JUDICIAL REVIEW IN NEW ZEALAND: A PREFERENCE FOR DEFERENCE?

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago

October 2008

ACKNOWLEDGMENTS

To Professor Stuart Anderson, for your invaluable guidance, constructive criticism, enthusiasm, encouragement, and reassurance as supervisor of this dissertation;

to Matt Smith, for drawing my attention to important commentary;

to Godfrey Potahu of the MLC, for locating material when all seemed lost;

to Michael Dobson, for proofreading skills *par excellence*;

to Laura Fraser, for your constructive advice and friendship;

to Kesia Denhardt, for your love and support throughout.

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INTRODUCTION

The scope of administrative law has developed rapidly over the past twenty years.[1] Developments in New Zealand, including the return of the doctrine of jurisdictional fact[2] and the discussion of the novel concept of proportionality[3] have greatly altered the methodology in which administrative law operates. This is particularly clear in relation to varying standards of review that may be applied by a court. In Canada, this development has manifested itself in the idea of *deference*; understood generally as the lowering of a traditional "correctness" standard on an alleged error of law made by a specialist tribunal to one of "patent unreasonableness". This approach has culminated in explicit curial recognition of the constitutional importance of these tribunals through a lowered level of intervention in an area of law where the courts had previously taken an interventionist approach.

No New Zealand court has yet openly applied a deferential approach on review. Courts instead seemingly adhere to their orthodox role as strict interpreters of statutes and the administrative bodies established by them. However, there have been a number of statutory tribunals established in New Zealand with a significant amount of specialised expertise in their own legal field, with the Maori Land Court the clear paradigm example. This may be indicative of an emerging constitutional order where administrative tribunals exercise their own discreet legal interpretations. Accordingly, this dissertation examines the possibility of "deference" forming a new part of the administrative law landscape in New Zealand, both on a broad principle level, and in relation to specific institutions.

Chapter I will outline the origins of the doctrine of deference in Canada, describing and analysing its birth and growth into a critical part of contemporary Canadian administrative law. In particular, focus will be placed on the challenges faced in interpreting the "spirit" of a deferential approach since the birth of the doctrine. The chapter will then discuss the existing academic treatment of deference in New Zealand, leading to the idea being more succinctly defined. Finally, "deference" will be construed in relation to two specific questions – the bodies to which a reviewing court might defer, and to what types of erroneous decision-making deference should apply.

Chapter II will examine the appropriateness of deference in a New Zealand context. Existing cases that have, both expressly and impliedly, dealt with the concept will be discussed and analysed to assess whether there are any existing "roots" for the concept to grow. Next, some of the primary

[1] Philip A Joseph (ed) *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007), p820.

[2] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597.

[3] *Wolf v Minister of Immigration* [2004] NZAR 414.

objections to deference will be examined in relation to the constitutional and legal framework of New Zealand: whether lessening levels of judicial intervention is really a matter for Parliament; whether New Zealand's smaller pool of legally-trained individuals would lead to problematic "agency capture"; and whether our institutional framework is actually as well-suited to deference as it would first seem.

Finally, Chapter III will examine deference in respect of specific administrative tribunals, so as to tie the previous discussion to some tangible examples. The specialist jurisdiction and expertise of the Maori Land Court will be the primary example. Its governing statute, Te Ture Whenua Maori Act 1993, will be explored in detail, and a significant case where deference to the Maori Land Court may have resulted in a different result will be analysed. The possibility of deference applying to the Film and Literature Review Board and the problems therein will also be assessed, with a general conclusion to follow.

CHAPTER I: THE ORIGINS AND STRUCTURE OF JUDICIAL DEFERENCE

Canada

The roots of a principled concept of "deference" stem from the Canadian jurisdiction. This "profoundly deferential attitude towards administrative interpretations of statutes"[4] emerged from the keystone case of *CUPE v New Brunswick Liquor Corporation.*[5] In that case, the court was faced with a complaint against the Public Service Labour Relations Board – a statutory tribunal created to rule on questions of Canadian labour law. The question for the Supreme Court was whether the Board could interpret the meaning of the term "other employee" in a particular way. Until this point in Canada, the standard of review would have been correctness. However, *CUPE* marked a departure from this, ceding a "wider range of administrative lawmaking to the board"[6]. Dickson J stated the standard to be applied:

> "Was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"[7]

Accordingly, the decision – that is, the interpretation[8] of the legal phrase "other employee" – must be "'more' than wrong"[9] to justify a reviewing court intervening and replacing the interpretation of the decision-maker. This approach was justified for several reasons. Firstly, the position of this labour board as a "specialised tribunal which administers a comprehensive statute [meant it] has developed [...] accumulated experience in the area"[10]. Moreover, the existence of a privative clause

[4] Michael Taggart "Lord Cooke and the Scope of Review Doctrine in Administrative Law" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon*, (Butterworths, Wellington, 1997, pp189-219), p204.

[5] [1979] 2 SCR 227 (Hereafter referred to as *CUPE*).

[6] Taggart, above n4, p206.

[7] *CUPE,* above n5, p237.

[8] Questions of interpretation, application, and mixed fact and law are addressed later in this Chapter under the heading "Deference to What". At this stage, however, it is clearer to outline the origins of deference in a purely descriptive, rather than evaluative or selective sense.

[9] *The Attorney-General of Canada v Public Service Alliance of Canada* [1993] 1 S.C.R 941, p955.

[10] *CUPE,* above n5, p235-6.

in the statute provided a "compelling"[11] rationale for non-intervention. Judicial restraint in the form of curial deference followed accordingly in this case.

Therefore, *CUPE* had created two "threshold" standards: correctness and patent unreasonableness, and was initially regarded as "encapsulating an entire approach to judicial review"[12]. Stemming initially from the context of labour relations tribunals[13] but spreading also to other areas of "inferior" tribunal decision-making[14], courts undertook what they described as a "pragmatic and functional analysis",[15] which included factors such as the wording of the statute, the nature of the problem, and the expertise of the decision-maker.[16] Following this analysis, the decision for the Court was a binary one: simply to defer (patent unreasonableness) or not to defer (correctness).[17]

The "Spirit" of Deference

Following this watermark, however, the "spirit" of *CUPE* underwent some challenges in interpretation and application. In *CAIMAW, Loc. 14 v Pacaar Canada Ltd.,*[18] Sopinka J for the majority stated in relation to the "patent unreasonableness" test that:

> "When a court says that a decision under review is [...] "patently unreasonable" it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion [...] on the merits, such a relative

[11] *CUPE,* above n5, p235-6.

[12] Christopher Taylor "Curial Deference and Judicial Review" *Advocate's Quarterly* ([1991] Vol 13) pp78-89, p78.

[13] See, for example, *CAIMAW, Loc. 14 v Pacaar Canada Ltd* (1989) 62 DLR (4th) 437.

[14] Such as the Canadian Tribunal established to control and regulate imported goods into that country, as well as many other administrative tribunals. See, for example, *National Corn Growers v Canada (Canadian Import Tribunal)* (1990) 74 DLR (4th) 458.

[15] See, for example, *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R 982, p991.

[16] Lorne Sossin and Colleen M. Food "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law", *University of Toronto Law Journal* (*Special Issue: Education, Administration and Justice: Essays in Honour of Frank Iacobucci*, 2007, Vol 57, pp581-606), p586.

[17] Ibid., 587.

[18] (1989) 62 D.L.R (4th) 437.

> statement cannot be made [...] in my view, curial deference does not enter into the picture until the court finds itself in disagreement with the tribunal".[19]

This approach arguably allows a court to establish a set of "of basic principles relevant to the merits of the case"[20] before deciding whether to defer. Commentators have pointed out difficulties with this, as it "permits the court to set very narrow bounds as to the range of final conclusions that would be upheld by a court [...] whilst ostensibly advocating curial deference".[21] Moreover, the creation of an "intermediate" standard of reasonableness simpliciter, between patent unreasonableness and correctness, by Iacobucci J in *Canada (Director of Investigation and Research) v Southam Inc*[22] muddied the water further. Gone was the initial *CUPE* approach of a choice between deference and non-deference, seemingly replaced by a contextual spectrum that could allow a court to justify any level of intervention. Dissatisfaction with these elements eventually culminated in a judgment by Lebel J in *Toronto (City of) v. CUPE, Local 79.*[23] Lebel J's primary concern was:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all."[24]

Accordingly, very recently, the Supreme Court in *Dunsmuir v New Brunswick*[25] has moved back towards a binary approach in determining the application of deference. The distinction between "patent unreasonableness" and "reasonableness *simpliciter"* was abandoned, and the approach returned to a binary decision between "correctness" and "reasonableness".[26] The relationship between patent unreasonableness and reasonableness simpliciter was stated as "unproductive and

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[19] *CAIMAW, Loc. 14 v Pacaar Canada Ltd,* above n18, p479.

[20] Taylor, above n12, p81.

[21] Ibid.

[22] [1997] 1 S.C.R 748.

[23] [2003] 3 S.C.R 77.

[24] Ibid., para [63], citing *Miller v. Newfoundland (Workers' Compensation Commission)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), para. 27.

[25] 2008 SCC 9.

[26] In doing this, Binnie J at para [139] recognises this "will shift the courtroom debate from choosing *between* two standards of reasonableness that each represented a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference".

distracting".[27] Accordingly, the Court recognised that questions of *degrees* of deference – that is, how "reasonable" a decision must be depending on factors such as a privative clause or the expertise of the tribunal[28] - should become an issue only *after* the decision of whether to defer or not is made. The approach in *Dunsmuir,* representing a return to "base" *CUPE* principles, demands that the first question be a straight "yes/no" one: questions of degree arise only when that first question is answered in the affirmative.

Some brief conclusions can be taken from the Canadian experience. The dissent of Lebel J represents dissatisfaction with variable standards of review being applied to a given question, and invited the Supreme Court to revisit this approach, or even recalibrate it entirely. However, rather than attempting to articulate a new approach to the question of judicial deference, Canada has in *Dunsmuir* recognised that a binary choice, much in the same mould as *CUPE,* is the more appropriate model.

New Zealand

In 1997, Professor Michael Taggart raised the possibility of deference operating as an explicit doctrinal tool for reviewing courts in a New Zealand context.[29] This was done, at least initially, through identifying certain aspects of Cooke J's approach in *Bulk Gas Users Group v Attorney-General.*[30] The issue for the Court in that case was the interpretation by the Secretary of Energy of the words "direct interest" in re-pricing of natural gas schemes in Auckland. Accordingly, the true question was "[w]hose interpretation of the statute should prevail – that of the Judge or that of the administrative decision-maker?"[31] This was answered to be the court, "in fulfilment of their constitutional role as interpreters of the written law".[32] However, Professor Taggart notes that this was not the entirety of the reasoning in *Bulk Gas*. Rather, Cooke J recognised that where "there remains legitimate room for judgment in applying the [correct statutory] test [...] the decision will stand unless it is [unreasonable]".[33] This suggests that a "pure question of interpretation" might be

[27] *Dunsmuir*, above n25, para [140].

[28] Ibid., para [151].

[29] Taggart, above n4, p189.

[30] [1983] NZLR 129 (CA).

[31] Taggart, above n4, p195.

[32] Ibid.

