
The Rule of Law and the Justiciability of Prerogative Powers: A Comment on Black v. Chrétien

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In *Black v. Chrétien*, the Ontario Court of Appeal addressed the issue of the courts' ability to review the exercise of Crown prerogative powers. While the court held that the exercise of prerogative powers is subject to judicial review in general, it stipulated that certain categories of prerogative powers are not reviewable. The court reasoned that judicial review is limited to instances where the nature and subject matter of the prerogative powers are amenable to the judicial process. In Conrad Black's lawsuit against the prime minister, the court found that the communication between the prime minister and the Queen represented an exercise of the prerogative to grant honours and that such a prerogative was non-justiciable.

The author is critical of the court's use of the doctrine of justiciability to shield executive officials from judicial review. He argues that the court adopted an undesirably formalistic approach to justiciability, with the consequence that a significant sphere of executive action lies beyond the reach of the rule of law. The author maintains that justiciability should solely depend on the legitimacy and capacity of the courts to adjudicate a matter. In his opinion, Black's claim against the prime minister was justiciable.

Dans l'arrêt *Black c. Chrétien*, la Cour d'appel d'Ontario soulève le problème du pouvoir qu'a la cour de réviser l'exercice des prérogatives de la Couronne. Alors que la cour a décrété que ces privilèges sont sujets à la révision judiciaire de façon générale, elle a stipulé que certaines catégories de ces prérogatives étaient intouchables. La cour a jugé que la révision judiciaire se limite aux instances où la nature et le contenu des prérogatives de la Couronne sont sujet à être entendus par le processus judiciaire. Dans cet arrêt, la cour a décidé que la communication entre le premier ministre et la Reine représentait un exercice de la prérogative d'octroyer des honneurs et que ce privilège n'était pas sujet à la révision judiciaire.

L'auteur critique l'utilisation que fait la cour de la doctrine de justiciabilité pour protéger un officier exécutif contre la révision judiciaire. Il démontre que la cour a adopté une approche formaliste de la justiciabilité, approche indésirable, qui a pour conséquence d'extraire de la primauté du droit une sphère importante de l'action exécutive. L'auteur maintient que la justiciabilité ne devrait dépendre que de la légitimité et de la capacité de la cour de se prononcer. Selon lui, la demande de Black à l'égard du premier ministre était justiciable.

* Assistant Professor, Faculty of Law, University of Toronto. I should note that I had some minor involvement in this case as a consultant to counsel for the appellant, and prior to that, expressed some criticism of the judgment of LeSage J. in the motion before the Ontario Superior Court. See L. Sossin, "Hoist on his Own Petard" *The Globe and Mail* (23 March 2000) A17. I wish to thank David Dyzenhaus, Julia Hanigsberg, Peter W. Hogg, Hudson Janisch, Patrick J. Monahan, and Mark Walters for helpful comments on earlier drafts of this article.

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Introduction**I. Judicial Review and the Crown Prerogative****II. Justiciability and the Crown Prerogative****III. The Implications of *Black* and the Rule of Law****Conclusion**

Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case ... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.¹

Introduction

The odd case of *Black v. Chrétien*² may have resulted in a happy ending for the parties involved, but the judgment of the Ontario Court of Appeal represents, in my view, a mixed blessing for Canadian law relating to the judicial review of Crown prerogative powers. On the bright side, the court has confirmed that the source of governmental authority, whether a prerogative or statutory power, should have no bearing on whether the exercise of that authority is reviewable. By upholding the dismissal of Black's claim, however, the court used the justiciability doctrine as a shield to immunize a category of prerogative powers from the reach of the rule of law. This is a disturbing development which merits closer examination.

The litigation arose in June of 1999 when the Queen decided not to bestow a peerage on Conrad Black. The Queen had apparently been informed by Prime Minister Jean Chrétien that Canadian law prevented Canadian citizens from being nominated as peers. Chrétien allegedly cited a 1919 Parliamentary resolution known as the "Nickle Resolution"³ as the source of this legal impediment.⁴ That resolution, which was neither a statute nor an instrument with any legal effect, requested the then King not to bestow honours and titular distinctions on subjects domiciled or ordinarily resident in Canada. Prior to that communication, in May of 1999, both Black and the British government had allegedly been assured by the Canadian government that, as long as Black obtained British as well as Canadian citizenship, there was no bar to his nomination. Within a matter of days, Black promptly became a citizen of the United Kingdom.

Black alleged that the prime minister's intervention on the eve of his nomination as a peer was politically motivated, and was undertaken in response to negative coverage of the prime minister in the Southam chain of newspapers owned by Black. Black sued the government of Canada for negligence and the prime minister personally for

¹ *Hurtado v. California*, 110 U.S. 516 at 535-36, 4 S. Ct. 516 (1884).

² (2001), 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.) [hereinafter *Black*].

³ The exact text of the resolution is reproduced in *Journals of the House of Commons of the Dominion of Canada*, vol. 55 (22 May 1919) at 295.

⁴ *Black*, *supra* note 2 at para. 11.

negligence and abuse of power, and sought \$25,000 in damages. The quantum of damages sought suggests Black's suit was motivated more by pride and principle than by a desire for compensation (although, to be sure, quantifying the value of a lost peerage is an esoteric undertaking).⁵

The government of Canada and the prime minister brought a motion to have all the claims dismissed on the grounds they disclosed no reasonable cause of action.⁶ LeSage J. granted the motion in part, and dismissed the claim against the prime minister for negligence and abuse of power on grounds that his exercise of the Crown prerogative relating to foreign affairs was non-justiciable.⁷ The negligence claim against the government (for misrepresenting that there was no bar to Black's nomination) was allowed to proceed.⁸

The Ontario Court of Appeal unanimously upheld the ruling of LeSage J.⁹ While concluding that a claim against a government decision was not non-justiciable simply because the decision was an exercise of a Crown prerogative, the court nonetheless held that the communication between the prime minister and the Queen represented an exercise of the prerogative of granting honours, and that such decisions were non-justiciable. Laskin J.A. explained this holding in the following terms:

The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no

⁵ That Black sought damages through a civil suit indicates, however, that his concern was for having been harmed in some way. If public accountability had been Black's concern, presumably he would have initiated an application for judicial review instead of launching a civil suit. Judicial review might have resulted in a declaration or an order compelling the government to undertake some action but would not have resulted in damages.

