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DISCRETION AND THE CULTURE OF JUSTICE

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This paper analyzes the role of multiculturalism in the exercise of administrative discretion. Whether the setting is national security or social welfare eligibility, standards of justice rise or fall on the judgments of individual "front-line" decision-makers. Such decision-makers are the human face of the state. Against this contextual backdrop, this paper addresses a series of critical questions, including: To what extent is the exercise of discretion specifically, and the character of the administrative state more generally, determined by culture and identity? Will decision-makers in a representative public service treat members of their own communities differently than members of other communities? Administrative culture and culture of the society at large are deeply entangled in the exercise of discretion. The reasons for discretionary decisions, in other words, must grapple with and not sidestep the values, beliefs and administrative structures which underlie them. This approach is elaborated in the Canadian context, with particular emphasis on the policy of the federal government to achieve a multicultural public service and the development of impartiality and fairness standards in Canadian administrative law.

> [B]ureaucracies, to be democratic, must be representative of the groups they serve.
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> J. Donald Kingsley, *Representative Bureaucracy*, 1944[1]

As Canada enters a new century of potential and promise, it faces an urgent imperative to shape a federal public service that is representative of its citizenry. The public service has met this challenge before; it must do so again. Just as the greater presence of francophones and women enriches and enhances the public service, so too do visible minorities bring new dimensions and vitality to it.

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[1] J. Donald Kingsley, *Representative Bureaucracy: An Interpretation of the British Civil Service* (Yellow Springs, OH: Antioch Press, 1944) at 305.

The public service must be regarded by its citizenry as its own, not as the preserve of any particular group. It must be driven by the principle that what an individual can do on the job must matter more than his or her race or colour.

Embracing Change, Federal Treasury Board Task Force, 2000[2]

I. INTRODUCTION

The soul of the administrative state is discretion. Whether the setting is national security, police activities, tax administration, social welfare eligibility or immigration and refugee determinations, standards of justice rise or fall on the judgments of individual "front-line" decision-makers. Such decision-makers are the human face of the state. Discretion inherently involves choices between various lawful courses of action in the context of particular affected parties. These choices are informed by statutory goals, legal criteria but also, inescapably, by the decision-maker's values and experiences.[3]

Discretion takes place in specific administrative contexts and frameworks. Just as it is shaped by values and experiences and by statutory direction and rule of law considerations, it is also influenced by bureaucratic structure, administrative culture, budgets, volume and external pressures.

Against this backdrop of the contexts and constraints on discretion, I seek to address a series of critical questions arising from the exercise of discretion in multicultural contexts; these include: To what extent is the exercise of discretion specifically, and the character of the administrative state more generally, determined by culture (whether understood in terms of religious, ethnic, linguistic or other group affiliations and identities)? Assuming culture matters in some sense, should the decision-makers be representative of the society at large, and if so what are appropriate mechanisms to ensure such representation? Will decision-makers in a representative public service treat members of their own communities differently than members of other communities? Finally, can a purely impartial and independent public service be responsive to vulnerabilities and cultural sensitivities among groups dependent on administrative decision-making?

Administrative culture and culture of the society at large are deeply entangled in the exercise of discretion. Concepts such as fairness, reasonableness and the rule of law cannot take on meaning in the abstract but must do so in particular contexts. Law cannot and should not be impervious to contextual analyses. While the legality of a decision should not turn on the cultural identity of the decision-maker, neither should such dynamics be construed as outside the legal analysis of administrative decision-making. While administrative law in such settings should be attentive to the ethnic, religious and linguistic background of decision-makers and affected parties, administrative law must also reflect and promote principles of equity, consistency and coherence. The result is a necessary, shifting and delicate balance. Achieving

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[2] Secretariat, Treasury Board of Canada, *Embracing Change in the Federal Public Service—Task Force on the Participation of Visible Minorities in the Federal Public Service* (Ottawa: 2000), online: <http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/tb_852/ecfps_e.asp> [*Embracing Change*].

[3] The classic studies of this phenomenon are Michael Lipsky, *Street Level Bureaucracy* (New York: Russell Sage, 1980). For a Canadian perspective, see Greg McElligot, *Beyond Service: State Workers, Public Policy and the Prospects for Democratic Administration* (Toronto: University of Toronto Press, 2002).

an optimal balance depends on transparency in decision-making with an emphasis both on the duty to provide reasons and on cultivating a culture of justification based on authenticity. The reasons for discretionary decisions, in other words, must grapple with and not sidestep the values, beliefs and administrative structures which underlie them.

This paper is divided into three sections. In the first section, I explore the contexts within which the debate over a representative public service has arisen and the policy initiatives to which this goal has given rise. In the second section, I examine the legal constraints on discretionary decision-makers, ranging from constitutional conventions and the *Canadian Charter of Rights and Freedoms*[4] to common law constraints on impartiality, independence and reasonableness. In the third and final section, I attempt to map out how our understanding of legality in the exercise of discretion may come to depend on public confidence in the representative nature of the public service.

This paper has been prepared for the "Symposium on Multiculturalism", being held at the National University of Singapore. This raises a question as to the portability of the principles discussed in this paper, which are developed in the Canadian context. This is not a comparative analysis. It remains to me unclear whether the dynamics of a representative bureaucracy and administrative law in one part of the world can shed insights on another, even if both share aspects of a Westminster tradition that informs both the principles of administrative law and the practices of public administration.

In Singapore, as in Canada, the membership of the public service has always been as relevant as the goals of efficiency and effectiveness to which the public service as a whole strives. In Canada, this found its greatest expression in the seismic shifts with the federal public service following the adoption of bilingualism in the 1960s and the more recent attempt to establish a public service that reflects the multicultural society it now serves, explored in the analysis below. In Singapore, this dynamic found expression in the drive to "localize" the public service following the era of colonial administration. In 1956, a Statement of Policy was issued entitled "Malayanisation", which read in part:

> No outside authority must be in a position to determine, even in the last instance, what appointments, promotions and disciplinary actions are taken in respect of the civil service. The establishment of a Public Service Commission with responsibility for these matters is the most effective way of achieving this objective and at the same time of securing freedom from interference in service matters by politicians and political parties. We must aim at a civil service that will loyally discharge its duties irrespective of the political complexion of the government…[5]

However, multiculturalism in Singapore, while embedded in the national identity, appears not to have penetrated the discourse of representative bureaucracy. As Chua

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[4] Part I of *The Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[5] Singapore Government, *Statement of Policy—Malayanisation*, Government Command Paper Number 65 of 1956, online: Singapore Public Service Commission <http://app.psc.gov.sg/history1.asp>.

Beng Huat explains:

> Basic to the conception of 'multiracialism/multiculturalism' is the idea of the equality of groups rather than of individuals. Thus cultural rights of different racial groups are emphasized and theoretically, protected by law or at least by administrative practice … the most obvious case is that of Singapore: there are four official languages, each school going child is required to take English plus his/her 'mother tongue' language, which is in fact generally the father's language as the child is assigned the father's race; two holidays of each racial/religious group, as often race and religion are coextensive, such as Malay/Muslim and Indian/Hindu, are assigned as national holidays per year; the distribution of the races in public housing estates, in which 80 per cent of the population reside, is controlled by quota at the level of each block of housing. *Significantly, while cultures of the races are institutionally supported at the group level, the market rules in the allocation of resources of education and jobs in the public sector; meritocracy is the rule and material success individualized.*[6] [Emphasis added.]

It is hoped that the reflections on these questions in the Canadian context contained herein will stimulate debate on the similar challenges facing other countries.

