*Aleksic* cited to D.L.R.].

which would place it well within the ambit of matters of “high policy”.<sup>56</sup> Justice Heeney emphasized that the decision was beyond the review of the courts as it “was a pure policy decision made at the highest levels of government, dictated by purely political factors.”<sup>57</sup> The sole exception to this non-justiciability would be where an individual claimed that their Charter rights had been violated.<sup>58</sup> Otherwise, without a cognizable standard by which to measure wrongful behaviour, this sort of review would not be well suited to court process.

Justice Wright provides a compelling dissent, holding that the action should be allowed to proceed on the basis that the *National Defence Act*<sup>59</sup> displaced Crown prerogative in this area.<sup>60</sup> He further noted that even if the prerogative did cover decisions to commit the armed forces to active service, it would still be subject to the rule of law, whether domestic or international.<sup>61</sup> While international law, unless written into domestic law, cannot be used to found a cause of action, Justice Wright suggested that international law, as it informs the honour of the Crown, provides a justiciable standard by which the use of royal prerogative as a shield can be measured.

*Blanco v. Canada* concerned an action by the plaintiff for an injunction against the federal government to prevent it from deploying armed forces to fight in Iraq without the consent of Parliament.<sup>62</sup> Justice Heneghan denied the interim injunction on three grounds: the question was not yet ripe, it was non-justiciable, and the plaintiff relied on inappropriate authorities.<sup>63</sup> Relying upon Justice Laskin’s judgment in *Black* and the Supreme Court of Canada’s decision in *Operation Dismantle*, Justice Heneghan affirmed that matters of high policy, including a decision to go to war, are not justiciable unless an individual claims that the exercise of royal prerogative has given rise to a breach of their Charter rights.

Finally, *Turp v. Canada (Prime Minister)* dealt with an attempt to prevent Canada from participating in the conflict in Iraq.<sup>64</sup> In that case,

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<sup>56</sup> *Ibid.* at 732.

<sup>57</sup> *Ibid.*

<sup>58</sup> See *Operation Dismantle v. Canada*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [*Operation Dismantle* cited to S.C.R.]. In *Aleksic*, Heeney J. found the Charter claim pleaded to be justiciable under this exception, though he expressed doubts as to whether this aspect of the claim was engaged by the facts as pleaded (*supra* note 55 at 733).

<sup>59</sup> R.S.C. 1985, c. N.4.

<sup>60</sup> *Aleksic*, *supra* note 55 at 730-31.

<sup>61</sup> *Ibid.* at 731.

<sup>62</sup> 2003 FCT 263, 231 F.T.R. 3 [*Blanco*].

<sup>63</sup> *Ibid.* at paras. 11-12.

<sup>64</sup> 2003 FCT 301, 237 F.T.R. 248, 111 C.R.R. (2d) 184.

the plaintiffs made an application for judicial review and a motion for interim relief. For reasons similar to those in *Blanco*, the Supreme Court of Canada declined to impose judicial constraints on the discretionary authority.

While none of the cases discussed above reached the Supreme Court of Canada, the Court offered its view of a similar dynamic in *Canada (Prime Minister) v. Khadr*.<sup>65</sup> *Khadr* involved a challenge to the Canadian prime minister's decision not to request that a Canadian citizen be transferred from the U.S. Guantanamo Bay detention facility. The Court concluded that the matter was justiciable and provided a declaratory remedy but declined to impose an order compelling the Canadian government to seek Khadr's repatriation. In justifying this decision, the Court observed,

The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution.<sup>66</sup>

As *Khadr* demonstrates, the exercise of public authority is never "purely political". The very fact of it being a public form of authority brings with it the obligation to all of those affected that it be exercised in good faith and for proper purposes. Public authority, understood as I have suggested in this study, does not exist outside the rubric of the rule of law.

### C. *Political Questions*

The question of the justiciability of foreign relations decisions and decisions bearing on sovereignty are species of a broader question hinted at above: the question of whether some disputes are inherently "political" and therefore beyond the realm of the judicial process, and subject to political rather than legal accountability.<sup>67</sup>

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<sup>65</sup> 2010 SCC 3, [2010] 1 S.C.R. 44 [*Khadr*].

<sup>66</sup> *Ibid.* at para. 37 [references omitted].