⁶ For the purposes of such a motion, the test is whether, based on the pleadings alone, it is "plain and obvious" that there is no cause of action, assuming all the facts alleged to be proven, and reading the pleadings in their most generous light. Further, where the law is not fully settled in a given area, the action should be permitted to continue. See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 74 D.L.R. (4th) 321.

⁷ LeSage J. concluded:

The PM's conduct here complained of is not within the reach of the court because it was not a justiciable order or decision regulating conduct. It is not within the power of the court to decide whether or not the advice of the PM about the prerogative honour to be conferred or denied upon Black was right or wrong. It is not for the court to give its opinion on the advice tendered by the PM to another country. These are non-justiciable decisions for which the PM is politically accountable to Parliament and the electorate, not the courts. Similarly, any question about the propriety of the PM's motivation is for Parliament and the electorate, not for the courts.

Black v. Chrétien (2000), 47 O.R. (3d) 532 at para. 27, 184 D.L.R. (4th) 755 (Sup. Ct.).

⁸ *Ibid.* at para. 10.

⁹ *Black*, *supra* note 2 at para. 77.

economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention. Instead, it involves "moral and political considerations which it is not within the province of the courts to assess".

In other words, the discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on Mr. Black rests not with Prime Minister Chrétien, but with the Queen. At its highest, all the Prime Minister could do was give the Queen advice not to confer a peerage on Mr. Black.

For these reasons, I agree with the motions judge that Prime Minister Chrétien's exercise of the honours prerogative by giving advice to the Queen about granting Mr. Black's peerage is not justiciable and therefore not judicially reviewable.¹⁰

While his claim against Prime Minister Chrétien was dismissed, Black was able to become eligible for a peerage by renouncing his Canadian citizenship, which he did. On 31 October 2001 he took his seat in the House of Lords as Lord Black of Crossharbour.¹¹ Prime Minister Chrétien presumably is happy as well. He has had his dubious championing of the 1919 Nickle Resolution validated, and more to the point, will not have to endure the indignity of the disclosures and media scrutiny of a civil suit. The British government and Crown have avoided an embarrassing entanglement in Canadian affairs. Finally, the Canadian taxpayers will be spared funding an expensive defence against a litigant with near-bottomless resources.

Black represents, at first glance, a significant and positive watershed in Canadian public law. The Ontario Court of Appeal has confirmed that the Crown may be civilly liable for the misuse of a prerogative power. This judgment has helped to eliminate an obsolete vestige of Canada's monarchical past. However, as I argue below, by finding Black's claim against Prime Minister Chrétien to be non-justiciable, the court left intact a sphere of executive authority that is effectively immune from the rule of law. This is not an acceptable or a justifiable immunity, even for (and, perhaps, especially for) a constitutional monarchy rooted in the common law.

This comment is divided into three parts. In Part I, I outline the scope of judicial review of the Crown prerogative power and its application in *Black*. In Part II, I examine more specifically the justiciability of prerogative powers and the rationale adopted by the Ontario Court of Appeal in *Black*. Finally, in Part III, I analyze the im-

¹⁰ *Ibid.* at paras. 62-64 [reference omitted].

¹¹ See K. Makin & J. Saunders, "Black Set to Give Up Canadian Citizenship" *The Globe and Mail* (19 May 2001) A1; R. Furness, "Black Suit vs. PM Turfed by OCA" *The Lawyers Weekly* (1 June 2001) 8; "Lord Black of Crossharbour" *The Globe and Mail* (1 November 2001) A1. For this reason, Black also has decided not to appeal the case further to the Supreme Court of Canada.

plications of *Black* and situate this decision within a broader jurisprudence on the rule of law in Canada.

I. Judicial Review and the Crown Prerogative

The very nature of a Crown prerogative is that it is discretionary. Dicey famously described this common law set of powers as “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”¹² The Crown prerogative once constituted the central source of executive authority in England and its colonial holdings. Today, it remains the source for a disparate set of executive powers, including foreign affairs (*e.g.* treaty-making and diplomatic appointments); defence and the armed forces (*e.g.* sending peacekeepers abroad); passports, pardons, and the prerogative of mercy; the hiring and dismissal of certain public officials; honours and titles; copyright over government publications; the law of heraldry; incorporating companies by royal charter; collecting tolls from bridges and ferries; and the right to proclaim holidays.¹³ This list is by no means exhaustive.

The scope of the Crown prerogative, over time, has been diminished. Since the House of Lords’ landmark ruling in *A.G. v. De Keyser’s Royal Hotel*,¹⁴ it has been well settled that the prerogative power of the Crown could be displaced by statute. Hogg and Monahan set out six areas where the Crown prerogative power remains meaningful: powers relating to the legislature; powers relating to foreign affairs; powers relating to the armed forces; appointments and honours; immunities and privileges; and the emergency prerogative.¹⁵

The Crown prerogative has always been part of the common law, and because it is the function of the courts to declare what the law is, courts have accepted that judicial review is an appropriate means by which to define the existence and scope of pre-

¹² A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at 424. This definition was cited by Laskin J.A. in *Black*, *supra* note 2 at para. 25, in turn citing the earlier adoption of this approach by the Supreme Court of Canada in *Reference as to the Effect of the Exercise by his Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings*, [1933] S.C.R. 269, (*sub nom. Re Royal Prerogative of Mercy Upon Deportation Proceedings*) [1933] 2 D.L.R. 348. More recently, the idea of the prerogative power representing a “residue of miscellaneous powers” was accepted in *Vancouver Island Peace Society v. Canada*, [1994] 1 F.C. 102, 64 F.T.R. 127 (T.D.), *aff’d* (1995), 16 C.E.L.R. (N.S.) 24, 179 N.R. 106 (F.C.A.). See generally P.W. Hogg & P.J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000); S. Payne, “The Royal Prerogative” in M. Sunkin & S. Payne, eds., *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999) 77.

¹³ For a description of each of these prerogatives, see H. Olson & P. Lordon, “Crown Prerogatives” in P. Lordon, ed., *Crown Law* (Toronto: Butterworths, 1991) at 61.

¹⁴ [1920] A.C. 508 (H.L.).