II. The Dilemmas of Representative Bureaucracy

The rise of the "administrative state" and the penetration of government programs and services into areas of social and economic life led both to dramatic expansion of the size of the civil service in postwar Canada and to greater attention to the powers public servants exercise.[7] While the Canadian public service is organized around the merit system of hiring and promoting public servants, through a process supervised by an independent Public Service Commission (PSC), the Government of Canada has also expressly set for itself the goal of a "representative" public service by means of an initiative launched in 2000 referred to as "Embracing Change".[8]

Before exploring the implications of representative bureaucracy for the impartiality and independence of discretionary decision-making, it is first helpful to say something about the present make-up of the public service and Canadian society.[9]

Canada has been transformed from a society with predominantly European roots into one that embraces many cultures and traditions. One Canadian in nine is a member of a visible minority group and more than half of the residents of Canada's largest city, Toronto, were born outside Canada or are from a visible minority community. There are more than ninety different ethnic groups in the Toronto Census Metropolitan Area (CMA) and over one million non-English or French speaking people. The top six ethnic groups are: European (997,180), East and Southeast Asian (488,350), British (457,990), Canadian (311,965), South Asian (291,520) and Caribbean (167,295).

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6 Chua Beng Huat, "Multiculturalism in Island South-East Asian" (2002) 69 Antropologi Indonesia 118 at 120, online at <http://www.jai.or.id/jurnal/2002/69/10brt4cbh69.pdf>.

7 J.E. Hodgets, "Canadian Administration Faces the Fifth Decade" (1949) 11 The Journal of Politics 715 at 720.

8 *Embracing Change*, *supra* note 2.

9 The statistics set out in this section are based on *Embracing Change*, *ibid.*

In the 1996 census, visible minorities numbered more than three million. Two million came as immigrants; one million are Canadian by birth. As a recent government report concludes:

> The federal public service is supposed to serve all Canadians, yet its workforce does not reflect the diversity of the Canadian population. Visible minorities are under-represented. In 1999 (end of fiscal year) one in 17 employees in the federal public service was a member of a visible minority group. Visible minorities are almost invisible in the management and executive categories; they account for one in 33. In 1999, of a total of 298 new executive appointments, 19 were visible minorities, of whom 5 were women.
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> In contrast, the private sector has been quick to recognize the capabilities and potential of visible minorities. The federally regulated sector (mainly banks, airlines, railways and communications) raised the visible minority representation in its workforce from 6 per cent to 9.9 per cent between 1997 and 1998. In 1999, visible minorities made up 16.7 per cent of Scotiabank's workforce. Of its management and executive ranks respectively, 10 per cent and 5 per cent were visible minorities.[10]

The statistics used by the Government in setting out its vision for "embracing change" indicate that visible minorities are:

1 in 9 in Canada
1 in 17 among all employees in the federal public service
1 in 16 among men in the federal public service
1 in 17 among women in the federal public service
1 in 33 among management in the federal public service

The Canadian public service has approximately 178,000 employees. The standard set under federal employment equity legislation requires that the visible minority workforce of each of those departments and agencies should be at least equal to labour market availability (LMA) as calculated by the department according to Census data. For each designated group under the legislation—visible minorities, women, Aboriginal peoples, and persons with disabilities—departments are required to make progress in bringing their departmental representation to the level of LMA. With few exceptions, in the area of visible minority representation, gaps persist between departmental representation and LMA.

Visible minorities are under-represented in the public service as a whole; in 1999 the public service-wide population of visible minorities was 5.9 per cent of all employees, well short of the LMA of 8.7 per cent (based on 1996 census data) for the public service as a whole. The PSC forecasted the hiring rates required for groups designated under the Employment Equity Act[11] to reach the LMA by a given year. To achieve LMA by the year 2005, the hiring rate for visible minorities would have to rise, beginning in fiscal year 1999-2000, from its historical average (calculated for the years 1990 to 1999) of 7.1 per cent to 20.1 per cent, or, from about 1 in 15 to 1 in 5. If the historical rate of recruitment of visible minorities continues,

[10] *Ibid.* at 20.
[11] S.C. 1995, c. 44.

it will take more than two and a half decades to reach LMA as defined by the 1996 census.

Some statistics show advances for visible minorities over the last decade. In the late 1980s visible minorities numbered about 6,000 in the federal public service and accounted for about 3 per cent of the workforce. By 1990 the visible minority population was 7,583, or 3.5 per cent. At the end of fiscal 1999, the population stood at 10,557, or 5.9 per cent.

Two factors other than recruitment help to explain the rise in percentage terms: the 1990s saw the total workforce of the public service shrink from about 218,000 to 178,000 employees; and, more visible minorities already in the public service are stepping forward to self-identify. Other figures reveal a different picture. For example, in 1998-1999, visible minorities received 19 of the 646 promotions involving the executive category. Four out of 38 external recruits into the executive group were visible minorities. Of 42 departments (with 200 or more employees), only four have surpassed a representation of 8.7 per cent for visible minorities. Visible minorities are concentrated in four departments: Revenue Canada, Human Resources Development Canada, Public Works and Government Services Canada and Health Canada. They accounted for 56.5 per cent of all visible minority employees in 1999. In contrast, these departments accounted for 43.9 per cent of the public service workforce. Of those departments, Revenue Canada employed 35 per cent of the visible minorities in the public service in 1999. In November of that year, Revenue Canada became a separate agency (Canada Customs and Revenue Agency—it has now been restructured as the Canadian Revenue Agency); removing Revenue Canada from current public service statistics would reduce the total representation of visible minorities from 5.9 per cent to 5.0 per cent. This is significant since the proportion of visible minorities appears highest in some of the areas which place significant discretion in front-line workers (such as Revenue Canada).

The overall population numbers mask a disturbing problem of distribution. Visible minorities start to disappear as a presence in the workforce at the more senior levels. This was portrayed in earlier federal reports (Breaking through the Visibility Ceiling (1992) and Distortions in the Mirror (1993)) as "now you see them... now you don't". Since 1991, the population of visible minorities in "feeder" groups for the executive category has languished between 6 and 6.5 per cent. In the top ten feeder groups, visible minority members account for only 3.4 per cent. Rates of promotion vary widely, favouring some occupation groups, such as economists, sociologists and statisticians, over others.

Women in the public service have faced negative attitudes and stereotyping and have been consistently undervalued. Visible minority women are said to face "double jeopardy". Accordingly, there must be equal emphasis on cultural and gender sensitivities in efforts to improve their representation and the climate of the workplace. Among women in the public service, 5.8 per cent are visible minorities. Visible minority women have furthest to catch up in executive ranks: of 3,421 executives in the federal public service in 1999, 919 were women, of whom 23 were visible minority women.

The fact that these statistics and proportional breakdowns are so readily available and publicized in Canada is itself quite significant. The "Embracing Change" Task

Force reached the following conclusion:

> The time has come to focus on results. The federal government should establish a benchmark that, if achieved, would help make up ground in the representation of visible minorities. The purpose of setting a benchmark is to seize the opportunity to make progress over a short period. In proposing this approach, the Task Force does not seek quotas for visible minorities, nor does it wish to see them become entrenched as an employment equity group. The driving principle must be that what an individual can do on the job must matter more than his or her race or colour.[12]

These kinds of studies tend to assume the need and rationale for a representative public service rather than justifying that need or articulating that rationale. I believe it is important to understand what a representative public service is meant to achieve, especially in the context of discretionary judgments that have been delegated to public officials. Is a public service whose demography reflects the demography of the public it serves the only goal? Do we, and should we, expect the decisions reached by a representative public service to differ from the decisions reached by an unrepresentative public service, and, if so, why? It is to the rationales of a representative public service in a multicultural society that I now turn.

A. *The Rationale for a Representative Public Service*

It is common now for governments to prioritize the removal of any improper barriers to entry into the public service and to enhance "diversity" in the public service.[13] That is to say liberal democracies now for some time have included claims to a public service constituted on the basis of inclusion and non-discrimination as tied to the notion of "government by the people" that lies at the heart of the democratic ideal.[14]

This interest in a barrier-free route of entry into the public service is of particular concern in Canada. For many decades the Canadian public service was a vehicle for social exclusion—especially against Canada's large Francophone minority. Canadian Francophones gained significant entry into the public service only after Pierre Trudeau's government enacted official bilingualism for Canada, which included access to all federal government services in either official language (English or French). This initiative was justified not on the basis that francophones would view front line discretion or decision-making differently than anglophones but rather as a question of access—both to social mobility through entry into the civil service and to government services for francophone citizens.[15]

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[12] *Supra* note 2 at 3.