[33] *Bulk Gas Users*, p136.

subject only to a *Wednesbury* standard of review,[34] and points towards deference in New Zealand being potentially viable. In brief, Professor Taggart claims that "as the broad principles of administrative law are applied to particular parts of the variegated administrative law landscape, accommodations of various sorts are made".[35] Interestingly, however, and importantly for the purposes of this dissertation, Professor Taggart's claim is attached to certain presuppositions:[36] that there is no one "right" answer to questions of statutory interpretation; and that the judiciary is not necessarily the best-placed constitutional body to provide that answer.

Since this original claim, the idea of deference in New Zealand and around the common law world has increased in sophistication. Professor Taggart has, as recently as last year, again advocated for a doctrine of deference to gain a foothold in New Zealand, but as part of a "rainbow of review", with proportionality contemporaneously supplanting *Wednesbury* to complement deference.[37] In addition to this approach, there have been other commentaries on what it means to "defer" – these are useful in introducing deference, as they add richness and sophistication to the initial enquiry.

Deference as "Respect" and "Due Deference"

David Dyzenhaus in 1997[38] discussed the reasons *why* a judge may defer. Firstly, he describes "deference as submission" as reflecting a "democratic positivist" point of view: that "the legislature is the sole source of law and that its legitimacy is derived from its accountability to the people".[39] Accordingly, recognition of deference would flow only from a formalistic adherence to statutory direction – that is, a privative clause. However, as can be seen from the *CUPE* decision and others, this is not entirely accurate. Thus, Dyzenhaus presents another paradigm in which deference should operate: deference as respect: "a respectful attention to the reasons offered [...] in support of a decision".[40] This is done through "determin[ing] the intent of the statute, not in accordance with the idea that there is some prior (positivistic) fact of the matter, but in terms of the reasons that best

[34] Taggart, above n4, p196.

[35] Ibid., pp202-203.

[36] Taggart, above n4, p203.

[37] Michael Taggart "Proportionality, Deference, *Wednesbury*" in New Zealand Law Society *Judicial Review: September 2007* (New Zealand Law Society, Wellington, 2007, pp23-67).

[38] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997, pp279-308).

[39] Ibid., p280.

[40] Ibid., p286.

justify having that statute".[41] This more realistic view allows a reviewing court to take into account factors such as a privative clause, as well as expertise, the question being asked, et cetera. Deference is then not merely bowing to the will of a superior law-making body, but can "rearticulate the proper relationship between the legislature, administrative agencies and the courts"[42] through a more involved application of the doctrine. In 2005, Murray Hunt, writing in a United Kingdom context,[43] used "deference as respect" to articulate a concept of "due deference", aiming to improve some of the difficulties the doctrine was facing in the United Kingdom.[44] The "due deference" approach is similar to that of Dyzenhaus in that it asks for a number of different factors to be considered, although it does ask for "degrees of deference"[45] to be applied, an approach rejected in *Dunsmuir*. Nonetheless, it is still useful to illustrate that a broader contextual approach is required.

Factors Giving Rise to Deference

When, then, should a court defer? Since the birth of the doctrine in *CUPE*, certain factors have been identified as indicative of a deferential approach being appropriate, that can, and must, be examined in a New Zealand context. These factors are not exhaustive, but provide a strong starting point to undertake a contextual deference analysis.

Expertise

Recognition of expertise as a relevant concern stemmed from the position of labour tribunals in Canada since *CUPE*. These "high-powered" tribunals, consisting of members with significant amounts of specialist labour dispute knowledge, were recognised by courts as being capable of developing their own body of jurisprudence. Moreover, expertise helps to justify why questions of "pure" law may be deferred to. In *Dunsmuir*, where the Supreme Court reconciled previous law on determining whether deference should apply or not, the Court stated "deference may [...] be

[41] Dyzenhaus, above n38, p303.

[42] Ibid., p286.

[43] Murray Hunt, "Sovereignty's Blight: Why Contemporary Public law Needs the Concept of 'Due Deference'" in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003, pp337-370).

[44] Namely, that in the context of deference as between the legislature and judiciary, had developed an idea of a "margin of appreciation" where a court would not step, recalibrating deference as a mere justiciability enquiry. See Hunt (Ibid.) p345-346.

[45] Hunt, above n43, p353.

warranted where an administrative tribunal has developed particular expertise of a general common law [...] in relation to a specific statutory context".[46] This trend stems from the statutory context that gave rise to *CUPE*, where it was stated that " In the administration of that [statutory] regime, a board is called upon [...] to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system".[47] When an administrative body operates for some time within a specific and identifiable statutory context, building experience and expertise in that area, then deference may be attracted, and applied in a justifiable and principled way.

Statutory Indications

The statutory context in which a tribunal adjudicates is obviously crucial, as is the nature of the issue at hand. If a statutory regime has been set up as a discrete dispute resolution mechanism, as was (and is) the case with Canadian employment law; or if that regime can be viewed as an alternative to an established and comparable system (such as Te Ture Whenua Maori Act 1993 and the Maori Land Court contrasting the Torrens system), then deference might be more likely. This is because the greater level of "compartmentalisation" means that a reviewing court should recognise the unique role these decision-makers have in the "complex decision-making environments of the modern state",[48] and accordingly be less inclined to interfere in these specialised contexts. Moreover, if the determination in question involves questions of "broad policy",[49] or if "legal are factual issues are intertwined and cannot be readily separated",[50] deference should apply. However, if the question is outside the tribunal's expertise and is of "central importance to the legal system",[51] then the opposite conclusion might be reached.

Privative Clauses

Likely the clearest indicator of deference being appropriate, a privative clause can be seen as "evidence of Parliament or a legislature's intent that interference by reviewing courts be

[46] *Dunsmuir*, above n25, para [54].

[47] *CUPE,* above n5, p235.

[48] Lorne Sossin and Colleen M. Food, "The Contextual Turn", above n16, p584.

[49] *Dunsmuir,* above n25, para [151].

[50] Ibid., para [51].

[51] Ibid., para [55].

minimized".[52] The reasoning for this is self-evident: when Parliament drafts law to *prima facie* restrict the access of a reviewing court to a decision of an inferior tribunal, deference to that decision would follow as a matter of logic and commonsense. Whilst not eliminating the inherent power of review altogether, privative clauses can at the very least be seen as indicating caution should be considered before a court undertakes a "correctness" analysis. It should be noted, however, that the absence of a privative clause is not determinative against the application of deference.[53]

Rights of Appeal

Rights of appeal are relevant for two reasons. In sitting alongside the inherent review power, they have an effect on how the exercise of review might work in practice. More specifically, the existence of an appeal right raises these two main questions:

1. Whether the existence of an appeal right necessarily ousts the possibility of review; and
2. Whether the granting of an appeal right necessarily equates to a correctness standard being applied.

In relation to the first question it is clear that in most cases, judges will exercise their inherent discretion to refuse review when an appeal right exists. This is because an appeal right can be viewed as a deliberate attempt by the legislature to allow an appellate court to "correct error and supervise and improve decision-making".[54] Thus, review (and the variable standards, including deference, it could bring) rests on shakier ground in this context, given that the "answer" lies in the appeal route.

However, it is worth noting that in some cases, appeal rights are simply not exercised. For example, Te Ture Whenua Maori Act 1993 makes explicit statutory provision for rights of appeal on "all or any part of the [initial] determination".[55] However, litigants have still preferred the inherent power of the High Court, such as in *Attorney-General v Maori Land Court*[56] and *MacGuire v Hastings District*

[52] *Dunsmuir,* above n25, para [52].

[53] Ibid., para [52].

[54] *Dunsmuir,* above n25, para [52].

[55] Te Ture Whenua Maori Act, s58(1).

[56] [1999] 1 NZLR 689 (CA).

Council.[57] This is an indication that review, with its inherent flexibility, could perhaps be retained alongside even robustly-drafted appeal rights. Where the governing statute also points towards a special "niche" for the decision-making body, as is arguably the case with the Maori Land Court,[58] this argument carries further weight, and may help to suggest review might in some cases still be available.

In relation to the second question, it is unsurprising that the exercise of most appeal rights would favour a standard of substitution. If an appeal right exists in respect of a decision made by a tribunal, appellate courts will be wary of applying anything less than a correctness standard in the face of clear legislative direction.

The claim for a correctness standard is strongest where the appeal right is limited to a point of law,[59] as the answer of how to correct an error has been explicitly dealt with by Parliament, and that answer involves a correctness standard. Parliament has considered the types of errors it wishes corrected on appeal and by identifying only questions of law as being subject to intervention, courts would be wary of departing from a correctness standard.

However, if a broader appeal right involves only limited grounds involving the application of standards other than correctness, then the issue becomes more complex. If an appeal right is less than absolute, then the existence of "levels of appeal" suggests that review is not precluded merely because a distinct route to correct the error exists. It is then arguable that if the appeal right is viewed as less than a straightjacket, the exercise of similarly flexible review standards should not then be precluded, as "room to move" still exists.

Shotover Gorge Jetboats Ltd v Jamieson[60] dealt with the breadth of an appeal from a specially created statutory body, the Lakes District Waterways Authority, to the District Court. In examining this question, Casey J stated that "appeal rights in respect of different authorities and tribunals depend very much on the meaning to be given to the particular statute conferring them".[61] Cooke J

[57] [2001] NZRMA 557 (PC).

[58] See Chapter 3 for application of the concept of deference specifically to institutions such as the Maori Land Court, especially its position in respect of the Torrens land tenure system.

[59] See, for example, section 58 of the Film, Video and Publications Classifications Act 1993, which restricts appeals from the Film and Literature Review Board to the High Court on "questions of law" only.

[60] [1987] 1 NZLR 437.

[61] Ibid., p442.

identified "another type of appeal [...] subject to a discretionary power to rehear the whole or any part of the evidence or to receive further evidence".[62] Such a right of appeal creates on the part of the appellate court a "customary allowance"[63] on matters of fact and discretion. It may be overenthusiastic to suggest that these types of comments could be stretched to apply to an appellate (or reviewing) court lowering their level of intervention on an error of *law*. Notwithstanding this, *Shotover* does seem to support the principle that the breadth and nature of appeal rights can vary, and will depend almost invariably on the nature of the statute conferring them. Accordingly, if the statutory context is such that the inherent flexibility of review being maintained is desirable, then a less rigid standard of appeal may be well-suited to sit alongside.

The Supreme Court in *Austin, Nicholls and Co Ltd v Stichting Lodestar*[64] has very recently also considered the nature of appeal rights. The decision relates primarily to the second difficulty: the standard of intervention on appeal. The question was the breadth of the appeal under section 27(6) of the Trademarks Act 1953.[65] In commenting on the nature of that appeal, the Supreme Court seems to favour a substitutionary standard. Elias CJ, writing for the Court, recognised the "customary allowance" point mentioned in *Shotover,* but did not hesitate in explicitly restricting its application to "findings of fact or fact and degree",[66] and made clear that "on general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case".[67] Generally, the approach of Elias CJ can be summarised at paragraph [16]:

> "Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellant court, even where that opinion is a matter of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong only in the sense that it matters, even if it was a conclusion on which minds might reasonably differ".

Thus, errors of law are to be assessed solely on correctness standards. These words have since been applied unilaterally in the High Court, pointing towards a trend of appellate courts having a much

[62] *Shotover Gorge Jetboats,* above n60, p442.