¹⁵ Hogg & Monahan, *supra* note 12 at 18-19.

rogative powers.¹⁶ Reviewing the exercise of those powers, however, was another story. Historically, these powers were understood as the unfettered terrain of the monarch and outside the province of the courts. This doctrine has been described in the following terms:

If it is claimed that the authority for the exercise of discretion derives from the royal prerogative, the courts have traditionally limited review to questions of vires in the narrowest sense of the term. They can determine whether the prerogative power exists, what is its extent, whether it has been exercised in the appropriate form and how far it has been superseded by statute; they have not normally been prepared to examine the appropriateness or adequacy of the grounds for exercising the power, or the fairness of the procedure followed before the power is exercised, and they will not allow bad faith to be attributed to the Crown.¹⁷

This approach largely has been discarded in the United Kingdom through a series of recent judgments which have held that the exercise of prerogative powers, including those exercised by ministers, will be generally subject to judicial review (a conclusion based on the plausible premise that prerogative powers can be abused or misused just as any other governmental authority).¹⁸ Since the landmark ruling of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*,¹⁹ courts in the United Kingdom have accepted that there is now no principled distinction that flows from whether the source of governmental authority is statutory or prerogative in nature.

In the context of the prerogative of mercy, for example, courts have been willing to intervene to hold that a decision on whether to grant mercy was invalid because the minister failed to consider other forms of pardon.²⁰ In *R. v. Ministry of Defence, ex parte Smith*, the Queen's Bench Division reviewed a defence policy prohibiting gays and lesbians from serving in the military.²¹ The government argued that the defence of the realm was a prerogative power. Brown L.J. held that the matter was justiciable and concluded, "To my mind only the rarest cases will today be ruled strictly beyond the

¹⁶ For an early confirmation of this approach, see *Case of Proclamations* (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). See also R. Brazier, "Constitutional Reform and the Crown" in Sunkin & Payne, *supra* note 12, 337 at 359.

¹⁷ S.A. de Smith, *de Smith's Judicial Review of Administrative Action*, 4th ed. by J.M. Evans (London: Stevens & Sons, 1980) at 286-87 [footnotes omitted].

¹⁸ For a review of this case law, see B. Hadfield, "Judicial Review and the Prerogative Powers of the Crown" in Sunkin & Payne, *supra* note 12, 197.

¹⁹ [1985] 1 A.C. 374, [1984] 3 All E.R. 935 (H.L.) [hereinafter *Civil Service Unions* cited to A.C.].

²⁰ See *R. v. Secretary of State for the Home Department, ex parte Bentley* (1993), [1994] Q.B. 349, [1993] 4 All E.R. 442.

²¹ [1995] 4 All E.R. 427 (Q.B.D.) [hereinafter *Smith*], *aff'd* (1995), [1996] Q.B. 517, [1996] 1 All E.R. 257 (C.A.).

court's purview."²² As there were no national security interests at stake in *Smith*, the court held that the challenge to the policy on human rights and irrationality grounds could proceed.²³ In *Burmah Oil v. Lord Advocate*, the House of Lords concluded that the Crown was required to pay compensation to a party that had suffered damages as a result of the exercise of a Crown prerogative.²⁴

Until recently in Canada, however, the traditional approach held sway and the exercise of a Crown prerogative generally was held to be immune from judicial review.²⁵ While the Canadian view was modified to accommodate judicial review of the exercise of the prerogative power under the *Canadian Charter of Rights and Freedoms*,²⁶ whether or not these powers are subject to judicial review on non-*Charter* grounds remained an open and somewhat murky question.²⁷

Laskin J.A. adopted a similar approach in *Black*, acknowledging that "[t]he court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute."²⁸ Laskin J.A. found that the prime minister's communication was an exercise of the prerogative power related to granting honours, and concluded:

In my view, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising his honours prerogative, a prerogative power that is beyond the review of the courts.²⁹

The Ontario Court of Appeal's conclusion that the prime minister was in fact exercising the prerogative power relating to the conferral of honours seems open to challenge. The prime minister has no authority over the Queen's choice of whom to nominate for a peerage, nor was the prime minister in fact expressing any opinion on

²² *Ibid.* at 446.

²³ *Ibid.*

²⁴ [1965] A.C. 75 (H.L.).

²⁵ See e.g. *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.), Cory J.

²⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. In *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [hereinafter *Operation Dismantle* cited to S.C.R.], the Supreme Court confirmed that the exercise of a prerogative power, such as a decision relating to foreign affairs, was subject to review for consistency with the *Charter*.

²⁷ In *Operation Dismantle*, *ibid.* at 471, Wilson J. highlighted the words of Lord Devlin in *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 at 159: "It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative."

²⁸ *Black*, *supra* note 2 at para. 29.

²⁹ *Ibid.* at para. 5. It is worth noting that Laskin J.A. did not comment on whether the communication additionally was an exercise of the prerogative power over foreign affairs, as LeSage J. had held in the court below.

whether Black was a worthy nominee. Similarly, the conclusion of the motions judge that the prime minister's communication was an exercise of the prerogative relating to foreign affairs seems to lack an air of reality. The communication in question in no way related to Canadian-British affairs. Plainly, what the prime minister communicated to the Queen was a legal opinion which had the intent and effect of barring Conrad Black from eligibility for a peerage. There is no need to categorize this communication abstractly. Any act of a prime minister in his or her official capacity that is not authorized by statute and not *ultra vires* must by definition be authorized by another kind of authority, whether a common law or a prerogative power of some kind. The rationale for the Ontario Court of Appeal's desire to attach the label of a particular prerogative power to the prime minister's conduct in *Black* is analyzed below.

Certainly, the more significant aspect of the judgment from the perspective of Canadian public law is the affirmation that the exercise of Crown prerogative powers properly may be the subject of judicial review on substantive grounds. Laskin J.A. stated this bluntly: "I agree with Mr. Black that the source of the power—statute or prerogative—should not determine whether the action complained of is reviewable."³⁰ Subsequently, he expressly adopted the House of Lords' expanded approach to reviewing the exercise of prerogative powers:

[T]he expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that adopted by the House of Lords in the *Civil Service Unions* case. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals.³¹

Lord Roskill's embrace of judicial review over the exercise of prerogative powers in the United Kingdom, however, had some limitations. Lord Roskill saw the scope of this review power as limited to contexts where an individual's legal rights, obligations, or legitimate expectations are affected by the exercise of a prerogative power.³² In

³⁰ *Ibid.* at para. 44.