[13] For a review of this trend, see Vidu Sonhi, "A Twenty-First Century Reception for Diversity in the Public Sector: A Case Study" (2000) 60 Public Administration Review 395.

[14] See for a classic statement of this argument, Frederick C. Mosher, *Democracy and the Public Service*, 2nd ed. (Oxford: Oxford University Press, 1968). See also Kingsley, *supra* note 1. Kingsley, often credited with launching the representative bureaucracy theory, was more interested in socioeconomic and class diversity than diversity of ethnic, racial or religious background.

[15] Interestingly, although officially bilingual for over thirty years, the Canadian government recently announced an "Action Plan for Official Languages" released by the Prime Minister in March 2003 intended

The removal of barriers, however, is not the same as the proactive commitment to a representative public service. The latter is often thought to imply that public servants will actively "represent" the interests, values or representatitveness of their community, while the former constitutes a passive approach to representation that suggests demographic proportionality is a good in and of itself.[16] Many proponents of passive representation, however, assume that active representation is a likely consequence of such changes to the make-up of the public service. Whatever the relationship between the two, the rationales for passive and active representation in the public service merit some consideration:

1. *The exercise of discretion should reflect values of the community in the public interest.*

This rationale builds on the expression of values inherent in discretionary authority (for example, in the immigration and refugee eligibility context). The legitimacy of such discretion is challenged by the question of whose values discretionary judgments should reflect. When a border agent is deciding if there is probable cause to search a vehicle driven by a Sikh driver, will the exercise of this discretion depend on whether the police officer is of Sikh origin, or Hindu or neither? This question is addressed below in more detail, but suffice it to say at this point that the evidence of cultural identity actually determining (or even significantly shaping) administrative decision-making is mixed at best.[17] However, the literature tends to survey public servants' identification with a minority representative role rather than tracking how this identification actually affects decision-making or the exercise of discretion.[18] What we do not know, in other words, is likely more revealing than what we do know.

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to rededicate the Canadian public service to the principles of bilingualism. The Plan is described in the following terms:

> The Action Plan makes official languages a priority again and changes the organizational culture of the Public Service. The government is investing $64.6 million over five years to create an exemplary public service in the area of official languages: a public service that can serve the Canadian public in both official languages, that offers a work environment conducive to the use of both official languages in designated bilingual regions, and that is representative of the population it serves.

See Public Service Human Resources Management Agency of Canada, "Annual Report on Official Languages 2003-04" (Ottawa, 2004) at 9, online: Public Service Human Resources Management Agency of Canada <http://www.hrma-agrh.gc.ca/reports-rapports/arol-ralo1_e.asp>.

[16] For one of the first studies to focus on this distinction, see David Rosenblook & Jeanette Featherstonhaugh, "Passive and Active Representation in the Federal Service: A Comparison of Blacks and Whites" (1977) Social Science Quarterly 873.

[17] See for discussion Sally Selden, Jeffrey Brudney & J. Edward Kellough, "Bureaucracy as a Representative Institution: Toward a Reconciliation of Bureaucratic Government and Democratic Theory" in Julie Dolan & David Rosenbloom, eds., *Representative Bureaucracy: Classic Readings and Continuing Controversies* (New York: M.E. Sharpe, 2003) at 134-54. See also David Pitts, "Diversity, Representation and Performance: Evidence about Race and Ethnicity in Public Organizations" (2005) 15 Journal of Public Administration Research and Theory 615.

[18] For an exception to this rule, see Jessica Sowa & Sally Coleman Selden, "Administrative Discretion and Active Representation: An Expansion of the Theory of Representative Bureaucracy" (2003) 63 Public Administration Review 700.

2. *In a society devoted to constitutional values such as equality and with a political culture of liberal democracy, the public service, as with other public institutions, should be responsive to the ethnic, cultural and gender composition of the population it serves.*

This claim is reflected in the quotation at the outset of the paper, that a democratic society requires a representative government in all respects. Specifically, this rationale assumes that a representative public service will be more responsive to the needs and concerns of diverse communities. Such an aspiration immediately gives rise to interpretive challenges. What are the categories of representation which matter—and why? Is a man from Manitoba of Welsh ethnicity entitled to expect other Manitoba Welshmen in the public service generally or to handle public services that affect him specifically?[19] Should we be more concerned with representation of disadvantaged minorities? And, if I am a member of a disadvantaged minority, is it significant to me that a proportionate share of the public service is from my community, or that the public servant with whom *I* come into contact is from my community? These are some of the many questions raised by this rationale for a representative bureaucracy.

While there is not space in this analysis to explore the ramifications of identity politics for the public service, it is important to emphasize that this notion is not unbounded. That is, there are simply some groups, or intersecting combinations of groups, which will not be able to be reflected in the make-up of the public service. In this sense, representativeness is not simply a policy choice but a proxy for a series of other policy choices about which groups to prioritize in setting goals and targets for recruitment.

3. *The more perspectives and backgrounds included in public decision-making, the more qualitatively enhanced that decision-making in the aggregate will become and the more legitimate it will be viewed by those affected.*

On this rationale, different voices and perspectives will help refine and improve the quality of public decision-making. This rationale reflects the claim that a representative public service will perform at a higher level when assessed in terms of public perception. One study has shown that AIDS patients measurably preferred to interact with public service providers viewed as representative of their interests and background.[20] To take another example, police forces have found that the most effective way to penetrate ethnicity-based criminal organizations and gangs is to recruit officers from that ethnic community. Those officers are able to plan more effective crime prevention strategies and to investigate crimes involving those organizations and gangs more successfully. At a more abstract level, this rationale assumes that people from similar backgrounds will share similar perspectives, values and beliefs.[21] This assumption, however, may be empirically flawed and risks introducing the same

[19] I am grateful to Tom Axworthy, a Welshman from Manitoba, for raising this concern in an earlier discussion of the topic.

[20] See Gregory Thielemann & Joseph Stewart Jr., "A Demand Side Perspective on the Importance of Representative Bureaucracy" (1996) 56 Public Administration Review 168. See also Rhys Andrews *et al.*, "Representative Bureaucracy, Organizational Strategy and Public Service Performance: An Empirical Analysis of English Local Government" (2005) 15 Journal of Public Administration Research and Theory 489.

[21] See Sally Sheldon, *The Promise of Representative Bureaucracy: Diversity and Responsiveness in a Government Agency* (Armonk, NY: M.E. Sharpe, 1997).

stereotypes and generalizations about cultural or ethnic or racial or religious communities through a back door that non-discrimination laws and constitutional guarantees have attempted to bar from the front door.

4. *The public service ought to be a beacon of inclusion and social mobility for society at large and a bulwark against disaffection and alienation on the part of minority groups.*

Entry into the public service may be a tangible sign of enfranchisement for minority groups, especially new immigrant communities. Beyond its symbolic significance, it is also a tangible conduit of social mobility for many groups who confront discrimination, exclusionary requirements or other barriers in the private sector.

As I have attempted to show, these rationales raise significant questions and concerns which are rarely the subject of serious debate. In Canada, at least, the aspiration for a representative public service has become an article of faith tied to support for multiculturalism. To agree with the aspiration, however, is not necessarily to subscribe to any or all of these rationales. Yet the rationale, it seems to me, is as important as the aspiration (and in some cases may be more so). Depending on which of these rationales predominates, one may develop more passive or more active expectations of how representation will influence discretionary decision-making. If one expects passive representation, this would appear to have minimal impact on the legal framework of discretionary decision-making. If active representation is an actual or perceived expectation, by contrast, this would appear to present significant challenges to the legal regime governing discretion, which depends on impartiality, independence and reasonableness defined as considering only relevant factors.