[63] Ibid.

[64] [2008] 2 NZLR 141.

[65] Ibid., para [1].

[66] Ibid., paras [5], [13].

[67] Ibid.

greater level of authority.[68] However, Ronald Young J in *E v Director of Proceedings*[69] has recently applied a more principled analysis to *Lodestar*, suggesting some flexibility in appeal may still remain. The High Court in this case was considering the breadth of appeal rights to be exercised in relation to section 109 of the Health Practitioners Competence Assurance Act 2003. Previous litigation had shown that section 109 appeals were to be dealt with on a quite narrow basis, more akin to review than appeal.[70] However, Ronald Young J held that as section 109 involved a "general appeal in that it is a right of appeal in the way of rehearing";[71] the approach in *Lodestar* should now apply. However, the decision then goes on to provide some indication as to *why* and *how* such an approach should apply to a particular right of appeal.

Firstly, it was noted that the decision made at first instance did not include the exercise of discretion, as the judgment involved a "comparison of the conduct of the practitioner against appropriate [identified] standards",[72] rather than a decision-making power based around policy implementation. Secondly, the court held it relevant that "there was no specialist medical expertise being exercised by the Tribunal,[73] requiring only an isolated application of given facts to known law – moving the Tribunal away from the notion of a truly "specialist" body. To reaffirm this point, the court noted that attention would have to be paid to this specialist knowledge if relevant to the initial determination.[74]

This approach seems to swing back towards *Shotover*; letting "standard-varying" factors into an analysis, even when the context is as seemingly unpromising as a general right of appeal. This point addresses the second issue identified in respect of appeal rights; that correctness standards will invariably be applied. A possible explanation for this may be that the reasoning of the Supreme Court in *Lodestar* was descriptive without being explanatory. Even though there was a clear indication that "appeal means substitution",[75] no explicit methodology was identified by the Supreme Court as appropriate, opening the door to "*E*-like" reasoning. This could even be taken as an implicit recognition by the Supreme Court that the High Court will, when the context demands it,

[68] See, for example, *Hutton v Webb* [2008] NZFLR 629 (HC), *Barry v Police* 3/4/08, Stevens J, HC Whangarei CRI-2007-488-29.

[69] 11/6/08, Ronald Young J, HC Wellington, CIV-2007-485-2735.

[70] *E v Director of Proceedings,* above n69, paras [8]-[9].

[71] Ibid., para [12].

[72] *E v Director of Proceedings*, above n69, para [15].

[73] Ibid., para [17].

[74] Ibid., para [18].

[75] *Lodestar,* above n64, para [16].

construe appeal rights in a less rigid manner. Therefore, even when the High Court has been "invited" by Parliament to correct an error, the invitation may not always involve a court substituting its judgment *de novo*. Accordingly, in a judicial review where a court is "uninvited" and may use its discretion more fully, standards become even more malleable.

Deference to What?

Deference has been discussed and applied in respect of many aspects of a first-instance decision-making body's reasoning. However, this has led to some confusion in scope of application, in that precisely which head, or heads, of review should attract the deference doctrine remains unclear. Accordingly, this dissertation will examine what it means to defer to an *error of law* made by an "inferior" tribunal. This will almost invariably (as was the case in *CUPE*) involve an alleged misinterpretation by the tribunal of their governing statute.

It is worth clarifying at this point precisely what this means. When assessing alleged errors of law, it is difficult to draw a clear dividing line between interpretation, application, and "mixed" questions of law and fact. This is because "the line between law and fact can be manipulated for pragmatic reasons".[76] The construal of the nature of an alleged error is important, as varying levels of intervention will then be justifiable by a court. For example, an error of fact, which requires that the mistake "plays a [...] decisive part in the tribunal's reasoning"[77] establishes a lower standard of intervention that a "pure" error of law, which is "wrong" if it "falls short of an objective truth".[78] Therefore, the focus here will be on the *interpretation* of a statute, as divorced from factual questions as conceptually possible. This removes the problem "customary allowance"[79] of relaxed intervention on findings of fact, and enables a more principled examination of whether deference can apply on the doctrinal, rather than pragmatic, level.

This view is not, perhaps, *prima facie* the most fertile ground on which to base a deference enquiry. It is a long-established fact that courts will apply a "correctness" standard to alleged errors of law.[80]

[76] Rebecca Williams, "When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact", *Public Law*, (2007 (Winter), pp793-808), p794.

[77] Ibid., p795.

[78] Ibid., p797.

[79] *Shotover Gorge Jetboats Ltd* , above n60, p439.

[80] For a recent example of the application of this standard, see *Major Electricity Users' Group Inc v Electricity Commission* (14 March 2008, High Court, Wellington, Wild J), where it was stated at para [80] in response to an

There is no way a decision-maker can interpret law "almost correctly". However, there have been instances, both in Canada and in New Zealand, where the potential of this approach is underlined. Moreover, there are also conceptual advantages in examining deference in respect of error of law. This is explained through error of law's position as the "hardest" standard, or to use a metaphor, the biggest weapon in a reviewing court's armoury. Therefore, error of law seems to be the logical starting point: if it is arguable that a court should defer from this high standard, it would not be a huge jump in logic to then suggest that the same relaxation (in the appropriate circumstances) might be applied to other, lower standards.

Some support for this approach can also be found in *Bulk Gas.*[81] Cooke J stated that a reasonableness test should apply where "there remains legitimate room for judgment in applying the [correct] test":[82] in other words, those questions of application of statutory standards may be deferred to.[83] There is support also in Canada, best illustrated by the opinion of Lebel J in *City of Toronto v CUPE:* [84]

> This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness [...] *even pure questions of law may be granted a wide degree of deference* where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention. The critical factor in this respect is expertise [...] where an administrative adjudicator must decide a general question of law [...] that determination will typically be entitled to deference.[85] (Emphasis added).

This quote reflects the unique position administrative tribunals now hold in our constitutional framework. These bodies' specialist knowledge and expertise means that parties using this specific medium should, and can, expect a valid determination of law in relation to their dispute. Indeed, when a tribunal is singled out as the appropriate dispute resolution mechanism, it makes administrative sense for this to be the case. Accordingly, deference may apply to alleged errors of law.

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alleged error of law on the part of the Electricity Commission that "there is only one standard of review in such a situation: correctness".

[81] *Bulk Gas Users Group v Attorney-General,* above n30.

[82] Ibid., p136.

[83] Taggart, above n4, p196.

[84] *Toronto (City of) v. CUPE, Local 79* above n23.

[85] Ibid., para [71].

Deference to Whom

Deference to various bodies has been contemplated across the common law world. In Britain, the concept is used to interpret the relationship between the three branches of government, and whether a court could, or should, ever "defer" to Parliament's will, particularly in relation to human rights.[86] This is perhaps reflective of a broader trend, evident too in New Zealand's Supreme Court in *Lodestar,*[87] of using the term "deference" in a variety of contexts relating to the level of intervention to be applied by a reviewing court when faced with an alleged error. However, for the purposes of this dissertation, the question of "deference to whom" will be somewhat narrower, and will focus solely on "court-substitute" administrative tribunals. These bodies might broadly be understood as those which undertake an adjudicative approach (in principle, applying identifiable legal standard to given sets of variable facts). However, there are obviously difficult questions of degree to be analysed in respect of this definition, which will be addressed in this subsection.

There are several justifications for analysing only "inferior" bodies displaying adjudicative behaviour in respect of judicial deference. The first is the nature of "errors" that will be made by these bodies. Given they are acting like a court by applying legal standards to facts; errors made are likely to be alleged errors of law. As this head of review currently demands a correctness standard[88], this area is a useful "testing ground", as the most interventionist standard is applied. If deference can be applied to correctness on error of law, then it would be reasonably simple to then evaluate whether that approach can be applied to other standards of review. Furthermore, questions of deference in relation to policy implementation or separation of powers can be unclear and "non-legal". Often, the discussion seems to entail an examination of justiciability under a different name, or even a court conducting an examination of the nature of the decision made (considering such things as the policy content present), then working backwards from that point to justify a conclusion of intervention, or lack thereof. However, once a class of adjudicative-behaving bodies has been identified, many of these difficulties can be sidestepped, with the only remaining live issues concerning how precisely to examine the decisions made by such a body.

Canada

[86] See, for example, *R. (on the application of Prof-Life Alliance) v BBC* [2003] UKHL 23.

[87] *Austin, Nicholls and Co Ltd v Stichting Lodestar*, above n64.

[88] See, for example, *Major Electricity Users' Group v Electricity Commission* (14 March 2008, High Court, Wellington, Wild J).

With the landmark *CUPE* decision stemming from decisions of comparatively high-powered labour relations tribunal, the Canadian deference jurisprudence is directed towards tribunals who perform "court-substitute" roles. This theme has been reflected recently in the Supreme Court of Canada, where Lebel J in *Toronto (City) v CUPE, Local 79*[89] "raised concerns about the appropriateness of[...] an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers".[90] Moreover, in *Chamberlain v. Surrey School District No. 36*[91], Lebel J provided some principles on which to assess the nature of a power being exercised by an inferior tribunal. Although these comments are made in relation to the determination of the standard of review to be applied to a decision-maker under the quite specialised Canadian "pragmatic and functional approach",[92] they are still useful in demonstrating that adjudicative decision-makers can be appropriate vessels for deference to apply. The basic starting point from *Chamberlain* is that:

> "[T]he key question is the basis on which the legislature intended review by the courts to be available. This inquiry must be undertaken bearing in mind the fact that the legislature has decided to take the matter out of the hands of the courts and to give the tribunal primary authority over it."[93]

Lebel J then lists some factors, such as the presence (or absence) of a privative clause, the specialised nature of the tribunal and the limits of its jurisdiction,[94] which could point towards Parliament intending a less interventionist standard of review to be applied to that body. Lebel J has also provided guidance as to when a tribunal will be performing judicial or quasi-judicial roles. In addition to "anything in the [statutory] language in which the function is conferred",[95] direct effect on the rights and obligations of persons, the adjudicative process being involved, and application of substantive rules rather than formulated policy[96] were also identified as features of an adjudicative tribunal.

New Zealand

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[89] 2003 SCC 63.

[90] *Toronto (City) v CUPE, Local 79I,* above n89, para [61].

[91] [2002] 4 S.C.R 710.

[92] Ibid., para [61].

[93] *Chamberlain v. Surrey School District No. 36*, above n92*,* para [192].

[94] Ibid.

[95] Ibid., para [21].

[96] Ibid.

The New Zealand Law Commission has recently published an Issues Paper on Tribunals in New Zealand,[97] which provides a useful guide in assessing what an adjudicative tribunal actually is. The report does recognise the inexorable difficulty that "the concept of tribunal has historically not been clearly defined, and even the term 'tribunal' has been described as an 'unusually fluid expression'".[98] Notwithstanding this, there is some discussion that can be easily applied to help identify the types of tribunals that might most easily attract deference.