³¹ *Ibid.* at para. 47 [reference omitted].

³² *Civil Service Unions*, *supra* note 19 at 417:

If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory

Black, Laskin J.A. adopts this limitation as well.³³ Since Conrad Black had neither a right to nor an expectation of receipt of a peerage, the court concluded that not even the expanded scope for judicial review over the prerogative power applied in this case. Specifically, Laskin J.A. adopted what he referred to as the “subject matter” test from Lord Roskill’s reasons in *Civil Service Unions*, under which, Laskin J.A. explained, in a somewhat circular fashion, that “[o]nly those exercises of the prerogative that are justiciable are reviewable.”³⁴ In the passage from *Civil Service Unions* adopted in *Black*, Lord Roskill stated:

Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament, and the appointment of ministers as well as others are not, I think, susceptible to judicial review *because their nature and subject matter are such as not to be amenable to the judicial process*. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.³⁵

Laskin J.A. cited these remarks as support for his conclusion that the prerogative of granting of honours, as a category of prerogative powers, cannot support a justiciable, legal challenge.³⁶ In my view, Laskin J.A. has misapprehended the meaning of this passage. I do not believe Lord Roskill intended to categorize a set of powers that, in and of themselves, were immune from judicial review because they did not affect an individual’s rights, obligations, or legitimate expectations. Indeed, if this was his intent, it seems odd to include the prerogative of mercy with the granting of honours. An exercise of the prerogative of mercy typically *will* affect an individual’s rights, obligations, and legitimate expectations,³⁷ as Laskin J.A. himself observed elsewhere in

power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

³³ *Black*, *supra* note 2 at para. 49.

³⁴ *Ibid.* at para. 50.

³⁵ *Civil Service Unions*, *supra* note 19 at 418 [emphasis added].

³⁶ *Black*, *supra* note 2 at para. 58.

³⁷ This point is echoed by Hadfield, *supra* note 18 at 217. Also, as mentioned above, U.K. courts post-*Civil Service Unions* have accepted the justiciability of decisions relating to the prerogative of mercy. See *Smith*, *supra* note 21.

his reasons.³⁸ Rather, I believe Lord Roskill was making the point that where a public decision calls for a delicate balance of competing policy, ideological, political, social, moral, and historical concerns, judicial resolution may be inappropriate. Some prerogative powers such as the granting of honours will often require such balancing. The exercise of other prerogative powers, such as the granting of a passport, will rarely involve such balancing. In *Black*, however, there was no delicate political or moral decision-making at issue. It should be reiterated that the prime minister was not deciding whether Black was *worthy* of an honour, but rather whether he was *legally entitled* to the honour.³⁹ In this sense, the prime minister's communication was no different than the communication of a transportation department official as to whether an individual is legally entitled to a driver's license. Why should one public official's legal opinion be reviewable while another public official's legal opinion be immune from judicial accountability?

The troubling aspect of the Ontario Court of Appeal's reasoning is that it simply exchanges one type of formalism for another. Now, the question is no longer "Is the exercise of authority based on a Crown prerogative?" but rather "Is the exercise of authority related to the conferral of honours?" For Laskin J.A., prerogative powers fall into specific subject-matter categories (for example, the prerogative of honours, the prerogative of foreign affairs), and these categories in turn fall along a spectrum of reviewability. In his reasons, he distinguished non-justiciable prerogative powers such as the granting of honours from those prerogative powers at the other end of the spectrum, such as granting passports and, significantly, the prerogative of mercy, which he observed are no longer viewed as "royal favours", and would presumably give rise to justiciable claims if exercised wrongfully.⁴⁰

³⁸ *Black*, *supra* note 2 at para. 55.

³⁹ Whether the prime minister expressed a legal opinion, or merely expressed Canadian policy, is open to interpretation. However, on a motion to strike a claim, all the facts as alleged must be accepted as true. Black alleged that the prime minister had informed the Queen that conferring a peerage on Black would represent a "contravention of Canadian law" (*ibid.* at para. 11). Laskin J.A. subsequently characterized the distinction between expressing a law or a policy as missing "what this case is about" (*ibid.* at para. 57). In that same passage, he stated that the prime minister was engaged in advising the Queen about Canadian policy (*ibid.*).

⁴⁰ Laskin J.A. explained this distinction with respect to the prerogative of mercy as follows:

Though on one view mercy begins where legal rights end, I think the prerogative of mercy should be looked at as more than a royal favour. The existence of this prerogative is the ultimate safeguard against mistakes in the criminal justice system and thus in some cases the Government's refusal to exercise it may be judicially reviewable. That was the view taken by the English Queen's Bench Division in *Re Secretary of State for the Home Department, Ex p. Bentley*. There, the court held that the Home Secretary's decision not to grant a posthumous conditional pardon was judicially reviewable.

Ibid. at para. 55 [reference omitted].

Because Laskin J.A. adopted what he termed the “subject matter” approach, the question of how to characterize the prime minister’s communication becomes crucially important. In this regard, he concluded as follows:

Focusing on wrong legal advice or the improper interpretation of a policy misses what this case is about. As I see it the action of Prime Minister Chrétien complained of by Mr. Black is his giving advice to the Queen about the conferral of an honour on a Canadian citizen. The Prime Minister communicated Canada’s policy on honours to the Queen and advised her against conferring an honour on Mr. Black.⁴¹

This characterization of the prime minister’s action in *Black* is one-dimensional and difficult to sustain. Whether the prime minister communicated Canada’s policy on honours to the Queen, or legal advice to the Queen, he made what could be characterized as an administrative decision pertaining to Mr. Black.⁴²

In *Liability of the Crown*, which was written before the Ontario Court of Appeal’s decision, Hogg and Monahan make a similar point in criticizing LeSage J.’s dismissal of Black’s claim on justiciability grounds.⁴³ They are highly skeptical of immunizing a category of prerogative powers from judicial review (and emphasize that if the prime minister’s actions had been taken pursuant to a statute, there would have been no suggestion that those actions were not reviewable).⁴⁴ In a variation of the *Civil Service Unions* approach, a key distinction for Hogg and Monahan is whether the power exercised relates to a particular, named individual. They view this distinction as analogous to the scope of procedural fairness in administrative law, where the duty of fairness will apply where the rights, interests, and privileges of a particular individual are affected. Since the action in *Black* was targeted at a specific, named individual, Hogg and Monahan conclude that it should have been considered justiciable.⁴⁵

This approach, while overcoming the problem of formalism highlighted above, sidesteps the problem of justiciability. There may be prerogative decisions (for example, upon whom to bestow the Order of Canada) that are not matters capable of adjudication in a court even though they affect named individuals. The government may consider a range of partisan, social, and cultural factors in selecting individuals to honour that do not lend themselves to objective evidence or judicial resolution. On the other hand, certain legislative or policy decisions (for example, the decision to adhere

⁴¹ *Ibid.* at para. 57.