In the analysis below, I intend to explore this apparent dichotomy and suggest problems in viewing representativeness only through passive or active lenses. In areas where discretion turns on value structures, administrative culture and empathy, this bright line becomes decidedly blurred. Here, the question is not *whether* decision-makers represent particular viewpoints, perspectives and preferences but simply *which* viewpoint, perspective and preference is given priority and *why*.

III. The Legal Contexts of Representative Bureaucracy

The legal constraints on discretionary decision-making and the legal backdrop for a representative public service in Canada intersect at a number of key junctures. First, there is a constitutional dimension to a representative bureaucracy. The merit principle has been recognized as part of a constitutional convention of a non-partisan public service (although the scope of merit remains contested).[22] The rule of law is a further unwritten constitutional principle that implicitly requires discretionary decision-makers who are neutral and considering only relevant factors. Second, the *Charter* recognizes the right to equality and to be free of discrimination on grounds including linguistic, religious and ethnic affiliations. Third, statutes governing the public service specifically protect the merit principle and often establish arm's length public service commissions to oversee the selection and promotion process. Fourth and finally, the common law provides additional protection relating to

[22] See the discussion of the merit principle in Lorne Sossin, "Speaking Truth to Power? The Search for Bureaucratic Independence" (2005) 55 U.T.L.J. 1.

procedural guarantees of independence and impartiality in administrative decision-making. Taken together, these legal regimes suggest little connection between the legal requirements of a representative public service on the one hand, and the legal requirements of neutral, fair and reasonable public service decision-making on the other hand.

A. *The Merit Principle, Constitutional Convention & the Rule of Law*

The point of departure for any discussion of public service independence as a constitutional norm is the constitutional convention that the public service remains neutral as between partisan interests (the "Convention").[23] Kenneth Kernaghan has outlined the content of the Convention in an oft cited list of six key principles, derived from a classic, Weberian understanding of the separation between politics and administration:

1. Politics and policy are separated from administration; thus, politicians make policy decisions and public servants execute these decisions.
2. Public servants are appointed and promoted on the basis of merit rather than of party affiliation or contributions.
3. Public servants do not engage in partisan political activities.
4. Public servants do not express publicly their personal views on government policies or administration.
5. Public servants provide forthright and objective advice to their political masters in private and in confidence; in return, political executives protect the anonymity of public servants by publicly accepting responsibility for departmental decisions.
6. Public servants execute policy decisions loyally, irrespective of the philosophy and programs of the party in power and regardless of their personal opinions; as a result, public servants enjoy security of tenure during good behaviour and satisfactory performance.[24]

The most detailed discussion of the implications of this convention in Canada is contained in the Supreme Court's judgment in *Fraser v. Public Service Staff Relations Board*.[25] This case did not centre on the merit principle *per se* but on the scope of

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[23] According to Kenneth Kernaghan and John Langford, "Political neutrality is a constitutional convention which provides that public servants should avoid activities likely to impair, or seem to impair, their political impartiality or the political impartiality of the public service..." K. Kernaghan & J. Langford, *The Responsible Public Servant* (Halifax and Toronto: IRPP and IPAC, 1990) 56. See also D. Siegel, "Politics, Politicians, and Public Servants in Non-Partisan Local Governments" (1994) 37 Canadian Public Administration 1 at 1-30, and J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government* (Toronto: University of Toronto Press, 1973) at 89. For the classic Weberian account, see Max Weber, *Essays in Sociology*, ed. and trans. by H.H. Gerth & C. Wright Mills (New York: Oxford University Press, 1958) at 218-220.

[24] This list is reproduced in K. Kernaghan "The Future Role of a Professional Non-Partisan Public Service in Ontario" Panel on the Role of Government Paper, Research Paper series (2003) at 11; and K. Kernaghan, "East Block and Westminster: Conventions, Values, and Public Service" in C. Dunn, ed., *The Handbook of Canadian Public Administration* (Don Mills: Oxford University Press, 2002) 104 at 104 and 106. See also K. Kernaghan, "Political Rights and Political Neutrality: Finding the Balance Point" (1986) 29 Canadian Public Administration 639.

[25] [1985] 2 S.C.R. 455 [*Fraser*].

a public servant's latitude to criticize the policies of the government. The Supreme Court held that "[A] public servant is required to exercise a degree of restraint in his or her actions relating to criticism of government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties".[26] In his holding in this case Dickson C.J. invoked the "tradition" in the Canadian public service which "emphasizes the characteristics of impartiality, neutrality, fairness and integrity.[27]

The principle of bureaucratic neutrality has been described by courts as an "essential principle" of responsible government,[28] as a matter of the "public interest in both the actual, and apparent, impartiality of the public servant".[29] By extension, a public service's neutrality can only be assured if public servants are hired and promoted according to non-partisan criteria. Non-partisan is not necessarily the same as neutral. For example, public servants who demonstrated sympathy with vulnerable minority groups would not be neutral in their decision-making but their activism would not benefit any particular party or ideological camp. Such "biases", of course, would seem inconsistent with the public servant's obligation to uphold the rule of law.

The obligation to comply with the rule of law would be a straightforward duty on public servants but for the fact that the rule of law is a deeply contested notion which also must be balanced against other unwritten constitutional principles such as democracy and Parliamentary sovereignty.[30] While it has been recognized as the animating principle for the judicial review of administrative action,[31] and is mentioned alongside the supremacy of God in the preamble to the *Charter*, the rule of law remains largely unexplored as a constitutional norm by courts in Canada. In the *Secession Reference*, where the Supreme Court affirmed the rule of law as an underlying constitutional principle, it described the importance of the rule of law in terms of subjecting executive authority to legal accountability and protecting citizens from arbitrary state action:

> 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*, supra, at pp. 8056, "[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

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[26] *Ibid*. at 466.

[27] *Ibid*. at 471.

[28] *Osborne v. Canada* [1991] 2 S.C.R. 69 at 88. Sopinka J. rejected the government's argument that s. 33 of the *Public Service Act* was immune from *Charter* scrutiny because it codified a constitutional convention, but did observe that the fact a provision reflects this convention "is an important consideration in determining whether in s. 33, Parliament was seeking to achieve an important political objective".

[29] *Fraser*, *supra* note 25 at para. 47.

[30] See *British Columbia v. Imperial Tobacco Canada Ltd*. 2005 SCC 49 at paras. 57-68. For recent appraisals, see P. Hogg & C. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U.T.L.J. 715 and W. J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005) 16 N.J.C.L. 175.

[31] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 819 at paras. 53 and 56.

> a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[32]

The executive accountability to legal authority referred to in this passage is accomplished by another constitutional postulate—all executive authority is subject to judicial review on the grounds that the rule of law has been contravened.[33] This constraint on the exercise of discretion is discussed below.

B. *Canadian Charter of Rights and Freedoms*

The *Charter* is often thought to provide support for the goal of a representative public service, both by making barriers to entry for minority groups potentially unconstitutional and by providing constitutional support for affirmative action programs. Section 15(1) of the *Charter* provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Section 15(2) provides that "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

The scope of this protection in the context of the public service was considered by the Supreme Court in *Lavoie v. Canada*.[34] The Court considered the constitutionality of a provision of the *Public Service Employment Act* ("*PSEA*")[35] under which Canadian citizens receive preferential treatment in federal Public Service employment.[36]

The hiring of public servants and application of the merit system in the Canadian public service is governed by the PSC. The PSC is also responsible for the exercise of discretion to prefer Canadian citizens. Staffing takes place by either open or closed competition, the difference being that closed competitions are restricted to existing employees of the Public Service. Because the provision discriminates on the basis of national origin, the Court held that it infringed s. 15(1) of the *Charter*. In the eyes of the Court, the impugned provision conflicts with the purpose of s. 15(1), which is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Under section 1 of the *Charter*, infringements may be justified as reasonable limits demonstrably justified in a free and democratic society. In *Lavoie*, the majority accepted that the Government's preference for citizens demonstrated such a reasonable limit. The Court found that the signal effect of the impugned provisions is not

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[32] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at para. 70.