Unlike Australia, many tribunals in New Zealand have been set up as "substitutes for adjudication by the courts", and accordingly are commonly considered as part of the "judicial machinery of the state".[99] Despite this recognition, however, it would overly simplistic to assert that tribunals, whether capable of performing adjudicative functions or not, are automatically to be considered as "mini-courts". Merely because a tribunal is created to relieve a court of some function, it cannot then be automatically considered a court,[100] and must instead be placed on a spectrum, with administrative action at one end, and "pure" judicial behaviour at the other. That said, there is a recognition that "much tribunal-decision making has obvious similarities to the judicial process [involving] an institutional guarantee that disputants will have an opportunity to present proofs and reasoned arguments to an impartial judge".[101]

The relevant type of administrative court or tribunal for the purposes of this dissertation might then be described, at least as a starting point, those which undertake "decisions which require applying standards to facts"[102] to assert which claimed individual right will prevail as between the two parties in dispute. Tribunals that deal with "polycentric" questions – that is, issues of wide-ranging effect such as supervising legislation or developing policies[103] - are not as applicable to this paradigm. This is particularly important in this context also. If deference was to be accorded to all tribunals, including those making non-adjudicative decisions, it may be difficult to say in "polycentric" cases precisely what element of a decision was being deferred to by a reviewing court. Therefore, more easily identifiable adjudicative behaviour is perhaps the more appropriate paradigm in which to operate. There is some common law to support this view, primarily around the applicability of

[97] New Zealand Law Commission, *Tribunals in New Zealand* (NZLC IP 6, Wellington 2008).

[98] Ibid., p32.

[99] Ibid., p36.

[100] Ibid., p37.

[101] Ibid., p37.

[102] Ibid., p38.

[103] Ibid., p39.

section 27 of the New Zealand Bill of Rights Act 1990 (NZBORA). Section 27(1) guarantees every person "the right to the observance of the principles of natural justice by any tribunal [...] which has the power to make a determination in respect of that person's rights, obligations, or interests". The High Court in *Air Nelson v Minister of Transport*[104] affirmed that "the authorities suggest that before s27 can be engaged there has to be a determination of an adjudicative nature...deciding something in the nature of a [dispute] between parties".[105]

Conclusion

For a targeted examination of deference in the following chapters to have some depth in analysis, the broad notion of deference, established in *CUPE*, must be targeted to a specific focus. This chapter has attempted to do this so later discussion and conclusions relating to the concept can be applied, if necessary, from a high level of abstraction to a broader context. Therefore, the remainder of this dissertation will examine deference in respect of "court-substitute" administrative tribunals and "pure" errors of law. In determining whether these alleged errors should be deferred to, factors identified in this chapter as potential "triggers" will be considered throughout.

[104] [2008] BCL 589.

[105] *Air Nelson v Minister of Transport*, above n104, para [58].

CHAPTER II: DEFERENCE IN NEW ZEALAND

Introduction

The concept of deference has not yet explicitly been recognised as a doctrinal tool in New Zealand. However, as Professor Taggart points out, "[i]f you look at what Judges so, as well as what they say, there is a good deal of deference".[106] Because "deference" as an abstract, unprincipled idea involves merely different levels of judicial intervention being applied, it is not difficult to imagine some cases in which the notion plays out implicitly. That said, there are also some examples in New Zealand of more explicit discussion, but not acceptance, of this approach.

Fulcher v Parole Board[107]

This Court of Appeal judgment concerned a Parole Board's decision to fix conditions to the parole of a prisoner, F. The Board had, under section 58 of the Criminal Justice Amendment Act, extended F's conditions for the length of his sentence. This was (presumably) done under the assumption that this was not inconsistent with section 62 of the same Act, which stated the Board would not place prisoners in a position of "disadvantage". F claimed that the section 58 action by the Board involved a misinterpretation of "disadvantage" under section 62. Although Thomas J, with the majority, found that section 58 prevailed, he did comment on how a court should approach the question of whether "disadvantage" had occurred. His view that the Board's interpretation was "at least tenable"[108] suggests an implicit willingness to consider the "error" in terms of reasonableness. Moreover, Thomas J considered "there is still scope for the Courts to manifest deference to the determination of tribunals [...] on questions of law, including the interpretation of their governing statute".[109]

Thomas J was not, however, prepared to defer to the Board's interpretation. In discussing Professor Taggart's paper on deference, his starting point was "the fundamental tenet [...] that the Court's constitutional role is to interpret the written law".[110] He accepted the possibility of deference, but

[106] Taggart, above n4, p202.

[107] (1997) 15 CRNZ 222 (CA).

[108] Ibid., p244.

[109] Ibid., p245.

[110] Ibid.

then warned that a reviewing court is "not to abdicate its ultimate responsibility for the decision".[111] This apparent unwillingness to depart from the established correctness standard leads Thomas J to conclude, in obiter, that a Court is always entitled to reach a different conclusion to the Board, despite deference being granted.[112] Thus, we are left with a frustrating situation: an apparent acceptance of the idea of deference, encouraging application of those principles to the Parole Board, but a correctness standard nonetheless being applied.

It seems as though this may be due in large part to Thomas J's failure to outline the requirements of deference in their entirety. Although there is acceptance that deference may be paid to administrative decision-makers, there is no discussion of how an appropriate standard - i.e. a *CUPE* "patent unreasonableness" standard – should apply. Thus, when Thomas J identifies factors suggesting deference is appropriate,[113] he departs from correctness without a clear alternative direction. Accordingly, it seems that he is then forced to return to the safer waters of "fundamental constitutional doctrines", as he was unable to measure the Board's decision against any empirical standard, meaning deference in this case may have appeared unprincipled and overly simplistic. This trend is perhaps also reflected in *International Pilots Committee v Domestic Pilots Committee,*[114] where a correctness standard was applied notwithstanding the comment that "where different views are reasonably open and the [legal] issue is finely balanced the Courts [...] should be low to interfere [and] be clearly satisfied that an expert tribunal's interpretation is wrong".[115] Notwithstanding this difficulty, *Fulcher* does still recognise that deference may have a legitimate place in New Zealand administrative law.

Gordon v Auckland City Council[116]

The allegation in this case was that the Auckland City Council had erred in deciding notification of resource consent under the Resource Management Act 1991 was unnecessary, based on the meaning of "facade" and whether it included the roof of a building. The court noted that question may be construed as a question of fact, or as "a question of degree over which two persons, both understanding the law, may differ".[117] This may be seen as an attempt to recalibrate an issue so as to

[111] *Fulcher v Parole Board*, above n107, p245.

[112] Ibid., p247.

[113] Ibid., p246.

[114] 1 NZELC 95,170.

[115] Ibid., p174.

[116] Unreported, 29 November 2006, HC Auckland, Fogarty J CIV-2006-404-4417.

[117] Ibid., para [15].

justify a different level of intervention by the court. The court then, in addressing the issue, noted that the Council's interpretation of "facade", which included a roof, was "an available meaning".[118] Notwithstanding this, the court took a different view of term which, in their view, "gives effect to the objective and policies [of the Act]".[119] This seems to represent a court undertaking a deference-type analysis, but in lieu of any principled application of relevant *CUPE*-like factors, reaching a conclusion that can be viewed as superficial. Accordingly, decisions such as this illustrate the potential for explicit recognition of deference to enhance the clarity of administrative law.

Leary v New Zealand Law Practitioners Disciplinary Tribunal[120]

The issue in this case was an appeal by a solicitor against having been struck off the role of New Zealand barristers and solicitors. The appeal was denied by the Tribunal, and then appealed to the High Court. Early in the judgment, the court (Williams, Venning and Andrews JJ) cited with approval judicial comment that "the decision as to what is 'professional misconduct' is primarily a matter for the profession expressed through its own channels, including the disciplinary committee".[121] They also explicitly affirmed the expert nature of the Tribunal.[122] This view seems to impliedly support an implicit acceptance of deference, as it pertains to the *meaning* of "professional misconduct" in the generality of cases, rather than any lowered level of intervention because of an advantage in fact-finding by the Tribunal. However, this seemingly "pure" doctrinal basis is then departed from by the Court, suggesting an unwillingness to engage with the deference principle, perhaps due to fear of abdication of role. The question of error is reframed in terms of the evidence offered by the Tribunal, and labels "deference" as relating to "matters of discretion", which collapses when a decision is "wrong",[123] apparently underlining a correctness approach, despite encouraging early signs in the judgment.

R v Hansen[124]

[118] *Gordon v Auckland City Council* , above n116, para [35].

[119] Ibid., para [43].

[120] [2008] NZAR 57.

[121] Ibid., para [5].

[122] Ibid.

[123] Ibid., paras [46], [54].

[124] [2007] NZSC 7.

Although somewhat removed from the context and focus of this dissertation, it is also worth briefly examining the Supreme Court's (and particularly Tipping J's) use of the term "deference". Tipping J addresses the concept in respect of the constitutional relationship between the judiciary and the legislature, and is almost entirely comparative with the United Kingdom. This approach involves the courts giving "latitude"[125] to Parliament on questions of policy, even when individual rights are at stake in a review case. Therefore, Tipping J's mention of "deference" is actually more akin to the recent examination of a "spectrum of review" to replace *Wednesbury* unreasonableness. Notwithstanding this, it does at least represent a possible willingness of our highest court to apply varied standards of review, depending on the subject matter.

Conclusion

It seems that a concept of deference in New Zealand is not entirely foreign. However, the lack of a principled base for this concept means that its current operation is unclear in ambit. In some cases, courts flirt with departing from a correctness standard on errors of law – often for legitimate reasons similar to those mentioned in Canada – but fall at the final hurdle. This is perhaps understandable, given that to defer would involve a perceived, but perhaps not entirely accurate, departure from a court's "fundamental role" of interpreting written law in accordance with Dicey's conception of the rule of law. Accordingly, it becomes easier to understand why deference is often mentioned, but not actually applied.

However, the reasons for New Zealand courts merely "glancing" at deference may be slightly deeper and more fundamental. Our significantly different constitutional framework from Canada means that it is overly simplistic to point out the advantages of a concept such as deference, then "graft" it without thought onto our administrative law landscape. Numerous factors, the most important of which stem from New Zealand's smaller legal profession, mean that deference may actually cause more problems than present solutions. Whether this means that the notion behind deference (that is, varying levels of intervention on errors of law) should be abandoned altogether, or merely continued "behind the scenes", will be examined in Chapter Three.

Objections to Deference

<u>Parliament and "Dialogue"</u>

[125] *R v Hansen*, above n124, para [116].

Judicial review plays an important part in the constitutional framework of New Zealand. To guard against abuse of power by administrative bodies and government generally, the High Court possesses an inherent power to "control and contain the Executive's exercise of power within the limits laid down by Parliament"[126] through judicial review. It has also been said that the judiciary is "likely to be the most reliable in its adherence to principle, neutrality, and rationality".[127] Accordingly, a court's role of ensuring that other branches of government adhere to principles of legality through the mechanism of judicial review will be understandably adhered to strictly by reviewing courts. If a court fails to do so, they arguably abdicate their constitutional role of ensuring the executive act within the limits prescribed to them by law.