⁴² It should be noted that the prime minister’s advice was not binding on the Queen, either in law or convention. In practice, however, it would be hard to imagine circumstances in which the Queen would confer an honour on a Canadian citizen where the prime minister had advised against her doing so.

⁴³ Hogg & Monahan, *supra* note 12 at 19-21.

⁴⁴ *Ibid.* at 20.

⁴⁵ *Ibid.*

to a particular international treaty) may be well documented and turn on judicially cognizable questions of international and domestic law. Hogg and Monahan acknowledge the importance of a case by case approach, concluding: “In short, it seems preferable in each case to determine whether the particular issues raised in the litigation are amenable to judicial review, rather than to apply a blanket immunity for any and all exercises of the prerogative which fall within a particular category.”⁴⁶ Therefore, it is neither the source nor the target of government action that should determine justiciability; rather, justiciability should turn solely on questions of legitimacy and capacity of the courts to adjudicate a matter.

II. Justiciability and the Crown Prerogative

In *Black*, Laskin J.A. linked his understanding of the “subject-matter” of the prerogative power (that is, which category or prerogative power it falls into) with the justiciability of the challenged government action:

At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide “whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch”.

Under the test set out by the House of Lords, *the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.*⁴⁷

Justiciability is an elusive concept, but generally is held to refer both to the capacity and legitimacy of courts to undertake the adjudication of a matter.⁴⁸ There are two germane questions before any court making a determination of justiciability. First, can the matter be determined according to objective, judicially cognizable standards and evidence? Second, is the matter appropriate for adjudication given the constitutional, political, and legal systems in Canada? In other words, does the court have the capacity and legitimacy to decide the case?

The Ontario Court of Appeal, in adopting Lord Roskill’s finding in *Civil Service Unions* that the source of governmental authority (whether based on prerogative or

⁴⁶ *Ibid.*

⁴⁷ *Black*, *supra* note 2 at paras. 50-51 [references omitted, emphasis added].

⁴⁸ See generally L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999) at 1-26 [hereinafter Sossin, *Boundaries*].

statute) should have no bearing on the question of judicial review, has resolved (in my view, correctly) the question of legitimacy. The court has held that the exercise of a prerogative power by the prime minister (or, presumably, by cabinet or by any individual minister) is not a "purely political" question, and that judicial review over the exercise of prerogative powers per se is not inappropriate.⁴⁹ This is in keeping with the recent trend in the Supreme Court, summarized succinctly by Lamer C.J.C. in the *Re Provincial Judges Remuneration* as follows: "[T]he exercise of all public power must find its ultimate source in a legal rule."⁵⁰ It follows that it is the duty of the courts to resolve claims that these legal rules have been violated.

It is problematic to suggest that some prerogative powers will give rise to justiciable claims while others will not, just as it would be problematic to suggest that some statutes give rise to justiciable rights and obligations but others are beyond the province of the courts. It is important to emphasize here that if the government wishes to immunize a public power from judicial review, it may attempt to do so through statutory means. Privative clauses in statutes that authorize executive action have been upheld as severely restricting the scope of judicial review.⁵¹ Further, if the government wishes to subject a particular power to political rather than legal remedies, this also may be accomplished through legislative means. In *Canada (Auditor General) v. Canada (Minister of Energy, Mines, and Resources)*,⁵² the Court declined to intervene in a dispute between the auditor general and a minister over disclosure of documents because the statute empowering the auditor general contained a reporting requirement in response to non-compliance. In other words, since a mechanism was put in the statute for resolving (or at least airing) disputes, the Court held that it would be inappropriate to intervene.

While Canadian courts have yet to embrace a formal "political questions" doctrine of the kind that characterizes the American constitutional jurisprudence,⁵³ they

⁴⁹ Even if the exercise of some prerogative powers has political dimensions, the Supreme Court held that it is incumbent on courts to disentangle the legal from the political dimensions of such decisions, and proceed to adjudicate the legal aspects where possible. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 26-28, 161 D.L.R. (4th) 385 [hereinafter *Secession Reference*].

⁵⁰ [1997] 3 S.C.R. 3 at para. 10, 150 D.L.R. (4th) 577.

⁵¹ Statutes cannot, however, entirely preclude judicial review of executive action. As a constitutional standard, review will always remain for executive authority taken without jurisdiction, or for executive action that is patently unreasonable. See *Crevier v. Quebec (A.G.)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

⁵² [1989] 2 S.C.R. 49, 97 N.R. 241.

⁵³ See *Baker v. Carr*, 369 U.S. 186 at 208-37, 82 S. Ct. 691 (1962). The origin of the "political questions" doctrine is the U.S. Constitution, which provides, *inter alia*, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ...; to Controversies ..." (U.S. Const. art. III, § 2, cl. 1). This has been interpreted as limiting the power of judicial review in the U.S. to "cases and controversies", which exclude, for example, reference questions posed by the executive.

have found disputes non-justiciable that raise a purely political matter, or that impugn the wisdom of government action, or for which Parliament has provided, by statute, a political rather than legal remedy.⁵⁴ None of these are applicable to the *Black* case. Because the effect of *Black* is to allege an abuse of process on the part of the prime minister, this raises a prima facie legal issue. As Wilson J. affirmed in *Operation Dismantle*, once a legal issue is raised, the courts have no discretion to decline to adjudicate the matter simply because it also happens to raise issues of political sensitivity.⁵⁵

Once the question of appropriateness has been resolved, the focus of the justiciability analysis turns to the capacity of the court to adjudicate the particular matter before it. Canadian courts have held that where a matter is hypothetical, abstract, premature, moot, of a purely political, spiritual or moral matter, or not susceptible to proof, the judicial process lacks the capacity to resolve the matter.⁵⁶ The action at issue in *Black* would appear to be a matter for which a court would have sufficient capacity to determine. The evidence that Mr. Black sought to proffer was not of a kind unsuitable to proof or incapable of being weighed by the court. Indeed, much of the factual evidence is uncontested. The prime minister did not dispute providing the legal advice to the Queen regarding Black's nomination. The correctness of that legal advice, and the prime minister's motivations for offering it, are not beyond judicial understanding or expertise; indeed, the contrary appears to be the case.