<sup>67</sup> For a more detailed discussion of this question, see Sossin, *Boundaries*, *supra* note 22, c. 4.

A vivid illustration of this dilemma was provided by the parliamentary crisis in December 2008, which was precipitated when the Governor General decided to accede to the Conservative government's request to prorogue Parliament in order to avoid a vote of non-confidence in the House of Commons. Would a court have the capacity or legitimacy to interfere with the discretionary authority exercised by the Governor General on deeply partisan matters going to the heart of the democratic credibility of Parliament?<sup>68</sup> On the other hand, if not by the court, how will the rule of law be vouchsafed in the midst of such a crisis? Consider what might have happened if, as rumours at the time suggested, the Conservative government threatened to remove the Governor General if she refused the request to prorogue.

The question of whether a "political questions" doctrine applies in Canada was addressed, at least in part, by the Supreme Court of Canada in the context of the reach of the *Canadian Charter in Operation Dismantle*.<sup>69</sup> In that decision, dealing with a challenge by an antinuclear NGO to the government's decision to permit U.S. cruise missiles to be tested in Canada, the Court concluded that the claim was non-justiciable because it turned on evidence (e.g., the Soviet Union's military strategy) that was incapable of being proven in a Canadian court. In her concurring reasons, Justice Wilson held that it was not open to a court to decline to deal with Charter claims of this kind merely because they involved cabinet decisions or dealt with politically sensitive issues.<sup>70</sup> However, she went on in the same judgment to recognize that an issue will be nonjusticiable if it involves "moral and political considerations which it is not within the province of the courts to assess."<sup>71</sup> In this fashion, while rejecting the American political questions doctrine per se, she opened the door to the development of a distinctly Canadian approach, which would turn on the ability of a court to parse a dispute into legal, moral, and political aspects.

The Court's approach in *Operation Dismantle* was put to the test in subsequent cases, notably the *Secession Reference*. The *amicus curiae* lawyer (appointed by the Court to argue Quebec's position in that case) challenged the justiciability of the questions referred by the government

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<sup>68</sup> On the failure to provide reasons, see L. Sossin & A. Dodek, "When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture, and the Governor General" in Peter H. Russell & Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009) 91. While a court would be ill-suited to the task of reviewing the merits of the Governor General's exercise of discretion, once again, I see no reason why a court should not be able to review allegations that the discretion was exercised for an improper purpose, in bad faith, or in violation of applicable constitutional conventions.

<sup>69</sup> *Operation Dismantle*, *supra* note 58.

<sup>70</sup> *Ibid.* at 472.

<sup>71</sup> *Ibid.* at 465.

to the Court, which dealt with the legality of a unilateral declaration of secession. The Court indicated that the question, put simply, was whether the dispute “is appropriately addressed by a court of law.”<sup>72</sup> The Court had also examined the issue earlier in the *Reference Re Canada Assistance Plan (B.C.)*:

In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.<sup>73</sup>

In the *Secession Reference*, the Court held that a finding of nonjusticiability is called for where adjudicating an issue would take the Court beyond its own assessment of its proper role in the constitutional framework of Canada’s democratic form of government, or “where the Court could not give an answer that lying within its area of expertise: the interpretation of law.”<sup>74</sup> The Court concluded that the questions posed by the government on the issue of secession were strictly limited to aspects of the legal framework in which decisions about secession might be taken, and thus were justiciable. The Court observed,

As to the “legal” nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extra-legal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.<sup>75</sup>

This is significant, in my view, as the exercise of discretionary authority always involves a legal element. The legal element is precisely the one addressed by Justice Rand in *Roncarelli*: what are the boundaries imposed by the rule of law on the exercise of public authority? While questions of whether discretionary authority was exercised in bad faith would appear always to engage “a legal aspect”, the Supreme Court of Canada has treated such issues as nonjusticiable in a number of settings.

In *Thorne’s Hardware Ltd. v. Canada*,<sup>76</sup> a federal Order-in-Council that altered the boundaries of the Port of Saint John was challenged. The applicant claimed that the executive decision had been motivated by the ulterior and improper purpose of expanding the revenue base of the National Harbours Board. While conceding that there could be review in “an

<sup>72</sup> *Secession Reference*, *supra* note 21 at para. 26.

<sup>73</sup> *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545, 83 D.L.R. (4th) 297 [Ref Re C.A.P.].