[33] See *Crevier v. Quebec* [1981] 2 S.C.R. 220. See also M. Elliot, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001).

[34] 2002 SCC 23.

[35] S.C. 2003, c. 22, ss. 12, 13.

[36] See s. 16(4)(c) of the *PSEA*.

to discourage immigration but to underscore the value of citizenship. For the dissenting judges, which included the Chief Justice, the impugned section of the PSEA violated s. 15(1) of the *Charter* in a way that marginalized immigrants from the fabric of Canadian life. A law that bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of the qualifications or merits of individuals in the group, was found to violate human dignity. The dissenting judges further found that the infringement in this case was not justified under s. 1 of the *Charter*. Assuming that enhancing citizenship and encouraging a small class of civil servants to become Canadian citizens are pressing and substantial objectives, they concluded that the discrimination complained of was not rationally connected to either of these objectives.

Thus, while it is justified for the Government to prefer citizens over non-citizens in the public service, it would be a constitutional violation to prefer some kinds of citizens over others on religious, cultural, ethnic or linguistic lines (unless this were part of an affirmative action initiative, is an exempted category of legislation under s. 15(2) of the *Charter*). Although the *Charter* provides important values underlying the Government's commitment to multiculturalism in the public service, this commitment is expressed most clearly in the statutes and regulations which constitute and empower the public service itself.

C. *Statutes and Administrative Law*

A number of statutes govern the activities of the public service. The leading legislative framework is the Canadian *PSEA*, whose preamble recognizes that

> the public service has contributed to the building of Canada, and will continue to do so in the future while delivering services of highest quality to the public;
>
> Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded; [and that]
>
> Canada will also continue to gain from a public service that strives for excellence, that is representative of Canada's diversity and that is able to serve the public with integrity and in their official language of choice; the public service, whose members are drawn from across the country, reflects a myriad of backgrounds, skills and professions that are a unique resource for Canada; …[37]

The *PSEA* provides that:

> **10.** (1) Appointments to or from within the public service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the public service.[38]

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[37] *PSEA*, Preamble.
[38] *Ibid*.

While merit is a mandatory basis for public service appointments, the term itself is left undefined in the Act. Thus, it is unclear whether representativeness is highlighted as an element of merit, or as a supplemental goal of public appointments. The issue is clarified somewhat by the Canadian PSC, which is responsible for governing and enforcing the merit system in public appointments. The PSC has traditionally defined merit in terms of three related values: fairness, equity and transparency.[39] While fairness relates to objectivity and transparency relates to results that are "clear and explainable", equity is said to include reasonable access to competitive opportunities for appointment and representativeness. Representativeness as a goal is described simply as "reflective of the Canadian society in all its diversity".[40]

Not only is the legislation governing appointments to the public service cloaked in ambiguity, the legislation empowering those public servants to exercise discretion on behalf of the Crown is also often articulated in vague and subjective terms. For example, as discussed below, immigration officials are delegated a discretionary power to exempt individuals from the provisions of the *Immigration Refugee Protection Act* ("*IRPA*") on "humanitarian and compassionate" grounds.[41]

While the scope and criteria of discretionary authority is often set out in statutory form, the procedural constraints operating on decision-makers (e.g. disclosure, reasons, etc) are developed at common law through the principles of judicial review, whereby decisions by administrative officials or bodies are challenged in court on either procedural or substantive grounds. Administrative law is intended to ensure that public authority is exercised in accordance with the governing statutory provisions and in a fair and reasonable fashion. One procedural requirement stipulated by these principles compels the decision-maker to be impartial and independent. This is not an abstract or universal standard, but rather one to be worked out contextually in the circumstances of each administrative decision.

The absence of bias is sometimes referred to as an independent procedural entitlement, but in Canada, the Supreme Court has made clear that it should be understood as a further aspect of the duty of fairness.[42] Two related but distinct protections are said to comprise the right to an unbiased decision: first, the right to an impartial decision-maker; and second, the right to an independent decision-maker. It is not necessary to establish actual bias in order to invalidate an administrative decision or decision-making process. Rather, the requirement is to demonstrate a mere reasonable apprehension of bias. The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty in*

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[39] See Canada, PSC Advisory Council Working Group on Merit, *Merit in the Public Service* (Ottawa: 2001), online: Public Service Commission Advisory Council <http://pscac-cccfp.gc.ca/publications/rpt_merit/index_e.php>.

[40] *Ibid.* at 5

[41] S.C. 2001, c. 27. Section 25 (1) of the *IRPA* provides that: "The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations."

[42] See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at 849.

Canada v. National Energy Board:

> ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decisionmaker], whether consciously or unconsciously, would not decide fairly.[43]

The standard for reasonable apprehension of bias, as with the other aspects of procedural fairness, will vary according to the context and the administrative decisionmaker involved.[44] Here again, the closer the resemblance of the administrative setting to the judicial model, the higher the standard of impartiality. As in the other contexts of procedural fairness, the Court has emphasized the purposive nature of the analysis of bias. Wherever the reasonable apprehension of bias standard is situated in the circumstances of a particular case, the constant principle remains that justice should not merely be done, but should also be seen to be done from the perspective of the parties directly involved and the public at large.

A finding of bias presupposes the absence of impartiality. Concerns over impartiality may arise in two different ways. First, there may be a concern that a particular decision-maker or tribunal member has an interest in a decision. Second, there may be a concern that a group of decision-makers, or an entire administrative body, has a collective interest in a decision. In either case, a reasonable apprehension of bias may result.

The originating principle of bias is that a decision-maker should not decide her or his own case. A reasonable apprehension of bias may arise where a party or witness is related to the decision-maker. Relationships may be of a personal, professional or business nature. The issue is whether the relationship is such that a reasonable person might fear the decision-maker would not approach the matter with an open mind. As a result, not every relationship will result in a reasonable apprehension of bias. A purely professional association, for example, may not rise to this standard if tribunal members are normally drawn from among the ranks of a particular profession.[45] The courts have confronted only incidentally the question of whether membership in a particular cultural, racial, ethnic or linguistic group could give rise to a reasonable apprehension of bias

The Supreme Court's most significant (although, for the reasons discussed below, unsatisfying) treatment of this issue occurred in the judicial context in *R.D.S. v. The Queen*.[46] In that case, the trial judge (who was African-Canadian), was hearing a case involving an African-Canadian youth who was charged with assaulting a police officer. The only two witnesses at trial were the accused himself and the police officer. The police alleged that the youth had resisted arrest and become violent with him. The youth alleged that he had been the subject of threats of violence at the

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[43] [1978] 1 S.C.R. 369 at 394; this test was adopted and discussed in *R. v. S. (R.D.)* [1997] 3 S.C.R. 484 at 496 per Major J., at 502 per L'HeureuxDubé and McLachlin JJ. and 530-531 per Cory J.

[44] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 S.C.R. 623.

[45] See *Committee for Justice & Liberty in Canada*, *supra* note 43.

[46] (1997) 151 D.L.R. (4th) 193 (S.C.C.).

hands of the police officer. Their accounts of the relevant events differed widely and the case turned on credibility. The trial judge indicated that she had a reasonable doubt about the accused's guilt even without accepting the evidence of the accused with respect to the conduct of the police officer. She concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offence beyond a reasonable doubt. The trial judge concluded her reasons with the following comments:

> The Crown says, well, why would the officer say that events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

The case reached the Supreme Court on the question of whether these comments gave rise to a reasonable apprehension of bias—a divided Court issued four separate sets of reasons. Writing for what became the majority judgment on this issue, Cory J. observed:

> The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial:
>
> ... does not mean that a judge does not or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. [Canadian Judicial Council, Commentaries on Judicial Conduct (1991) at 12.]
>
> It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. *The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.* See for example the discussion by The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), C.J.W.L. 1. See also Devlin, *supra*, at pp. 408-409.

> Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was pre-determined or that a question was decided on the basis of stereotypical assumptions or generalizations.[47] [Emphasis added.]

Cory J. addressed the question of whether or not what was referred to as "social context" should be referred to in a judgment. He stated:

> It is the submission of the appellant and interveners that judges should be able to refer to social context in making their judgments. It is argued that they should be able to refer to power imbalances between the sexes or between races, as well as to other aspects of social reality. The response to that submission is that each case must be assessed in light of its particular facts and circumstances. Whether or not the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements will depend on the facts of the case.[48]

On the facts of this case, Cory J. held that the comments by the trial judge were "unfortunate", "worrisome" and "come very close to the line" but when considered in light of the submissions and evidence in the case, did not in his view give rise to a reasonable apprehension of bias.[49]

Three judges of the Court dissented and found the comments did create a reasonable apprehension of bias. The two female judges of the nine member court concurred with Cory J. but would have gone even further, asserting:

> An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context: …from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential pre-condition. A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality.[50]

Thus, while the majority of the Court found that the comments did not constitute a reasonable apprehension of bias, that majority split on the question of whether it was desirable and appropriate that the trial judge refer to her own "personal understanding and experience of the society" in which she lived and worked. When combined with the dissenting judges who concluded the comments were both inappropriate and reflected bias, this led to the result in the case being, first that the comments did not render the decision legally invalid, but second, that it would have been preferable in the eyes of the majority had the trial judge not addressed the social context surrounding that assessment in her reasons.

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[47] *Ibid*. at paras. 119-120.
[48] *Ibid*. at para. 121.
[49] *Ibid.* at para. 152.
[50] *Ibid*. at paras. 44-45.

What this case and its debate about the nature of bias disclose is the difficult balance required in decision-making settings between identity and merit. Traditionally, these concepts are seen in tension with one another. To the extent we privilege identity and seek a public service that is representative, merit matters less; and, to the extent merit is the sole driver of appointments, identity recedes as a priority. But need these concepts be oppositional? Could a person's familiarity with another perspective or set of life experiences itself be an element of merit? As Lizzie Barnes observes:

> There is no doubt that reconfiguring our understandings of merit is as difficult as that of complicating notions of identity. But without a shift in this regard, the transformative capacity of any step will be limited. If we do not believe the diverse ways of living produce diverse skills and abilities, we are never going to entrust important decision-making power to groups composed of people from a diversity of backgrounds.[51]

It is against this backdrop of the tension between objective merit and subjective identity in constitutional and administrative law that what I have termed the culture of justice takes on its form and its content—it must respond both to the contextual realities of multiculturalism and to the universal and egalitarian attributes of impartial decision-makers. It is to reconciling these aspirations that I now turn.

IV. The Culture of Justice

The key question around which the analysis to this point has circled is if a representative public service (whether passive or active) will have a tangible impact on the exercise of administrative discretion. Will a public service that reflects the face of a country decide particular cases differently than a public service that disproportionately reflects some faces more than others? If so, does such differentiation among decision-makers according to cultural, ethnic or linguistic affiliation violate the merit principle or the rule of law or amount to discrimination as a matter of constitutional law or bias as a matter of administrative law?

In this section, I explore the relationship between discretion and culture more directly.[52] This examination revolves around the case study of the discretion to exempt non-citizens from removal on humanitarian and compassionate grounds under Canadian immigration law.[53]

The relevant statutory scheme contains no criteria for the determination of humanitarian and compassionate grounds. This discretion is controversial because some

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[51] L. Barnes, "Public Appointments and Representativeness" [2002] P.L. 606 at 613.

[52] On the legal and administrative framework of discretion in Canada, see Lorne Sossin, "Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields and Discretionary Justice in Social Welfare" (2004) 42 Osgoode Hall L.J. 363; and Laura Pottie & Lorne Sossin, Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare" (2005) 38 U.B.C. L. Rev. 147.

[53] This section is adapted from a more detailed study of the humanitarian and compassionate decision-making in Lorne Sossin, "From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion" (2005) 55 U.T.L.J. 427. My analysis of H&C decision-makers builds on a variety of exposures to H&C decision-making, including a series of training seminars on discretionary decision-making for H&C officers entitled "From Fettering to Reasonableness" conducted in 8 different regional offices in 2004-05. The insights I have gleaned from these training settings are impressionistic and no doubt partial. Nonetheless, they constitute a window into public service values which I suggest legal observers too rarely see clearly.

believe it to be too broad, too unstructured and too difficult to supervise.[54] It originally resided as an extraordinary and exceptional power in the hands of the Minister and over time has devolved to become a front-line, high volume decision-making context.[55] Broad unstructured discretion is often thought to involve policy-making by other means but rarely is seen as a setting for the development of legal norms. Indeed, since K.C. Davis' influential study *Discretionary Justice*, administrative discretion is most often posited as an oppositional threat to the rule of law—as a potential source of abuse and arbitrary state action—that needs to be constrained and limited by rules and principles of legality.[56]

Discretion and law cannot be neatly juxtaposed. There is a tension between how legal standards are articulated and how they are interpreted by the individuals charged with applying them. This is not simply a matter of looking to the intent of legislators versus the motivations or preferences of front-line decision-makers. There is a significant intermediating role for guidelines, manuals, directives, circulars and the compendium of what might be termed "soft law". For example, the Ministry has issued a policy guideline with regard to "humanitarian and compassionate grounds" (Inland Processing Manual No. 5)[57] that is intended to elaborate the criteria for the exercise of this discretion. It provides:

> Applicants bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain an immigrant visa from outside of Canada in the normal manner would be (i) unusual and undeserved or (ii) disproportionate. Applicants may present whatever facts they feel are relevant.[58]

It is far from clear whether terms such as "unusual and undeserved" or "disproportionate" shed more light on the discretion than "humanitarian and compassionate considerations". At a minimum, however, the guideline provides decision-makers a vocabulary with which to justify their determinations and a discussion of how various factors should be considered in reaching those determinations (for example, the relevance of an applicant having family members in Canada or revealing a history of family violence). In *Baker v. Canada (Minister of Citizenship and Immigration)*,

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[54] See, for example, S. Davis *et al*., "Ch. 10, Rethinking Discretion: Residual Powers" in *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works Canada, 1997) 134-136 (arguing for more safeguards against abuse of discretion). See also C. Dauvergne, "Evaluating Canada's New Immigration and Refugee Act in its Global Context" (2003) 41 Alta. L. Rev. 725.

[55] For a historical overview, see R. Haigh & J. Smith, "Return of the Chancellor's Foot? Discretion in Permanent Resident Deportation Appeals Under the Immigration Act" (1998) 36 Osgoode Hall L.J. 245 at 262-68.

[56] Davis' primary paradigm for discretionary decision-making was police oriented. It was here, in his view, that "huge concentrations of injustice" invited "drastic reform". Davis' prescription for unchecked discretion was to advocate for more internal administrative rule-making. K.C. Davis, *Discretionary Justice* (Westport, Conn.: Greenwood Press, 1969) at 215. For further discussion, see K. Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in K. Hawkins, ed., *The Uses of Discretion* (Oxford: Clarendon Press, 1992) 11.

[57] *Inland Processing Manual No. 5*, online: Citizenship and Immigration Canada <www.cic.gc.ca/manual-guides/english/ip/ip05e.pdf> [IP5].

[58] *Ibid.*

L'Heureux-Dubé J. treats these guidelines as a reflection of Canada's "compassionate and humanitarian values".[59] This clearly invites a set of cultural assumptions to guide the exercise of administrative discretion. Compassionate and humanitarian values, I would suggest, cannot be construed in an ethnic, religious, social or economic vacuum.