According to Black's account of the facts, which must be accepted as true for the purposes of the motion to dismiss the claim based on the pleadings alone, the prime minister chose to intercede in an effort to exact retribution against Conrad Black for his Southam newspapers' coverage of the prime minister. This is a serious allegation of abuse of power. As to whether Black's evidence could bear out his claims if tested at trial, this is another question, and one which now is unlikely ever to be resolved.⁵⁷

Judicial review is also excluded where a non-judicial forum is provided by the Constitution for the resolution of disputes, such as the power given to the Senate to adjudicate impeachment claims. See *Nixon v. U.S.*, 506 U.S. 224, 113 S. Ct. 732 (1993).

⁵⁴ See Sossin, *Boundaries*, *supra* note 48, c. 4.

⁵⁵ *Operation Dismantle*, *supra* note 26 at 472. Wilson J. was referring to the review of prerogative powers under the *Charter*, but there is no principled reason to adopt a different view to claims which go to the heart of the rule of law, as discussed in more detail below.

⁵⁶ It was on these grounds that the claim in *Operation Dismantle* was dismissed. In that case, proving the claim against the government would have required evidence that Canada had become a more likely target for nuclear destruction by the Soviet Union as a result of permitting the U.S. to test cruise missiles on Canadian soil. For further discussion, see Sossin, *Boundaries*, *supra* note 48 at 48-55.

⁵⁷ While much of the damaging evidence consisted of remarks made during private conversations between Black and Chrétien, which cannot be corroborated, the prime minister's eleventh-hour intervention, reversing Canada's stated position on Black's nomination, is suspicious. Black's allegation that the Nickle Resolution was a mere pretext for an ulterior agenda is at least credible. As Black pointed out in his factum, the Nickle Resolution applied only to persons resident or domiciled in Canada, which Black was not. Further, according to Black's claim, this resolution has been routinely ig-

Rather than consider the issue of the court's capacity in the context of the particular facts and circumstances of the case, the Court of Appeal in *Black* simply emphasized the discretion implicit in the prime minister's prerogative authority. Laskin J.A. asserted that "[e]ven if the advice was wrong or careless or negligent, even if his motives were questionable, they cannot be challenged by judicial review."⁵⁸ In my view, the Ontario Court of Appeal has used the doctrine of justiciability in an undesirably formalistic fashion, so as to remove a significant sphere of executive action from the reach of the rule of law. In the following section, I consider the implications of this holding for the rule of law, and for its cardinal principle that no discretion is absolute.

III. The Implications of *Black* and the Rule of Law

The rule of law is a contested notion.⁵⁹ In the *Secession Reference*, the Court described the importance of the rule of law in the following terms:

The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis* is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.⁶⁰

Following *Roncarelli v. Duplessis*, the rule of law has come to embrace the principle that no discretion is "untrammelled".⁶¹ No matter how wide a grant of statutory authority (or how broad a prerogative power), all government decision-making must conform to certain basic tenets, such as being rendered in good faith and not for ulterior or improper motives.

nored in numerous instances over the years, including the cases of Sir Conrad Swan and Sir Neil Shaw, who had received titles during the tenure of Chrétien's government. Whatever one makes of the Nickle Resolution, it does not appear to constitute an enforceable, legal barrier to a Canadian citizen's nomination for a titular honour. See plaintiff's Amended Statement of Claim, *Black v. Jean Chrétien and the Attorney General for Canada*, Court File No. C33887 at para. 16.

⁵⁸ *Black*, *supra* note 2 at para. 65.

⁵⁹ For recent appraisals, see A. Hutchinson, "The Rule of Law Revisited: Democracy and Courts" in D. Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999) 196; J. Jowell, Q.C., "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] Pub. L. 671; T.R.S. Allen, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 L.Q. Rev. 221.

⁶⁰ *Supra* note 49 at para. 70 [references omitted].

⁶¹ [1959] S.C.R. 121 at 140, 16 D.L.R. (2d) 689 [hereinafter *Roncarelli* cited to S.C.R.].

The rule of law has little meaning if it cannot be meaningfully enforced. Is there a principled basis on which to say that certain categories of executive action should be entirely immune from judicial review for breach of the rule of law? While justiciability concerns will sometimes render specific decisions inappropriate for adjudication (that is, courts may lack the legitimacy or capacity to adjudicate them), this must be considered on a case by case rather than a categorical basis. As a general point, I would contend that any allegation of a breach of the rule of law by the prime minister in the exercise of an executive power (whether statutory or prerogative in origin) raises a *prima facie* justiciable claim. As Professor Wade stated:

The powers of public authorities are ... essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. [...] This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest ... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.⁶²

A similar notion has been adopted by the Supreme Court of Canada in *Roncarelli*,⁶³ and elevated in the *Secession Reference* to the status of part of Canada's unwritten constitution.⁶⁴ Nonetheless, as several observers have emphasized, notwithstanding the *Roncarelli* case and a handful of others,⁶⁵ the rule of law has rarely been the basis for a judicial remedy in Canada.⁶⁶ Indeed, the post-*Roncarelli* Supreme Court of Canada

⁶² W. Wade, *Administrative Law*, 6th ed. (New York: Oxford University Press, 1988) at 399-400, cited with approval by Laws J. in *R. v. Somerset County Council, ex parte Fewings*, [1995] 1 All E.R. 513 at 524.

⁶³ In *Roncarelli*, *supra* note 61 at 140, Rand J. stated: "there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator." This principle has been affirmed by the Supreme Court on many occasions, most recently in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281 at para. 16, 200 D.L.R. (4th) 193, 2001 SCC 41.

⁶⁴ *Supra* note 49. See also *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748-50, 19 D.L.R. (4th) 1, in which the Supreme Court held that the rule of law had constitutional status by virtue of the preamble to the *Constitution Act, 1867*.