<sup>74</sup> *Secession Reference*, *supra* note 21 at para. 26.

<sup>75</sup> *Ibid.* at para. 28.

<sup>76</sup> [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577 [*Thorne’s Hardware* cited to S.C.R.].

egregious case” of the cabinet failing to observe jurisdictional limits or “other compelling grounds,”<sup>77</sup> Justice Dickson (as he then was), writing for the Court, held that “[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings.”<sup>78</sup> Justice Dickson was unwilling even to review the evidence that alleged that the cabinet had acted in bad faith and contrary to the rule of law. He found that it was “neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order-in-Council”<sup>79</sup> and observed that “governments may be moved by any number of political, economic, social or partisan considerations.”<sup>80</sup> Nonetheless, Justice Dickson was at least prepared to examine the evidence “to show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence.”<sup>81</sup> In this sense, he was not prepared to close the door entirely to review of Orders-in-Council.

In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City of)*,<sup>82</sup> the Supreme Court of Canada applied the *Thorne’s Hardware* principle in the context of a municipal corporation appointing a board of inquiry under Ontario’s municipal legislation. Writing for the Court, Justice Binnie held that the applicants had no right to examine municipal councillors with a view to establish that they had improper motives in voting for the creation of a board of inquiry. He held that the “motives of a legislative body composed of numerous individuals are ‘unknowable’ except by what it enacts.”<sup>83</sup>

This approach has meant in practice that the rule of law may amount to little more than a velvet fist in an iron glove. If courts are unwilling to allow litigants to advance evidence of bad faith or improper motives in the exercise of discretionary authority, or to consider such evidence when it is presented, then judicial oversight will be limited to the rare occasions, such as *Roncarelli*, where a decision maker announces publicly that he wielded authority he did not have and did so for improper reasons.

Consider the example of *David Suzuki Foundation v. British Columbia (A.G.)*.<sup>84</sup> In *Suzuki Foundation*, an environmental NGO sought to challenge an Order-in-Council that exempted timber originating from the

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<sup>77</sup> *Ibid.* at 111.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* at 112 [references omitted].

<sup>80</sup> *Ibid.* at 112-13.

<sup>81</sup> *Ibid.* at 115.

<sup>82</sup> [1998] 3 S.C.R. 3, 40 O.R. (3d) 158 [cited to S.C.R.].

<sup>83</sup> *Ibid.* at 36.

<sup>84</sup> 2004 BCSC 620, 17 Admin. L.R. (4th) 85, 8 C.E.L.R. (3d) 235 [*Suzuki Foundation*];



northwest regions of British Columbia from a prohibition on export, as set out in section 127 of British Columbia's *Forest Act*.<sup>85</sup> The petitioners claimed that subsection 128(3) creates conditions precedent to the jurisdiction of the Lieutenant Governor in Council (LGIC) to exempt timber from the provisions of section 127. Subsection 128(3) of the *Forest Act* requires that the LGIC be satisfied that the timber will be surplus to requirements of processing facilities in British Columbia, that the timber cannot be processed economically in the province, and further, that the exemption will prevent waste or improve the utilization of timber cut from Crown land. Justice Hood held that the *Forest Act* provided to the LGIC powers to exempt, conditional only on his or her own subjective assessment.<sup>86</sup> Justice Hood characterized this authority as a "complete, unfettered, subjective discretion."<sup>87</sup> Justice Hood found that the court's role was limited to determining whether the LGIC had performed its functions within the boundary of the legislative grant and in accordance with the terms of the legislative mandate.<sup>88</sup> He concluded that the LGIC had acted within the scope of its statutory powers.<sup>89</sup> He conceded, however, that there would need to be at least some consideration of relevant evidence for the decision to be made appropriately, and that the LGIC must act in good faith.<sup>90</sup> Justice Hood noted,

The important factor is the subject matter of the decision. Where it involves the consideration of political, economic, social, and other matters so vital to the legislators, but which the Courts are ill-equipped to weigh or consider, the Court must defer to legislators where no error in law or jurisdiction is found. Finally, the difficulties in differentiating between legislative and administrative functions should be avoided by taking this basic jurisdictional supervisory role approach, and interpreting the statutory provisions in a context of the pattern of the statute in which it is found. I note that this seems to me to lead inevitably to a pragmatic and functional analysis.<sup>91</sup>

Courts have expressed particular unease when confronted with challenges to decisions of government that reflect clear policy preferences, particularly around public spending. For example, in *Canadian Bar Association v. British Columbia*,<sup>92</sup> where the Canadian Bar Association (CBA)

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<sup>85</sup> R.S.B.C. 1996, c. 157.