That said, Parliament's position as sovereign law-maker in New Zealand means that clear indications can, and have, been given to the judiciary on how review powers are to be exercised. The clearest example of this is a privative clause that purports to exclude a court from reviewing; with the celebrated *Anisminic*[128] case highlighting the fact that the courts will not cede their power of review lightly and will rarely hold a privative clause to be effective. Therefore, even where there is a statutory direction suggesting otherwise, courts have shown themselves in New Zealand to be very wary of relinquishing their inherent power of review. This reveals one of the major difficulties with deference: why would a court, without clear instruction from a superior law-making authority to do so, relinquish some of their inherent powers designed to check other branches of government? Surely the only way a court could, or should, be convinced to defer would be through the expression of abundantly clear parliamentary intent. In the absence of such intent, it is perhaps difficult to see a court voluntarily lowering standards of intervention.

It is also worth noting, however, that *Anisminic* itself is not fatal to deference in New Zealand. Even though *Anisminic* essentially held that all errors of law are "jurisdictional"[129] – creating an expansionist approach to review in the face of privative clauses and suggesting a blanket correctness standard – New Zealand courts have been reluctant to embrace *Anisminic* entirely, at least in this context. Therefore, the seemingly counter-intuitive (to deference) ethos is more contextualised in New Zealand, and accordingly does not preclude the error of law standard being examined and assessed. Many privative clauses in a post-*Anisminic* context explicitly state that errors "on the ground of lack of jurisdiction"[130] are exempt from the application of a privative clause, suggesting a

[126] Geoffrey and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004), p291.

[127] Ibid., p285.

[128] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[129] Ibid., p171. See also, for an affirmation of this principle in the New Zealand context, *Peters v Davison* [1999] 2 NZLR 164, p181.

[130] Intelligence and Security Act 1996, s19(9).

dichotomy remains. This has been recognised in cases such as *Zaoui v Attorney-General,*[131] which stated that "lack of jurisdiction" might not mean "material errors of law" when "clear words to the contrary"[132] were to be used. Thomas J in *Fulcher v Parole Board*[133] echoes this sentiment by expressly allowing for "deference to the determination of tribunals [...] on questions of law, including the interpretation of their governing statute".[134] This is, however, never an easy enquiry to conduct.

Therefore, in lieu of a "silver bullet" from Parliament, courts must use inference, suggestion and implication to recognise intent to grant an administrative tribunal a greater level of freedom in interpreting its governing law. I would submit that it is too crude for Parliament to attempt to do this in one move. Rather, courts should "take the hints" given to it, through privative clauses, recognition of expertise, appeal rights and other similar concerns to then form a less interventionist opinion in respect of that tribunal. From that point, the mantle is then returned to Parliament, who can adjust the level of intervention granted by the court through further use of statutory "pointers", if necessary.

The idea of "dialogue" between Parliament and the judiciary has been discussed in Canada, albeit in a slightly different context. Much ink has been split there in relation to courts striking down legislation they deem inconsistent with the Canadian Charter. "Dialogue" fits into this matrix by claiming that "court decisions in *Charter* cases usually leave room for a legislative response, and usually received a legislative response [...] [m]etaphorically speaking, there were at least two 'voices' translating *Charter* requirements into laws".[135] Although this approach has been directed more at the "anti-majoritarian" objection to judicial review, particular in countries with a written constitution,[136] the underlying broader principles are of some use in this context as well. This is through viewing "dialogue" as "a useful way of articulating the constraint that should be felt by judges".[137] If, in the context of striking down Canadian legislation, a court cannot interpret the statute in a "Charter-friendly" manner, it merely asserts that sentiment clearly and expressly. Responsibility then swings back to the legislature. Similarly, if a court in New Zealand chooses to defer based on a legislative "hint", it is up to the legislature to decide if the bounds of the

[131] [2005] 1 NZLR 691.

[132] Ibid., para [104].

[133] *Fulcher v Parole Board* (above n107).

[134] Ibid., p245.

[135] Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright "Charter Dialogue: Ten Years Later or Much Ado About Metaphors", *Osgoode Hall Law Journal* (2007, Vol 45, No 1, pp1-65), pp3-4.

[136] Ibid., p1.

[137] Ibid., p13.

administrative body's authority drawn by the court are consistent with the legislative intent that created those powers at first instance, or whether recalibration through further "hints" is required.

Agency Capture

New Zealand has a smaller available pool of resources (especially legally-trained personnel) to invest in the establishment, maintenance and operation of administrative tribunals. Accordingly, when compared to Canada, our tribunals appear less "robust" or "expert". It then becomes harder for a reviewing court to hand such tribunals independence over interpretation when they may be viewed as insufficiently qualified. A comparison of employment law between the two jurisdictions provides an illustrative example. The Canadian Public Service Relations Act 2003[138] sets out the requirements for membership of the Public Service Labour Relations Board, the first instance adjudicating body for labour disputes in Canada. Members must, among other things, be Canadian citizens; hold no other office; must not be employed by an employment organisation recognised as a bargaining agent; and have knowledge and experience in labour relations.[139] There is therefore an appreciable amount of independence and impartiality recognised by Parliament in the formation of such robust administrative tribunals in Canada. This is especially evident when compared to New Zealand's equivalent statutory regime, the Employment Relations Act 2000. That Act makes no provision whatsoever as to the minimum requirements needed to be a member of the Employment Relations Authority: the closest it comes is a requirement that the Chief of the Authority makes "such arrangements as are practicable to ensure that members of the Authority discharge their functions in an orderly and expeditious way and in a way that meets the object of [the Employment Relations] Act".[140] No mention is made of knowledge of employment law, general law, legal training, independence from union membership, or even a general interest in the area. This example is reflective of a broader trend in New Zealand of less "robust" tribunals. Whether this is due to inadequacies inherent in the statutory instruments, or merely as a result of New Zealand's smaller "base" of specialists in particular legal areas is a moot point for the purposes of this dissertation. The main conclusion to note is that New Zealand tribunals are simply not as "expert" as those in Canada, and are therefore less likely to attract deference from supervisory reviewing courts.

Perhaps of deeper concern is that, in New Zealand, those who have influence in drafting of the laws are also often those who end up applying them. This problem has been identified, primarily in the United States, and termed "agency capture". This manifests itself as the "interchange of personnel between the government and the private sector [meaning that] [r]egulatory agencies might be

[138] Which replaced the 1973 Act of the same name, under which *CUPE* was decided.

[139] Public Service Labour Relations Act 2003 (Canada), s18.

[140] Employment Relations Act 2000, s166.

'captured' by the exchange of personnel with the agencies they are responsible for regulating".[141] If this problem is viewed as material by a reviewing judge, there is little chance they would defer to that administrative tribunal, owing to the self-interested nature of their interpretations. On a higher level of abstraction, a court would be unwilling to allow a body to essentially both make and apply their governing law, as to do so would violate constitutional principles such as the separation of powers and rule of law. Owing to the amorphous nature of this issue,[142] it is difficult to assess the problem in depth, particularly in New Zealand, where no attention has seemingly been paid to it.

A recent American journal article[143] demonstrates explicitly the problems agency capture can create. This article discusses an example where the Environmental Protection Agency (EPA) promulgated a rule under the Clean Water Act (CWA) that encouraged coal-mining of abandoned sites, which was then challenged[144] by non-profit environmental groups. This was on the basis that the EPA, intertwined with the regulated agency (coal-mining), had drafted a rule that was far too industry friendly.[145] On review, the court held the rule as valid. However, it has been claimed that the reviewing court conducted only a "superficial review",[146] ignoring the complex requirements of the EPA and "by allowing the [tribunal] to justify their actions based solely on the Act's general purpose, fail[ing] look at the real reasons behind the [tribunal's] industry-friendly rule".[147] Thus, the "expert" administrative decision-maker was granted an improperly large amount of freedom to operate, and was perhaps able to take advantage of that through agency capture.

The capacity for these difficulties to emerge is also present in New Zealand. For example, the Telecommunications Commissioner[148] from 2001, Douglas Webb, headed the Telecommunications Commission (an administrative tribunal *par excellence*) after having "made decisions on telecommunications reform, [...] includ[ing] advising governments on the privatisation of state-

[141] Edna Earle Vass Johnson, "Agency 'Capture': The 'Revolving Door' between Regulated Industries and their Regulating Agencies", *University of Richmond Law Review,* 18.1 (1983), pp95-121, p95.

[142] Ibid., p96.

[143] Reid Mullen, "Statutory Complexity Disguises Agency Capture in *Citizens Coal v EPA*", *Ecology Law Quartley*, 34.1 (2007), pp927-953.

[144] *Citizens Coal Council II* 447 F.3d 879 (6th Cir. 2006) (en banc).

[145] Ibid., p931.

[146] Mullen, above n143, p927.

[147] Ibid., p929.

[148] Appointed under the Telecommunications Act 2001, s9.

owned telecommunication companies".[149] Although this would fall well short of any suggestion of bias, factors such as this do create at least some basis to doubt the independence of such tribunals, particularly in New Zealand-specific oligopolies such as telecommunications. The Environmental Risk Management Authority (ERMA) provides another interesting example. The Authority, which exists to "make decisions on applications to import, develop, or field test new organisms",[150] currently includes a past President of the New Zealand Plant Protection Society, an employee of a private horticultural company, and a partner in a large law firm.[151] With the only statutory directive on membership being to retain "a balanced mix of knowledge and experience in matters likely to come before the Authority",[152] the potential for self-interested application does exist, especially if deference was afforded.

However, agency capture may not be fatal to deference. There are also certain advantages that the concept may provide. The principal one of these, and linked to the justification of deference generally, is expertise. Knowledgeable former industry members "bring new perspectives [and] knowledge to the agency allowing the regulatory process to be more responsive to the real world".[153] This can also help the agency and the industries have a more efficient and understanding relationship.[154] Finally, to view agency capture as universally negative takes an overly cynical view of the integrity of statutory regulation in a given area.[155] A negative view of agency capture *presumes* that members of tribunals will use deference to their own ends. However, given that these individuals have departed the private sphere in favour (ideally) of the politically-neutral sphere of adjudication, this argument may carry little weight.

Institutional Structure; Abandoning Dicey

There may also be deeper causes of conflict between the Canadian approach to deference and New Zealand. The Canadian attitude towards deference of granting administrative tribunals a greater

[149] Internet: "Beehive: Commerce Commission: Appointment of Telecommunications Commissioner" http://www.beehive.govt.nz/node/12604; accessed 2 September 2008.

[150] Internet: "ERMA: The Authority" http://www.ermanz.govt.nz/about/authority.html; accessed 2 September 2008.

[151] Ibid.

[152] Hazardous Substances and New Organisms Act 1996, s16(1).

[153] Edna Earle Vass Johnson, above n141, pp98-99.

[154] Ibid.