⁶⁵ In *Roncarelli*, *supra* note 61, Premier Duplessis of Quebec, acting through the Manager of the Liquor Commission, revoked the liquor license of a tavern owner who had been actively supporting Jehovah's Witnesses. The Supreme Court quashed the revocation based on the premier's disregard for the rule of law. For examples of applications of *Roncarelli* in civil cases, see *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.); *Alberta (Minister of Public Works, Supply & Services) v. Nilsson* (1999), 246 A.R. 201, [1999] 9 W.W.R. 203 (Q.B.), leave to appeal granted (1999), 181 D.L.R. (4th) 380 (Alta. C.A.).

⁶⁶ See H.W. Arthurs, "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29 at 49, n. 31; D. Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality" in M.J. Mossman & G. Otis, eds., *The*

case law has made it less likely, from a practical perspective, that the rule of law will provide a meaningful restraint on government action in the future.

In *Thorne's Hardware v. Canada*,⁶⁷ a case cited by Laskin J.A. as authority for the non-justiciability of the prime minister's action in *Black*, a federal Order in Council that altered the boundaries of the port of St. John was challenged. The applicant claimed that the cabinet decision had been motivated by the ulterior and improper purpose of expanding the revenue base of the National Harbours Board. While conceding that there could be review in "an egregious case" of the cabinet's failing to observe jurisdictional limits or "other compelling grounds",⁶⁸ Dickson J. (as he was then), writing for the Court, held that "[d]ecisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings."⁶⁹ Dickson J. was unwilling even to review the evidence that alleged that the cabinet had acted in bad faith, contrary to the rule of law. He found that it was "neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council"⁷⁰ and observed that "governments may be moved by any number of political, economic, social or partisan considerations."⁷¹ Somewhat ironically, Dickson J. was prepared to examine the evidence to "show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence."⁷²

In *Consortium Developments (Clearwater) Ltd. v. Sarnia (City of)*,⁷³ the Supreme Court applied the *Thorne's Hardware* principle in the context of a municipal corporation's appointment of a board of inquiry under Ontario's municipal legislation. Writing for the Court, Binnie J. held that the applicants had no right to examine municipal councillors with a view to establishing that they had improper motives in voting for the creation of a board of inquiry, holding that the "motives of a legislative body composed of numerous individuals are 'unknowable' except by what it enacts."⁷⁴ As David Mullan observed in his analysis of *Consortium Developments*,

In other words, provided there are no jurisdictional infirmities on the *face* of the text of the resolution appointing the board of inquiry, it may not matter whether all of the councillors acted on the basis of the most outrageous motivations or, put more accurately, it is not for the courts to assist the applicant in any way in

Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy (Montreal: Thémis, 2000) 313 at 321.

⁶⁷ [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577 [hereinafter *Thorne's Hardware* cited to S.C.R.].

⁶⁸ *Ibid.* at 111.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 112.

⁷¹ *Ibid.* at 112-13.

⁷² *Ibid.* at 115.

⁷³ [1998] 3 S.C.R. 3, 165 D.L.R. (4th) 25 [hereinafter *Consortium Developments*].

⁷⁴ *Ibid.* at para. 45.

an attempt to build an evidential record establishing that that was the case. Only if the information is volunteered explicitly and that information goes as far as establishing that all members of council voting for the resolution were acting in “bad faith” will there be any possibility of success on an application to enjoin the continuation of such an inquiry or, presumably, any other form of legislative or executive action.⁷⁵

Also in 1999, the Supreme Court of Canada decided the case of *Wells v. Newfoundland*.⁷⁶ Wells was a controversial consumer representative member of the Newfoundland Public Utilities Board, whose position was eliminated under the terms of a statutory restructuring of the board. His litigation concerned whether he was entitled to compensation for this constructive dismissal (at the time, Wells was six months short of having his pension vest). Writing for the Court, Major J. concluded that, while Wells’ position could be terminated by statute, absent express statutory provisions to the contrary, contract law and contract remedies governed the employment relationship. Consequently, as the Crown was in breach of its contract with Wells, he was entitled to compensation by way of damages. Major J. framed the issue of the obligation upon governments to respect the rights of individuals in the following terms:

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations—rights of the highest importance to the individual—those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation’s understanding of the relationship between the state and its citizens.⁷⁷

In the spirit of this comment, Major J. discussed, in *obiter*, whether the rule of law could apply to legislative action, which in this case might have entitled Wells to an administrative law remedy in addition to civil damages. Brushing aside “anecdotal” suggestions that the statutory restructuring was specifically intended to remove Wells from the Board, Major J. found no “evidence” of bad faith and on this basis, distinguished *Wells* from *Roncarelli*.⁷⁸ What Major J. could have stated but chose not to, is simply that the principle in *Roncarelli* had no application in the legislative context.⁷⁹

⁷⁵ Mullan, *supra* note 66 at 327 [emphasis added]. I also drew this conclusion in L. Sossin, “Developments in Administrative Law: The 1997-98 and 1998-99 Terms” (2000) 11 Supreme Court L.R. (2d) 37 at 87-88.

⁷⁶ [1999] 3 S.C.R. 199, 177 D.L.R. (4th) 73 [hereinafter *Wells*].

⁷⁷ *Ibid.* at para. 46.

⁷⁸ *Ibid.* at para. 58.

⁷⁹ Major J. did reaffirm that the duty of procedural fairness has no application to the legislative realm (*ibid.* at 222 [references omitted]):

Both the decision to restructure the Board, and the subsequent decision not to reappoint the respondent, were *bona fide* decisions. The decision to restructure the Board

As I have suggested elsewhere,⁸⁰ Major J. appeared to imply in *Wells* that if the evidence had established that “personal animus” motivated the enactment of the statute at issue, it could have been nullified as a breach of the rule of law and therefore *ultra vires* legitimate legislative power.⁸¹

The Supreme Court has emphasized that the *Charter* should not provide a right that has no remedy.⁸² There is no reason that this same principle should not apply to the rule of law doctrine in Canada’s unwritten constitution as well.⁸³ The Supreme Court’s decisions in *Thorne’s Hardware* and *Consortium Developments* appear at odds with this principle. While these decisions admittedly leave open a remedy for egregious violations in circumstances where executive officials publicly announce that they have acted in bad faith, the Court has removed most potential abuses of power from any judicial remedy.