<sup>86</sup> *Suzuki Foundation*, *supra* note 84 at para. 12.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* at para. 91. On the reluctance of the Court to impose constraints on the legislative decision-makers, see *Canada (A.G.) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1.

<sup>89</sup> *Suzuki Foundation*, *supra* note 84 at paras. 142, 258.

<sup>90</sup> *Ibid.* at paras. 125-28.

<sup>91</sup> *Ibid.* at para. 121.

<sup>92</sup> 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, [2007] 1 W.W.R. 331.

sought to establish a constitutional right to legal aid in civil justice settings, Chief Justice Brenner held that

[i]n the case at bar, there is no challenge to a specific governmental decision, act, or statute. The case cannot be characterized as raising an issue with respect to the limits of statutory, administrative, or executive authority. The challenge is to the funding, content, administration, operation, and effect of an entire public program that invokes various federal and provincial statutes, ministries, agencies, and non-governmental entities and actors.

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What the plaintiff effectively seeks in the case at bar is to have the court conduct an inquiry on the subject of civil legal aid, define a constitutionally compliant civil legal aid scheme, order the defendants to implement such a scheme, and oversee the process to ensure compliance.<sup>93</sup>

In *Friends of the Earth v. Canada (Governor in Council)*,<sup>94</sup> the federal court was faced with a challenge to the government's policy response to its Kyoto Protocol commitments, and particularly to the duties of the government as elaborated in the *Kyoto Protocol Implementation Act*<sup>95</sup>—a private member's bill committing the government to certain steps implementing the Protocol. With specific regard to this case, Justice Barnes held that the court has no role to play reviewing "the government's response to Canada's Kyoto commitments within the four corners of the KPIA."<sup>96</sup> He expressed doubts that the court has any role to play in controlling or directing the other branches of government in the conduct of their legislative and regulatory functions outside of the constitutional context.<sup>97</sup> Justice Barnes rejected an approach that would have him separate the *KPIA* policy imperatives into justiciable and nonjusticiable components.<sup>98</sup> He noted that orders made under such an approach would be substantially empty of content.<sup>99</sup> For example, he could mandate a regulatory response by a certain date, but he would lack any control over its significance or substance.

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<sup>93</sup> *Ibid.* at paras. 47, 49.

<sup>94</sup> 2008 FC 1183, [2009] 3 F.C.R. 201, 299 D.L.R. (4th) 583 [*Friends of the Earth (F.C.)*]. The Federal Court of Appeal dismissed an appeal from this decision, indicating simply that it agreed with the reasons of the trial judge: *Friends of the Earth v. Canada (Governor in Council)*, 2009 FCA 297, 313 D.L.R. (4th) 767, 93 Admin. L.R. (4th) 72.

<sup>95</sup> S.C. 2007, c. 30 [*KPIA*].

<sup>96</sup> *Friends of the Earth (F.C.)*, *supra* note 94 at para. 46.

<sup>97</sup> *Ibid.* at para. 40.

<sup>98</sup> *Ibid.* at para. 34.

<sup>99</sup> *Ibid.* at para. 39.

Justiciability, on this view, is tied not only to the subject matter of a dispute but also to the court's remedial reach.<sup>100</sup> This approach, however, ignores important principles from other spheres of Canadian public law. Courts have articulated the scope of constitutional conventions in significant detail, for example, while noting that such standards are unenforceable. A remedy, moreover, may not require enforcement of any kind. For example, it is always open to a court to issue a declaratory remedy when the scope of intervention is limited, as the Supreme Court of Canada did in *Khadr*, discussed above.<sup>101</sup>

In my view, the focus on remedies, like the focus on rights in *Black*, places undue and unwise limits on judicial oversight for potential abuse of discretionary authority. As an alternative, I have argued that no subject matter of discretionary authority, in and of itself, should be viewed as nonjusticiable. Justiciability should be seen as a spectrum on which varying levels of judicial scrutiny may be situated. No form of public authority, however, ought to be seen as lying entirely outside the spectrum of legal oversight. As I discuss below, the key to fulfilling *Roncarelli's* promise is to approach justiciability as an elaboration of the rule of law principle, rather than its outer boundary.