[155] Ibid., p101.

amount of freedom in interpretation of their laws seems to be based around attacking traditional, Diceyan views on institutional and constitutional structure. The Canadian approach seems to encourage the pseudo-recognition of a "fourth branch" of government in administrative tribunals, which will thus demand modified judicial behaviour. Canadian thought suggests that Dicey's theory, which derives sources of law only from Parliamentary sovereignty and the rule of law (i.e. common law)[156] as:

> "Ma[king] no place for [administrative agencies in law-making]; it was deliberately construed as an ideological obstacle in the way of their growth. The major component of the obstacle is the assumption that law of the land to which public officials are to be held accountable to is [...] maintained as such by judges of the superior courts who have ultimate interpretative authority over the law".[157]

Accordingly, for Canada to move "out of the shadow" of Dicey, judicial behaviour would have to be altered so as to recognise the birth of a new world order in the form of competent and established administrative tribunals. Law would have to be granted another source, owing to the comparative expertise and importance of these new bodies. The only logical way for this to occur would be for one of the "established" law-making bodies to recognise this, and in Canada, the judiciary was seen as the logical (and obvious) choice. Therefore, a "split" in the judicial branch would be necessary, so as to recognise that the law is "not always a whole, unified, integrated thing with the Courts at the top fully competent to administer the whole thing".[158]

Administrative institutions, then, were handed more freedom to interpret after *CUPE* as their institutional strength necessitated a judicial recognition of their constitutional importance. The judiciary made an implicit recognition in *CUPE* and subsequent cases that judge-made law and statute's "[battle] for supremacy"[159] must be tempered by an alternative way of deriving legality. As Dyzenhaus points out, this must not, and could not, be done in a purely formalistic way.[160] Rather, the legitimacy of these bodies standing independently is based on their robustness and inherent expertise: recognition that 'the administrative state is here to stay",[161] necessitating a recalibration

[156]Matthew Lewans, "Rethinking the Diceyan Dialectic", *University of Toronto Law Journal* (Winter 2008, Vol 58, pp75-104), p82.

[157] Dyzenhaus, above n38, p281.

[158] Taggart, above n4, p212.

[159] Lewans, above n156, p102.

[160] Dyzenhaus, above n38, p280.

[161] Ibid., p289.

of Dicey's ideology. Factors such as expertise are important in this enquiry in Canada, as they help to rationalise the "birth" of a new law-making body, fully divorced from its roots in the judicial branch of government.

However, the situation is quite different in New Zealand. There has been no such overt opposition to the Diceyan roots of our legal and constitutional framework. Although much administrative decision-making is "not significantly different to that of the courts",[162] the smaller New Zealand legal profession means that these tribunals lack the institutional strength to be considered a "fourth branch" of government. As illustrated by the problem of "agency capture", the relative independence of tribunals in New Zealand compares unfavourably with examples such as Canada. Moreover, New Zealand may simply have insignificant resources to justify administrative tribunals moving from the shadow of the "judiciary" in the orthodox sense.

The solution in New Zealand seems to have been to 'integrate' tribunals as "part of the judicial machinery of the state"[163] within the Diceyan paradigm. There is no separation of the two different decision-making bodies. Rather, as is evident from such cases as *Fulcher* and *Gordon*, courts retain a supervisory role over administrative tribunals through an implicit lack of confidence in the independence and expertise of the tribunal. For example, in *Gordon*, the High Court was not willing to accept the Auckland City Council's position on the meaning of "facade",[164] despite that body presumably having more first-hand experience and practical experience in construing a workable legal regime in this area. This seems indicative of a (perhaps understandable) unwillingness in New Zealand to allow administrative tribunals to strike out independently.

There are therefore fewer reasons for a judge to lower a correctness standard in New Zealand. As the judiciary and tribunals in New Zealand operate within roughly the same administrative paradigm, i.e. there is no 'border fence' between the two, there is less reason for judges to display any modified behaviour in relation to these "junior" tribunals. To extend the metaphor, it is hard to build a border fence when the two parties occupy the same backyard. Therefore, broad assertions that "it is presumed that judges who are experts on the law do not possess expertise in the same quantity [as specialist tribunals]",[165] and should thus defer accordingly, may be examining the question from the wrong perspective. In New Zealand, it is not so much *judicial behaviour* that matters, but the *institutional design* in which they operate. The New Zealand context, including an unwritten constitution that demands statutory regulation of administrative decision-making be adhered to as

[162] New Zealand Law Commission, "Tribunals in New Zealand", above n97, p38.

[163] Ibid., p36.

[164] *Gordon v Auckland City Council,* above n116, para [44].

[165] Michael Taggart "Proportionality, Deference, *Wednesbury*", above n37, p46.

sovereign law, may be inherently less likely to tolerate deference as a concept. Discussion of this problem on the level of application, rather than the level of origin, perhaps only hides the real difficulty the doctrine could face.

CHAPTER III: JUDICIAL DEFERENCE AND SPECIFIC INSTITUTIONS

Introduction

Chapters One and Two have outlined and discussed the theoretical underpinnings of the concept of deference. However, to gain a fuller insight into the appropriateness of this doctrine being explicitly recognised in New Zealand administrative law, examples of practical application must also be considered. There are several administrative tribunals in New Zealand that may possess the requisite qualities to attract deference from a reviewing court. Whether or not this *prima facie* suitability is negated through the presence of some, or all, of the concerns mentioned in Chapter Two is the subject of this chapter. This chapter does not seek to answer the question of whether deference should apply to *all* administrative tribunals. Rather, certain examples have been chosen here to evaluate the possibility of the "door being opened", in a similar way to labour tribunals in Canada. The growth of the doctrine from that point, as with Canada, would depend on the willingness of reviewing courts to embrace the concept in a wider sense.

The Maori Land Court (MLC)

Jurisdiction and Appeals

The Maori Land Court, along with the Waitangi Tribunal, occupies a unique niche in New Zealand's judicial landscape and seems one of the best possible examples of a "deference-appropriate" tribunal. There are some specific provisions in its governing statute, Te Ture Whenua Maori Act 1993 (TTWMA), that relate to the MLC's jurisdiction.[166] However, more broadly, it is sufficient to note that the MLC is mandated under statute to "promote and assist in the retention of Maori Land [...] in the hands of the owners; and the effective use, management and development [...] of Maori land or General land owned by Maori".[167] Although there has been some litigation as to the precise ambits of this jurisdiction[168] (which will be discussed in this chapter), the MLC does bear the primary responsibility for Maori land in New Zealand. The jurisdiction has consequently been extended to the areas of fisheries, aquaculture, and the foreshore and seabed.[169] A Bill currently under Select

[166] See Te Ture Whenua Maori Act 1993 (TTWMA), ss18-20.

[167] Ibid., s17(1).

[168] See *Attorney-General v Maori Court* [1999] 1 NZLR 689 (CA)

[169] Te Ture Whenua Maori Act 1993, s26B; Maori Fisheries Act 2004 ss181-182, s260; Foreshore and Seabed Act 2004, s46.

Committee consideration would, if passed, "expand the jurisdiction of the Court into all areas of collective Maori asset ownership".[170] Chief Maori Land Court Judge Joe Williams sums up the jurisdictional situation of the MLC by stating "[i]n time, the Court will need a new name because land will be just one of its many foci",[171] underlining its appreciable specialisation.

Appeals from MLC determinations may be made to the Maori Appellate Court (MAC) and are not restricted to points of law.[172] MAC decisions may then be generally appealed to the Court of Appeal or directly to the Supreme Court with leave.[173] However, as discussed in Chapter One, it is more common for the inherent power of review to be relied on in "correcting" MLC determinations. Several significant cases relating to the Maori Land Court[174] demonstrate that review (and accordingly, perhaps deference) is the preferred avenue for aggrieved Maori Land Court litigants.

Expertise

The existence of a separate Maori Land Court recognises the different cultural values and importance given by Maori to their lands, described in the statute as a "taonga tuku iho of special significance".[175] Accordingly, there are throughout Te Ture Whenua Maori Act 1993 several references to specifically Maori concepts, such as ahi ka, kaitiaki, whangai, and, most importantly, tikanga Maori[176], somewhat briefly defined in section 4 of TTWMA as "Maori customary values and practices". Therefore, much is left to the MLC itself to create a coherent jurisprudence on these terms, as Parliament has deliberately not done so in any detail.

[170] Waka Umanga Bill: see Internet "Waka Umaga Bill" http://www.parliament.nz/en-NZ/PB/Legislation/Bills/0/7/8/00DBHOH_BILL8344_1-Waka-Umanga-M-ori-Corporations-Bill.htm, accessed 11 September 2008.

[171] Chief Maori Land Court Judge Williams, in *Te Pouwhenua*, Issue 45 (May 2008), p3. Accessed on 11 September 2008 at http://www.justice.govt.nz/Maorilandcourt/pdf/Te-Pouwhenua-45.pdf

[172] Te Ture Whenua Maori Act 1993, s58(1).

[173] Ibid., ss58A-58B.

[174] See, for example, *Attorney General v Maori Land Court* [1999] 1 NZLR 689 (CA) and *Bruce v Edwards* [2003] 1 NZLR 515 (CA).

[175] Te Ture Whenua Maori Act 1993, preamble.

[176] Ibid., s4.

There are some statutory indications[177] that "there is some scope for the Maori Land Court to apply Maori custom law in its special jurisdiction".[178] As well as unsurprisingly being able to rule on claimed ownership of Maori land[179], sections 29 and 30 enable the Chief Judge to advise on matters of tikanga. The court's[180] specialist expertise also extends under section 61 to the High Court being able to refer any question of tikanga Maori back to the Maori Appellate Court, with the resulting opinion being binding on the High Court.[181] The section 68 guarantee that "any party or witness" may address the Court in te reo Maori affirms this specialist nature. In exercising these specialist functions, section 7(2A) TTWMA states that judges of the Maori Land Court must not be appointed to the bench "unless that person is suitable, having regard to the person's knowledge and experience of te reo Maori, tikanga Maori, and the Treaty of Waitangi". However, this expertise is not limited solely to TTWMA. Under s6A(1) of the Treaty of Waitangi Act 1975, the Waitangi Tribunal may ask the Maori Appellate Court to consider specifically Maori factors, including "Maori custom and usage". Moreover, section 252 of the Resource Management Act 1991 allows the Chief Environment Court Judge to appoint an alternate judge to that court in consultation with the Chief Maori Land Court Judge when it is necessary to do so – presumably when issues of tikanga Maori are before the Environment Court. Therefore, it can be seen that the Maori Land Court is as much a specialist tribunal as the labour relations board in *CUPE*. The court possesses a significant and specialised jurisdiction in relation to "the complex laws designed to replace customary tenure".[182]

The Maori Land Court is also of a unique importance by virtue of its guardianship of laws that sit sometimes uneasily alongside the Torrens land system.[183] This conflict stems primarily from the MLC's supervision of alienation of Maori land,[184] where rules apply that would seem repugnant to the Torrens system. For example, certain types of Maori land are considered inalienable, and the alienating of Maori freehold land is subject to strict statutory procedural requirements[185] that fetter the freedom of the owner or owners to alienate. Therefore, because "it is difficult to find one English

[177] Perhaps consistent with the idea of "dialogue" discussed in Chapter Two, as Parliament has indicated that the MLC should have its own discreet realm of decision-making in some circumstances.

[178] New Zealand Law Commission, "*Maori Custom and Values in New Zealand Law"* (Wellington, New Zealand Law Commission, 2001), para [258].

[179] TTWMA, s18.

[180] In this case, the Maori Appellate Court, but for the purposes of this comment, no distinction need be made.

[181] TTWMA, s61.

[182] New Zealand Law Commission, above n178, para [262].

[183] Ibid., para [100].

[184] See generally TTWMA, Part VII.

[185] Ibid., ss145, 147.

word that encapsulates the Maori concept of holding land",[186] maintaining the independence of legal principles relating to Maori land falls largely to the Maori Land Court.