The Ontario Court of Appeal in *Black* appears to have confirmed that the prime minister, in exercising the Crown prerogative relating to the granting of honours, has absolute discretion (although presumably subject, following *Operation Dismantle*, to judicial scrutiny under the *Charter*). This means that even if the prime minister’s communication had been made in bad faith, it could not give rise to a judicial remedy.

was deliberated and enacted by the elected legislature of the Province of Newfoundland. This is fatal to the respondent’s argument on bad faith, as legislative decision making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate. The judgment in *Reference re Canada Assistance Plan* was conclusive on this point in stating that: “the rules governing procedural fairness do not apply to a body exercising purely legislative functions”.

⁸⁰ L. Sossin, “Developments in Administrative Law: The 1999-2000 Term” (2000) 13 Supreme Court L.R. (2d) 45 at 67.

⁸¹ For an intriguing example of this approach, see *Bacon v. Saskatchewan Crop Insurance Corp.*, [1997] 9 W.W.R. 258, 157 Sask. R. 199 (Q.B.) (holding that a legislative scheme that was “arbitrary” could offend the rule of law although the agriculture scheme at issue in the case could not be so characterized), aff’d [1999] 11 W.W.R. 51, 157 Sask. R. 199 (C.A.) (upholding the trial judge’s finding that the legislation was valid, but expressly reversing the trial judge’s reasoning on the rule of law issue).

⁸² See e.g. *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at para. 50, 69 O.R. (2d) 448, Lamer J. (as he was then).

⁸³ It is clear, however, that some aspects of the constitution, such as constitutional conventions, only provide for declaratory legal remedies, not substantive ones. See the *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, (sub nom *Reference re Amendment of the Constitution of Canada*) 125 D.L.R. (3d) 1. On the renewed emphasis in Canada on the unwritten constitution, see M. Walters, “The Common Law Constitution of Canada: Return of *Lex non Scripta* as Fundamental Law” (2001) 51 U.T.L.J. 91; D. Dyzenhaus, “*Baker* and the ‘Unwritten’ Constitution” (2001) [unpublished, archived at McGill Law Journal].

Even if the prime minister, in communicating Canadian policy regarding honours to the Queen, had simply made up a legal rule that did not exist at all, no legal consequences would follow. While it is difficult to generate heartfelt sympathy for Black's plight, the target of a prerogative power could as easily have been a more vulnerable individual, and the basis for intervention could as easily have been that individual's ethnic, ideological, or social affiliations. To allow such abuses of power to remain immune from judicial scrutiny appears on its face to eviscerate the supremacy of the rule of law. Can *Roncarelli* and *Black* be reconciled?

Some have pointed to the fact that *Roncarelli* involved the revocation of a license, an administrative decision toward the judicial end of the decision-making spectrum, and thus attracts closer scrutiny than discretionary decisions at the legislative or policy end.⁸⁴ Once again, however, this approach tempts a return to formalism. The duty of fairness no longer turns on the categorization of a particular decision (unless, that is, it is a truly legislative decision to which no duty of fairness applies). Resurrecting such distinctions to justify immunizing certain governmental decisions from the reach of the rule of law is unjustified and potentially dangerous. An alternative approach would be to impose greater scrutiny on government decisions based on the authority vested in, and integrity expected of, the decision-maker. On this basis, where a premier and attorney general (as in *Roncarelli*) or a prime minister (as in *Black*) has his or her actions challenged, a higher standard is appropriate.

The better view is to err on the side of allowing rule of law claims to go forward. While Black's claim was framed in abuse of power, and sought damages rather than an administrative law remedy against arbitrary action, the principle at stake is analogous. It will be rare where evidence can be proffered that demonstrates decision-makers acted in bad faith, or for ulterior or arbitrary motives. *Roncarelli*, where Premier Duplessis testified as to his ulterior motives, was surely exceptional in this regard.⁸⁵ Other claimants, however, must be permitted to gather evidence to make their case. In *Consortium Developments*, this may well have meant compelling municipal councillors to testify, but limiting the questions they could be asked, or the use that could be made of the answers. The judicial regulation of discovery, however, can mitigate the potential for abuse or malicious civil suits. Fishing expeditions and open-ended attempts to harass governments can be filtered out.

As indicated above, it is unclear whether the facts as alleged by Black in this case could have been proven. What is clear, at least to me, is that the doctrine of justiciability should not be used as a shield to protect executive officials from the reach of the rule of law. This is equally important in claims raising the tort of abuse of process against a public official. As the Ontario Court of Appeal itself pointed out in *Odhavji*

⁸⁴ See Mullan, *supra* note 66 at 324.

⁸⁵ *Supra* note 61 at 134-37.

Estate v. Woodhouse,⁸⁶ the concern for the rule of law lies at the core of the tort of misfeasance in public office.⁸⁷

In *Black*, Laskin J.A. is certainly correct that no Canadian has an entitlement to an honour, and that the interest at stake in this decision was trivial at best (except, of course, to Mr. Black).⁸⁸ I would argue, however, that the court's vigilance regarding alleged breaches of the rule of law should not depend on the gravity of a particular decision.

Conclusion

Any arbitrary decision for which a public official cannot be held accountable represents an important erosion of some of the most basic and fundamental tenets of our legal and political systems. Where such a decision emanates from the prime minister, careful scrutiny is justified. There is no clear basis in an enlightened, constitutional monarchy for "royal favours" of any kind, and certainly no justification to insulate such favours from judicial accountability. Any alleged breach of the rule of law raises an important and justiciable legal issue (subject to the concerns outlined above regarding judicially cognizable standards).

The Ontario Court of Appeal's decision in *Black* has significantly diminished the vestiges of monarchical power in Canada. By the same token, however, the court has given its imprimatur to the untrammelled discretion of the prime minister in exercising certain Crown prerogatives, such as the granting of honours. For these reasons, *Black* represents both one important step forward, and one disturbing step back, on the road to reconciling the exercise of prerogative powers with the rule of law.

⁸⁶ (2000), 52 O.R. (3d) 181 at para. 22, 194 D.L.R. (4th) 577 (C.A.), leave to appeal to S.C.C. granted 7 September 2001.

⁸⁷ Borins J.A., writing for the majority, adopted the following remarks of Lord Steyn in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 at 1230 (H.L.): "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes."

⁸⁸ *Black*, *supra* note 2 at para. 62.