The *Baker* case illuminates this claim. Mavis Baker was an illegal immigrant who had four Canadian-born children during the 11 years she had lived illegally in Canada. The question for the immigration officer was whether the prospect of separating Mrs. Baker from her children constituted humanitarian and compassionate grounds for exempting her deportation pursuant to the *Immigration Act* that was then in force. Her application was denied. The reasons of the immigration officer for denying the application included references to Mrs. Baker's mental health condition, her likely reliance on social welfare and the overly generous Canadian immigration system. The decision of the officer was quashed by the Supreme Court on the basis that these reasons gave rise to a reasonable apprehension of bias and on the grounds that the decision constituted an unreasonable exercise of discretion. The resonance of this judgment extended far beyond the plight of Mavis Baker.[60]

One of the reasons for the Supreme Court's decision was that the immigration officer failed to exercise his discretion according to the provision authorizing that discretion.[61] L'Heureux-Dubé J. analyzed the wording of this provision in concert with the resulting regulation and guideline and reached the following conclusion:

> The wording of s. 114(2) and of regulation 2.1 requires that a decision-maker exercise the power based upon "*compassionate* or *humanitarian* considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. *They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner.* This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.[62] [Emphasis added.]

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[59] *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 at para. 72. For a series of essays exploring the significance of this case for administrative, international and constitutional law, see D. Dyzenhaus, ed., *The Unity of Public Law* (London: Hart, 2004).

[60] See D. Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law (2002) 27 Queen's L.J. 445 and D. Dyzenhaus & E. Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193.

[61] Section 114(2) of the then *Immigration Act* (now repealed: *IRPA*, s. 274(a)) provided, "The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations".

[62] *Baker*, *supra* note 9 at 66.

The Court found that the immigration officer had failed to consider Mrs. Baker's application in a manner respectful of these considerations (or, for that matter, respectful of Mrs. Baker). Specifically, the Court concluded that he had failed to be "alert, alive and sensitive" to the best interests of Mrs. Baker's children. This failure, combined with the unjustified departure from the Ministry's own guidelines, and from relevant international law standards, was sufficient to result in a finding that the decision was unreasonable.

While such examples of judicial intervention to articulate legal norms are noteworthy, they are the exceptions that prove the rule. There is no appeal from an humanitarian and compassionate decision, and for the overwhelming majority of applicants the values reflected in an officer's exercise of humanitarian and compassionate discretion are the only legal norms that matter. As Bouchard and Carroll observed in their study of the role of discretion in the immigration process:

> In complex policy areas that are characterized by high and emotive content like immigration, politicians, policy analysts, and the general public are less inclined to engage in policy debates which might challenge the broader framework of accepted social values. As a result, decisions that may have major public policy implications can be made by default by bureaucrats exercising their powers of discretion. These decisions, or policy outcomes, can have serious unintended consequences for the broader society.[63]

I want to suggest that not only may values be at play through front-line exercises of discretion, but also legal norms. These norms may be traced back to the idea that civil servants do not decide in vacuums but rather in contexts. As Rand J. succinctly noted in *Roncarelli*, "there is always a perspective within which a statute is intended to operate".[64] In other words, civil servants ought to advance the goals of the statute under which they take their grant of authority—but civil servants will determine how the goals of the statute are to be advanced. Dworkin's well-known metaphor of the doughnut aims at a similar insight:

> The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority.…Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.[65]

On this view individuals charged with deciding humanitarian and compassionate immigration claims (H&C officers) are not merely to consider in a disinterested way the objective evidence of hardship; rather, they are to examine the evidence in a compassionate fashion. How this purposive direction might animate individual discretionary decisions, however, would depend on particular factual claims and

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[63] Genevieve Bouchard & Barbara Wake Carroll, "Policy-Making and Administrative Discretion: The Case of Immigration in Canada" (2002) 45 Canadian Public Administration 239 at 239-40. On the problems of accountability in the context of discretionary decision-makers generally, see M. Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980).

[64] *Roncarelli v. Duplessis* [1959] S.C.R. 121 at 140. For discussion, see D. J. M. Brown & J. M. Evans, *Judicial Review of Administrative Action in Canada* at para. 13:1221.

[65] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 31.

institutional contexts. As the H&C guideline, IP5, indicates, there is no "case to be met" in the exercise of this discretion.[66]

The neutrality of the public service indicates that decision-makers should approach their task in a non-partisan fashion, not that they should refrain from engaging with the subject matter of their authority. Neutrality may also suggest that their approach to legal norms will be a pluralist one. Such norms may shift across regions, offices and individuals just as we may also expect them to shift across religious, ethnic and cultural communities. France Houle has characterized such discretion as sponge-like because it absorbs the values, assumptions and preferences to which it is exposed.[67] As Bouchard and Carroll reiterate, "Immigration officials, whether at headquarters or in the field, possess differing points of view on a whole range of issues associated with what is efficient, fair and in the public interest".[68] Bouchard and Carroll do not indicate whether ethnic, religious or cultural community of origin may have any bearing on these "differing points of view".

Independence as a common law legal constraint is tied to the framework of judicial independence. The focus of this model is on structural relationships and objective guarantees such as security of tenure and financial independence.[69] This model is less able to grapple with the realities in which the "interference" with administrative decision-making arises through culturally determined or mediated values. The Court has emphasized that ministers and their delegates are not judges and that their pursuit of legitimate policy objectives does not constitute bias.[70]

H&C decision-makers, of course, are neither ministers nor judges. They enjoy no security of tenure or financial independence beyond that which normally arises for the civil service. In these front-line decision-making settings, the concern is not one of objective guarantees of independence but rather the ability to decide freely according to their conscience. Conscience, of course, is not the only guide to H&C officials in this exercise of discretion. Ministerial intervention is another key backdrop in immigration decision-making. Ministerial involvement in individual case determinations has been a long and sometimes notorious practice.[71] Humanitarian and compassionate exemption began as a discretion which only the Minister could exercise. For example, in 1991, then Minister Barbara McDougall granted permanent

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[66] See IP5, *supra* note 57 at s. 5.29.

[67] F. Houle, "L'arrêt Baker: Le rôle des règles administratives dans la réception du droit international des droits de la personne en droit interne" (2002) 28 Queen's L. J. 511 at 516.

[68] See Bouchard & Carroll, *supra* note 63 at 248.

[69] As developed by the Court in *Valente v. The Queen* [1985] 2 S.C.R. 673, the objective guarantees of judicial independence involve financial independence, security of tenure and administrative independence (e.g. control of trial lists, court dockets, etc). This framework was adapted to the sphere of administrative tribunal decision-making in *Canadian Pacific Ltd. v. Matsqui Indian Band* [1995] 1 S.C.R. 3 and *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919. The independence protection for tribunals and other administrative decision-makers, unlike the protection afforded judges, is not constitutionally entrenched and can be overridden by statute. For discussion, see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001] 2 S.C.R. 781.

[70] See *Imperial Oil v. Quebec (Min. of Environment)* [2003] 2 S.C.R. 624.

[71] The most recent incident involved allegations that former Immigration and Citizenship Minister Judy Sgro personally intervened to help a female dancer obtain a visa. See D. Struck, "Canada Invites Strippers and Gets Scrutiny; Scandal Renews Debate on Program to Import 'Exotic Dancers'" *Washington Post* (December 5, 2004) A10.

residency on humanitarian and compassionate grounds to a foreign national so he could live with his same sex partner.[72]

While a minister's own cultural values may be significant in guiding her exercise of discretion, this does not pose the same kind of dilemma for legal accountability. Ministers must directly answer to Parliament, and ultimately the electorate, for their decisions. As Krislov and Rosenbloom have pointed out, "It is not the power of public bureaucracies *per se*, but their unrepresented power, that constitutes the greatest threat to democratic government".[73] Indeed, it is in response to this threat that the movement towards representative bureaucracy has been often directed.