The argument must then follow that, in order for the MLC to be able to exercise these functions correctly, and to give effect to clear Parliamentary intent, deference should be granted to the MLC in interpretation of specialised Maori land law. This has not occurred, however, and "the ability of Maori to exercise custom law has been restricted by loss of resources, by lack of recognition by the courts and by Parliament and by persistent and prolonged promotion of individualism and assimilation".[187] Accordingly, given the unique niche the MLC occupies in New Zealand, deference may be justified to overcome this systemic difficulty.

Attorney-General v Maori Land Court[188]

This case concerned a block of General land only "4.2km in length and 37 ¼ acres in area",[189] highlighting the desire of the litigants to assert the Maori Land Court's jurisdiction in higher courts. The land in question was vested in the Wairoa District Council after having been earmarked in 1930 for a paper road[190] as General land, but the road was never built. The Maori beneficial owners of the land then claimed that it was held under in a fiduciary capacity to them, and should be returned.[191]

This claim raised questions as to the Maori Land Court's jurisdiction to make such a vesting order, both in the case before the court and, more importantly, in future cases dealing with the relevant provision, s18(1)(i). In essence, the critical question[192] was whose statutory interpretation of the general meaning of s18(1)(i) should be preferred: the MLC, or Court of Appeal. Section 18(1)(i) is as follows:

[186] New Zealand Law Commission, above n178, para [110].

[187] Ibid., para [116].

[188] [1999] 1 NZLR 689 (CA).

[189] Ibid., p690.

[190] Ibid.

[191] Ibid., p691.

[192] The jurisdictional importance of which was affirmed by the Maori Land Court instructing counsel to defend its position in the Court of Appeal: see *Attorney-General v Maori Land Court*, above n209, p690.

18 General jurisdiction of Court

(1) In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, the Court shall have the following jurisdiction: [...]

[..] (i) To determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

The Maori Land Court's interpretation of the meaning of s18(1)(i) was that it was sufficiently broad to justify vesting orders of General land in Maori owners as Maori freehold land. Judge Savage noted s18(1)(i) was on its face "an immensely broad jurisdiction",[193] but read it in the context of the Act to reach the conclusion that:

> "However 18(1)(i) is interpreted, looking at it in the round, it must involve a grant of jurisdiction to this court where a party saying that notwithstanding that the land appears prima facie to be General land, it is in fact Maori freehold land or is held only by a fiduciary who has an obligation to return it to the status of Maori freehold land or General land owned by Maori and vest the title in the owners".[194]

Accordingly, title to General land could be recognised as fettered by a fiduciary interest by the MLC, who could then make an appropriate vesting order under s18(1)(i). The MLC saw s18 as being divided into "two conceptually different parts":[195] 18(1)(a)-(d) giving "primary jurisdiction" to hear and determine claims solely in relation to Maori freehold land, and from 18(1)(e) onwards (including s18(1)(i)), a secondary jurisdiction to examine matters "for the purpose of any proceedings", ancillary to the "primary jurisdiction" of s18. In particular, the MLC noted that s18(1)(i) "deals with 'any land'. This had to be contrasted with the grants of a primary jurisdiction which refer to Maori freehold land".[196] Thus, s18(1)(i) was recognised as having applicability to General land. Thus, to "say [...] that this is General land and this Court has no jurisdiction is simply to beg the question [of the fiduciary relationship demanding return to Maori owners]".[197] Moreover, s18(1)(i)'s direction of

[193] *In Re Tahora 2F2 Block*, MLC Tairawhiti District, Appln 9456, 2 October 1996, p3. I would like to acknowledge the generous assistance of Godfrey Pohatu at the Maori Land Court in Gisborne in locating a hard copy of this case.

[194] Ibid., p8.

[195] Ibid., p7.

[196] Ibid., p8.

[197] Ibid., p9.

jurisdiction for "any other purpose" was given tangible meaning in relation to General land, as "the Court should [...] hesitate before upholding such a proposition [the phrase "any other purpose" serves no meaning] in relation to an Act of Parliament".[198] Therefore, s18(1)(i) was held to be capable of being capable of relating to claims against General land by Maori beneficial owners.

The Court of Appeal, however, interpreted s18(1)(i) differently. The Court held that "the apparently broad language of s18(1)(i) must be read in its context both in relation to those provisions which immediately surround it, especially s17, and in relation to the scheme of the whole statute".[199] The reference to "any land" in s18(1)(i) could not be read literally, as "this wide definition is not to be applied when the context indicates a particular and more limited meaning".[200] The justification for this reasoning was primarily s17. This section, relating to the general objectives of the Court, states the Court's primary objective as promoting and assisting in the retention of *Maori land* and *General land owned by Maori* (emphasis added). Thus, later broad references to "land" in s17 were "plainly shorthand expression[s] for the categories of land which are the subject of the primary objective".[201] The same reasoning was applied to s18(1)(i), particularly when the only express power to change the status of General land to Maori land is through section 133,[202] meaning s18(1)(i) had to be read narrowly. The question of the fiduciary relationship then did not even arise. In summary, the Court held that "if s18(1)(i) had really been intended to effect such a radical change [in the jurisdiction of the MLC] [...] it might have been expected that this would have been done explicitly, by words directly spelling out that the paragraph was to apply beyond Maori land".[203]

This was, arguably, an appropriate interpretation for the Court of Appeal to reach. However, as illustrated in an article by Nin Tomas,[204] there are also difficulties with the Court of Appeal's approach. Tomas claims that the difference in interpretation stems from the tendency of the Court of Appeal to "focus on and give importance to different aspects of the interpretation process [...] to attribute different meanings to the words [...] used in framing the statute, and to prefer one over

[198] *In Re Tahora 2F2 Block*, above n193, p.10.

[199] *Attorney-General v Maori Land Court,* above n188, p698.

[200] Ibid., p698.

[201] Ibid., p696.

[202] Ibid, p699. The Court reasoned that as s133 was the only section expressly granting jurisdiction to change the status of land from General to Maori freehold, it would be a bizarre extension of jurisdiction to read s18(1)(i) as its equivalent.

[203] Ibid., pp701-702.

[204] Nin Tomas, "Jurisdiction Wars: Will the Maori Land Court Judges Please Lie Down", *Butterworths Conveyancing Bulletin*, vol9 no4, pp33-37.

the other",[205] which in this case led to an overly restrictive interpretation of s18(1)(i). For example, the Court of Appeal was prepared to read down the Long Title of TTWMA for its reference to "Maori land"[206] to contextualise s18(1)(i). However, the Long Title states TTWMA is "an Act to reform the laws *relating to* Maori land",[207] meaning that the MLC arguably "may incorporate actions which have a direct link to, or effect on, Maori land".[208] This may highlight the fact that "Judges do not appear to understand that safeguarding [Maori's] 'special' relationship [with land] is at the heart of the 'reform' indicated in the Long Title".[209] Tomas is not alone in this view.[210] The basic conclusion may then be that reviewing courts "do not have sufficient knowledge and understanding of the Maori focus of [TTWMA] to properly conduct [s18(1)(i)] inquiries".[211]

Finally, it is important to remember that one need not claim that the MLC was "right" in their interpretation of s18(1)(i). All that is required is the conclusion was that the reasoning of the MLC was *reasonable*: that a rational view of s18(1)(i) was taken. The fact that the Court of Appeal took a different view is not fatal. Reasonable people may disagree. It is what is *done* with that disagreement that matters. If the Court of Appeal was prepared to have accepted the Maori Land Court as an independent, "court-substitute" tribunal, for reasons such as its expertise, knowledge and specialisation, then a different result would have been reached. Certainly nothing would have stopped the Court of Appeal from interpreting s18(1)(i) in the manner it did: however, deference would demand that the Court recognise that, although they are in disagreement with the MLC, there are enough constitutional and institutional reasons to suggest that, barring irrationality, the MLC should be recognised as capable of forming its own interpretation.

However, a reviewing court still may claim that, if the MLC interpretation of 18(1)(i) is to be taken, fundamental rights would be affected. If under s18(1)(i) the Maori Land Court possesses the jurisdiction to vest General land as Maori freehold land, then the legal owners of the General land are denied their rights (as land owners) to the courts of general jurisdiction,[212] as Maori freehold

[205] Nin Tomas, above n204, p34.

[206] *Attorney-General v Maori Land Court*, above n188, p702.

[207] TTWMA, Long Title.

[208] Nin Tomas, above n204, p35.

[209] Ibid., p35.

[210] See, for example, Stephanie Milroy's commentary ([1999] NZ Law Review 363), p363: "[The MLC] is part of the judicial arm of government; the Judges are required to have to the same qualifications as those in other Courts; and it is a specialist Court and would seem appropriate to hear these kinds of matters".

[211] Nin Tomas, above n204, p37.

[212] New Zealand Bill of Rights Act, 1990, s27:

land applications are heard only in the MLC. This is, at first glance, a strong (and orthodox) argument for a general court: in protecting "fundamental" rights, they should invariably apply a correctness standard so as to ensure that right it not curtailed. However, on closer examination, this argument holds little weight. If a vesting order is made, then the legal title possessed in relation to the General land was always fettered by the fiduciary relationship with the beneficial owners. Thus, the argument that the legal owner would have rights to general courts is wrong, as their rights as legal owners, in conjunction with the fiduciary relationship, require the land to be delivered to the beneficial owners.

However, the existence of a fiduciary relationship in the broader context – a question usually reserved for courts of general (and therefore equitable) jurisdiction – necessitates explanation of precisely what is being deferred to if the MLC's view is to be preferred, and why this is justifiable. In taking a broader view of s18(1)(i) (i.e., deferring to the MLC), two points of law emerge:

1. That s18(1)(i) gives to the Maori Land Court the jurisdiction to vest General land in Maori; and
2. That the content or existence of that fiduciary relationship may have to be determined as a matter of law.

Given the wording of s18(1)(i), and the reasoning of the MLC in *Re Tahora 2F2 Block*, the MLC would undertake to answer both these questions in a given proceeding. The Court of Appeal's deference would mean that the MLC view of 18(1)(i) prevails and is the law of New Zealand, meaning the *existence* of the proceedings cannot then be questioned. This was all that would be decided on the reasoning of the Court of Appeal, as they were unwilling to engage the fiduciary point (the MLC was). However, the actual process, or *application,* of the jurisdiction – basically, whether a fiduciary relationship justifies a vesting order – was not dealt with by the Court of Appeal. Therefore, if a party disagrees with the Maori Land Court's construction of a fiduciary relationship as a matter of law, then it can still be reviewed. A good example of this might be where a statute allegedly precludes

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(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

the existence of a fiduciary relationship.[213] On review, the deference analysis would start again in asking whether there are good enough reasons to allow the MLC's view of the law of fiduciary relationships to be deferred to. However, regardless of the answer, this enquiry does not impinge on the first point of law that has been deferred to. In fact, in examining this question on review, the High Court is impliedly affirming the MLC's interpretation of s18(1)(i). In assessing the MLC's assessment of a fiduciary point of law, the reviewing court affirms that the MLC is validly exercising its jurisdiction under s18(1)(i), a view that was born out of deference.

"Weak" Deference?