### Conclusion: Beyond *Roncarelli*

This article has explored the relationship between the doctrine of justiciability and the principles of the rule of law. In particular, I have examined judicial decisions in a range of settings such as exercises of sovereignty, foreign relations, and political questions, where courts have opened the door to "untrammelled discretion" through their application of justiciability. I argue that the Supreme Court of Canada's justiciability case law should be re-evaluated from a rule of law perspective. Rather than finding spheres of discretionary authority to lie outside the realm of justiciability, I argue for a more nuanced approach. Recognizing that some merits-based judgments lie outside the capacity or legitimacy of the courts, I argue that other aspects of discretionary authority, such as whether that authority was exercised in good faith and for proper purposes, lie within the core of the courts' guardianship role over the rule of law.

In other words, in the context of particular disputes, there may be a range of matters on which courts lack the capacity or legitimacy to adjudicate. I do not believe, however, that the rule of law can be safeguarded if there are entire spheres of discretionary public authority that are immune from judicial review of any kind. While the spectrum of justiciability may

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<sup>100</sup> *Ibid.* at para. 47.

<sup>101</sup> See *supra* notes 65-66 and accompanying text.

permit minimal judicial oversight at the more political end of discretionary authority, fulfilling the project initiated in *Roncarelli* means vigilance against arbitrary exercises of discretion.

A number of scholars have remarked how often *Roncarelli* has been invoked over the past fifty years, but how rarely the rule of law is actually relied upon as a basis for invalidating executive discretion.<sup>102</sup> Even where an incidence of improper discretion can be addressed through judicial review (as in *Roncarelli*), judicial intervention depends on litigants with sufficient resources, patience, and initiative to come forward. In some key settings—judicial appointments, as discussed above, is one example—it is unlikely that a directly affected litigant will ever seek to contest an exercise of executive discretion. In such settings, respect for the rule of law must come through a partnership between the courts and the executive branch.

The aspect of *Roncarelli* that has received too little attention in my view, and with which my study concludes, is the implication for the executive of its commitment to the rule of law. While I have argued that judicial oversight ought to be available for the exercise of discretionary authority, not even the most effective oversight can identify and remedy the varied ways in which discretionary authority might be abused. In such settings, while it is the role of the courts to articulate the requirements of the rule of law, only executive leadership can promote and protect a rule of law culture among discretionary decision-makers.<sup>103</sup>

To conclude, the first step to completing the project that Justice Rand began in *Roncarelli* is to revisit the case law on justiciability to confirm that no category of executive discretion lies outside the scope of judicial oversight. All discretionary authority, irrespective of the subject matter, must be subject to legal boundaries. The point of departure for elaborating those boundaries is judicial oversight, but its destination is to internalize

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<sup>102</sup> See Peter W. Hogg & Cara F. Zwibel, “The Rule of Law in the Supreme Court of Canada” (2005) 55 U.T.L.J. 715. Hogg and Zwibel observed that the rule of law is invoked far more often than it is relied upon as grounds for invalidating discretion. David Mullan, in a similar vein, observed that *Roncarelli* never had the impact it should have had. See David J. Mullan, “The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality” in Mary Jane Mossman & Ghislain Otis, eds., *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Montreal: Thémis, 1999) 313.

<sup>103</sup> An example of this relationship may be seen in the context of the Supreme Court of Canada’s *Baker* decision (*supra* note 9). In *Baker*, the Court elaborated a different approach to exercising a discretionary exemption for humanitarian and compassionate grounds. Following this decision, a new guideline was issued and a new training initiative established in order to integrate the Court’s standards into the day-to-day decision making of front-line officials. For a discussion of this process, see Lorne Sossin, “The Rule of Policy: *Baker* and the Impact of Judicial Review on Administrative Discretion” in David Dyzenhaus, ed., *The Unity of Public Law* (Portland, Or.: Hart, 2004) 87.

a rule of law culture through the institutional mechanisms and practices of executive decision-making. Only then may *Roncarelli's* promise come to fruition.

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