Outside of the seemingly promising context of the MLC, however, it becomes difficult to identify cases where "pure" questions of law are decided differently as between an administrative tribunal and reviewing court. Rather, the issues seem to be classified more as questions of application – how the application of the law *in the given* case was wrong, rather than how the law would apply *in the generality of cases*. This makes a deference analysis very difficult. Therefore, it may be that another question must be asked before a MLC-type deference question is even possible – that is, what type of "error" is the court dealing with. If a reviewing court categorises an error as one of law, then a deference analysis would follow. However, if the question is not "generalisable", then a correctness standard cannot be justified, as the question is not one of law. It seems, however, that this dichotomy has largely been ignored by courts.

This tendency was affirmed as apparent by Lord Denning M.R in *Pearlman v Keepers and Governors of Harrow School,*[214] which concerned the meaning of the words "structural alteration [...] or addition" in relation to certain house renovations. In assessing the nature of the enquiry, Lord Denning highlighted the difficulty the reviewing court faced:

> "[T]he High Court has a choice before it whether to interfere with an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in the words: 'The court below had no jurisdiction to decide this point wrongly as it did.' If it does not choose to interfere, it can say: 'The court had jurisdiction to decide wrongly, and did so'".[215]

[213] Perhaps the most pertinent example could be the Foreshore and Seabed Act 2004, which purportedly vests title to the foreshore and seabed in the Crown absolutely.

[214] [1979] Q.B. 56.

[215] Ibid., p62.

This frank admission highlights the tendency in the example examined below, where courts are able to construe the nature of errors made to suit their preferred level of intervention. In some cases, courts are categorising some errors as errors of law when they are in fact something else entirely, then perhaps unjustifiably applying a correctness standard.

The first "deference question" might then examine whether the administrative tribunal is enough of a "court-substitute" to be able to decide *discreet* questions of law *at all*. This enquiry would borrow some, if not all, of the factors mentioned as relevant in Chapter One. If not, then the reviewing court must not examine alleged errors on a correctness standard. If, however, the administrative tribunal meets this first threshold, then a "pure" deference should follow: as the tribunal is able to decide points of law, it should then be considered whether reasonable disagreement is possible.

Film and Literature Board of Review (FLRB)

This administrative tribunal is governed by the Films, Videos, and Publications Classification Act 1993[216] (FVPCA). The function of the Board is to review classifications of publications made by the Office of Film and Literature Classification.[217] For the purposes of this analysis, the focus on this function will be limited to the Board's interpretation of what is "objectionable"[218] under the Act.

The Board has robust expertise. In appointing the 9 members of the Board, the Governor-General must act with the concurrence of the Ministers of Justice and Women's Affairs.[219] Moreover, in making recommendations of appointments to the Governor-General, Ministers must have regard to "the need to ensure that the membership of the Board includes persons with knowledge of, or experience in, the different aspects of matters likely to come before the Board".[220] The members must have held a practising certificate as a barrister and solicitor for at least 7 years prior to appointment.[221] Appeals to the High Court may only be on a point of law.[222]

[216] Specifically, by section 91, which establishes the body.

[217] Films, Videos, and Publications Classification Act 1993, s92.

[218] Ibid., s3

[219] Ibid., s93(1)-(2).

[220] Ibid., s93(5).

[221] Ibid., s93(4).

[222] Ibid., s58.

The specialised expertise of the Board is reaffirmed through the statutory treatment of the word "objectionable". The Act sets out robust criteria as to the precise contextualised meaning of this word,[223] and then provides an explicit statutory direction as to how classification of publications is to be regarded and approached:

> **4. [Classification of publications] a matter of expert judgment**
>
> (1) The question whether or not a publication is objectionable **[**or should in accordance with section 23(2) be given a classification other than objectionable**]** is a *matter for the expert judgment of the person or body authorised or required, by or pursuant to this Act, to determine it*, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination. (Emphasis added).

These indications together indicate that the Board may be an appropriate candidate to attract deference. The Board must exercise a significant amount of specialised expertise in exercising its function, bearing in mind that interpretation of "objectionable" could have significant precedential effect for the Board in the later generality of cases.

Society for the Promotion of Community Standards v Film and Literature Board of Review[224]

This case concerned the film *Visitor Q*, "the savagely satirical story of an extremely dysfunctional middle-class Japanese family consisting of mother, father, son and daughter".[225] The film involves excessive lactation, rape, drug use, and necrophilia.[226] Accordingly, the Film and Literature Board of Review, after an extensive application of section 3 classified the film as "objectionable" except for some specific exceptions.[227] The Society for the Protection of Community Standards appealed[228] this

[223] Films, Videos, and Publications Classification Act 1993, s3, especially s3(4) which lists additional factors the Board must take into account in determining whether a publication is objectionable, such as "the dominant effect of the publication as a whole" and "the impact of the medium in which the publication is presented".

[224] [2005] 3 NZLR 403 (CA).

[225] Ibid., para [36].

[226] Ibid., para [42].

[227] Ibid., paras [42]-[56].

[228] Even though review was not involved, the fact that the appeal involved questions of law means that this case is still relevant for the purposes of this discussion.

decision to the High Court, which was then appealed to the Court of Appeal. The Court of Appeal held that the Board, despite being "[a] bod[y] best suited to assess the issue"[229] of the meaning of the words "specified purpose" in s23(3) of the FVPCA, could not have its interpretation deferred to. This was because a statutory requirement of reasons for the decision was not complied with.[230] Therefore, the Court of Appeal seemingly struck down the decision based on an erroneous *application* of law, not an incorrect *meaning* of statutory terms, by the Board. The lack of intervention at the interpretation stage may suggest a *de facto* deferential mindset. Nonetheless, the Board's decision was still struck down on an error of law[231] and an inexorable correctness standard.

This suggests that the Court may have erroneously calibrated the question as one of *meaning*, and applied a correctness standard when they were in fact dealing with a different type of error. The dissent of Anderson P highlights the problems with the majority's approach. He makes explicit recognition of the statutory direction in s4(1) on more than one occasion,[232] then states that that section does not require the Board to "explicate every component of its reasoning including its determinations of fact".[233] His reasoning for this was as follows:

> "The knowledge and experience of a relevant factual context is effectively imputed to the Board, as one would expect in the case of an expert tribunal. It is not permissible to impugn the Board's finding of fact on the matter in question and I fail to understand how the Board could be considered in breach of an obligation to give reasons for its decision when all it has done is to have omitted identifying the basis for a factual conclusion, evidence or proof of which is, by virtue of s 4(1), not essential to its determination".[234]

Therefore, a failure to recognise the Board's expertise led the majority into impliedly imputing findings of fact on the part of the Board, when the question should have been restricted to "whether the Board has acted lawfully".[235] The risk of this is patently clear. If a court is willing to strike down "illegal" errors without asking whether the administrative tribunal had actually decided a point of law, it:

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[229] *Society for the Promotion of Community* Standards, above n224, para [122].

[230] Ibid., para [123].

[231] Ibid., paras [124]-[126].

[232] Ibid., paras [4], [11].

[233] Ibid., para [10].

[234] Ibid., para [12].

[235] Ibid., para [14].

a) Applies a "law" standard to what may be an "application", or even "factual" standard without any principled reason for doing so, other than an implied desire to have the "error" corrected. This might be analogised to using a hatchet when a scalpel is needed.

b) Totally precludes the possibility of asking whether the administrative tribunal should be allowed deference. In deciding an error of application under the guise of an error of law, the Court was able to apply a correctness standard without justification, and was able to skip "step 2" of the deference analysis, avoiding questions of expertise altogether.

c) May move outside the statutory bounds of an appeal. If, as is in this case, the right of appeal is limited to points of law,[236] then deciding as the majority did here (i.e. a "fake" error of law), then the risk runs that the appeal route is not in fact being adhered to.

It might then be just as important that the "weaker" deference question is asked first in all cases, so as to be sure that the second stage operates, and operates in the correct context. The "pure" deference enquiry can only operate successfully if true questions of law are the subject-matter. If this does not happen, then there is a grave risk of the courts wantonly interfering with decisions on little more than a whim.

[236] Films, Videos, and Publications Classification Act 1993, s58.

CONCLUSION

Introducing a novel, finite doctrine into the discretionary realm of administrative law is never a simple task. Judges will often be wary of explicitly labelling a new approach for fear of being drawn into a conceptual straightjacket, and will instead prefer to justify differing levels of intervention as pragmatically as possible.[237] This is, perhaps, one of the primary obstacles to deference in New Zealand being explicitly recognised as a doctrinal tool, especially when to do so is seemingly so counter-intuitive at first glance.

There are, however, some suggestions that deference may have a place in New Zealand administrative law. Deference seems a viable possibility in respect of the Maori Land Court, at least in the very specific context dealt with in this dissertation. The Court possesses a unique niche in New Zealand: the exclusive administration of an area of law – that is, Maori land – that is highly specialised and must co-exist with one of the most fundamental tenants of New Zealand property law. To ensure that the Torrens system does not overwhelm the existence of the Maori Land Court, it seems sensible to hand in good faith the Maori Land Court some independence in assessing the bounds of their own jurisdiction. Any fears against this move are mitigated through the robust experience and specialised knowledge of the court, as well as statutory indications of a purposefully defined, discreet jurisdiction in which to operate. *Attorney-General v Maori Land Court* is a good example of how the doctrine might operate in practice, and allays fears of rights to general courts being "stolen" by deference.

This is not, however, the end of the matter. One case will not automatically engender an altered judicial mindset. Notwithstanding this, if one is prepared to accept the Maori Land Court as an appropriate vehicle for deference, then a choice for reviewing courts emerges. The first is simply to recognise deference in the Maori Land Court. The Court is as good an example as the labour relations tribunal in *CUPE* and, as illustrated by the Canadian experience, the doctrine must be born somewhere. The Maori Land Court provides an opportunity for deference to grow. The doctrine would not be "stamped" across the breadth of all administrative tribunals: rather, the MLC should be recognised as the paradigm example of how deference can, and should, operate in different contexts in the future. Development of the doctrine would then simply be up to judges applying the concept in appropriate contexts as they arise.

[237] *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, Hammond J at para [379]:

> "Another concern is that things like spectrums of response and "deference" in this subject area are ultimately quite unhelpful, and even unworkable. To say that something rests somewhere on a "continuum" is a conclusion, not a principle; it does not tell us how that point in a spectrum is reached. And courts do not defer to anything or anybody: the job of courts is to decide what is lawful and what is not."

However, a court may also be prepared to suppress deference before it truly begins. There are identifiable institutional reasons – appeal rights, agency capture, and a smaller jurisdiction – that suggest, despite the promising context of the MLC, to apply deference would create more problems than it solves. The courts will be understandably jealous of their orthodox constitutional role as strict protectors of the written law, and will turn to any number of factors, extrinsic and formalistic, to justify not stepping down from this pedestal. There are also other methodologies within the discretionary spectrum of judicial review that can justify a lowered level of intervention on points of law, and a court may even choose to recalibrate as they see fit to avoid the question altogether.

The ultimate conclusion, however, is that the potential for deference in New Zealand exists. There are good reasons it should be applied, at least in an initially narrow context. Whether this potential is embraced or rejected by courts is dependent on their willingness to embrace novel constitutional realities, as adherence to old ones may merely beg the question of why a new approach is not taken. Deference may be counter-intuitive for judges, but until recognition of the developing landscape of administrative law occurs, the risk of relaxed intervention on errors of law (and even questions application or “mixed” fact and law) becoming unprincipled and unpredictable remains.

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