Even though front-line officers now exercise this discretion, it remains a ministerial discretion. This means it is open to the Minister to modify the criteria for exercising this discretion, as disseminated through the policy guidelines such as IP5, as a matter of policy preference. The Minister may also intervene in an individual case to overrule the decision of an H&C officer (though this is likely inaccurate language since one cannot overrule one to whom the decision-maker's power has merely been delegated). A legitimate question arises as to the propriety and legitimacy of political intervention in decision-making such as the H&C setting which involves no legal or objective expertise.[74] To the extent independence and impartiality are legal norms engaged by H&C decision-making (a relationship explored and reaffirmed in *Baker*), it is arguably difficult to construe ministerial involvement in a ministerial discretion as outside interference or bias.

Immigration related requests now form the bulk of the business at constituency offices of MPs from urban areas. These requests often filter down to managers and decision-makers through the CIC Minister's office. While a call from the Minister's office relating to a particular case could be the subject of allegations of wrongdoing in some administrative decision-making settings (e.g. interfering with the issuing of a license) it is not to be perceived in and of itself as illegitimate by immigration decision-makers. Because H&C decisions turn so often on credibility, expressions of support from an MP can be an important factor. Here, the link between discretion and multiculturalism occurs at the level of political mobilization and in consideration of the fact that cultural communities often are perceived to vote as a "bloc" and are thus able more effectively to lobby elected representatives.

The effect of ministerial influence is particularly relevant where an individual H&C decision might have an impact on national and international relations. For example, where American national guardsmen in Canada wish to remain and claim they will be "at risk" or suffer "disproportionate hardship" if returned to the US and compelled to serve in Iraq, a decision by a front-line H&C officer could have international implications. Moreover, this decision is further constrained by limited

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[72] See Nicole LaViolette, "Coming Out to Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act" 49 McGill L.J. 969 at 975.

[73] Samuel Kristov & David Rosenbloom, *Representative Bureaucracy and the American Political System* (New York: Praeger, 1981) at 21.

[74] An exception to this assertion may arise where the H&C claim involves an allegation of personalized risk to an applicant's life or security of the person if returned to the applicant's country of origin. These allegations are referred to pre-removal risk assessment (PRRA) officers for an opinion as to the objective basis of the claim. PRRA officers are referred to as the departmentally sanctioned experts on questions of risk. For a discussion of the expertise of PRRA officers and their role in the immigration and refugee decision-making process see *Nalliah v. Canada (Solicitor General)* [2004] F.C. 1649.

sources of evidence available to H&C officers. H&C officers cannot conduct first hand empirical research into country conditions abroad—they rely on a series of governmental and non-governmental data in ascertaining country conditions (e.g. levels of risk, etc)—much of which now must be disclosed to applicants.[75]

While H&C officers also will rely on submissions from applicants, where those submissions relate to country conditions that are not substantiated by Ministry approved sources, the weight attached to such submissions may be limited. Indeed, H&C officers are not generally permitted to conduct their own investigation of country conditions or individual circumstances using extrinsic sources (for example, searching an applicant on Google to corroborate personal data provided in an H&C application). If any extrinsic information is relied upon, the applicants must be informed.[76] Where officials are relying on their own personal experience with a country or country conditions, however, this fact is not disclosed, nor is it seen as "evidence".

The discretion exercised by H&C officers is also constrained by the scarcity of administrative resources and the pressures which this brings to bear on decision-makers through managers seeking efficient means of rationing staff time. While volumes of applications may increase both in quantity and complexity, there is no guarantee that the numbers of decision-makers will keep pace. This leads to one of two results. First, the same number of officers will decide more cases in the same fashion, which is to say decisions will be delayed, perhaps seriously so. Second, the same number of officers will decide more cases more quickly, which is to say the consideration given to decisions will be hastier. Consider the scenario of requiring decision-makers to close a particular number of files in a particular targeted timelines—say, 25-30 files a month or 5-8 files a week. This would constrain a wide range of choices that an H&C decision-maker might make, from whether to hold an interview with an applicant, to whether to ask the applicant for additional information, to how in-depth a review of materials and circumstances may be and so forth. Similarly, administrative resources and managerial priorities may affect the quantity and quality of training H&C officers receive.

Training is often focused on how to exercise the broad H&C discretion in a fashion that is fair and consistent and detached from individual value judgments. While I am unaware of any study of the implications of representative bureaucracy in the H&C contexts, other research exploring front-line discretion has tended to show a correlation between race, ethnicity and gender on the one hand and decision-making attitudes and behaviour on the other. In one study of American state administrators in the agricultural sector undertaken by Jessica Sowa and Sally Coleman, for example, they concluded that nonwhite administrators displayed a more expansionist orientation than their white counterparts.[77]

As Sowa and Selden explain, their findings lend credence to the view that representative bureaucracy in a multicultural setting may well have demonstrable effects

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[75] See *Haghighi v. Canada (Minister of Immigration and Citizenship)* [2000] 4 F.C. 407 (C.A.).

[76] See IP5, *supra* note 57 at s. 6.4.

[77] Sowa & Selden, *supra* note 18 at 702. See also Jeffrey Brudney, Ted Herbert & Deil Wright, "From Organizational Values to Organizational Roles: Examining Representative Bureaucracy in State Administration" (2000) 10 Journal of Public Administration Research and Theory 491.

on the outcome of discretion:

> The theory of representative bureaucracy maintains that a more representative workforce can lead to discretion being exercised toward the achievement of policy outcomes that are more representative and responsive to particular groups, especially minority groups … From the standpoint of exploring the impact of administrative discretion on policy outcomes favouring minority interests, one of the most interesting findings is that administrative discretion, as hypothesized, has a significant impact on the percentage of rural housing loans granted to minorities. The positive relationship between administrative discretion and policy outcomes indicates that the more discretion individual administrators perceive themselves to have, the more likely it is that they will produce outcomes that benefit minority interests.[78]

The questions left unresolved by empirical studies such as Sowa and Selden's is first if this correlation is desirable, and second if it erodes or infringes the impartiality and independence of the decision-maker. This is of particular concern where the outcome does not only favour the interests of some but also, potentially if not necessarily, disfavours the interests of others.

I do not believe the answers to the first questions can be determined by normative claims alone. This is a quintessentially political question that depends on a particular government and society's perspective on multiculturalism. If integration and nation-building is the priority, the positive correlation between cultural identification and decision-making attitudes might be a cause for concern. If celebrating and nurturing a multicultural mosaic is the government and society's preference, then this seems to me the fulfillment of the premise of representative public service and decision-makers that "reflect the diversity" of the society they serve.

The second question is more in the province of a legal analysis. Here too, however, the answer may lie in political dialogue and policy preferences more than in bright lines of legality, reasonableness and fairness. It seems to me the useful stricture imposed by law on discretionary decision-making (and it is noteworthy that it is of such recent vintage)[79] is the requirement of reasons. Underlying this requirement is the further duty to provide authentic reasons which actually disclose the reasoning of the decision-maker and not simply boiler-plate language designed to satisfy a formal legal hoop).[80]

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[78] Sowa & Selden, *supra* note 18. at 703 and 706.

[79] The common law duty for administrative decision-makers to provide reasons (at least if requested) was recognized in *Baker* in which the Supreme Court held, "Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision". *Baker*, *supra* note 59 at 845.

[80] For discussion of authenticity in reasons, see *Gray v. Ontario (ODSP)* (2002) 59 O.R. (3d) 364 (C.A.) in which McMurtry C.J.O. observed (at para. 22), citing an earlier decision of the Federal Court of Appeal:

> The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons." The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a

If discretionary decisions are accompanied by reasons which reflect cultural perspectives, the result can be a dialogue, as in the *RDS* case, about which elements of a decision-maker's background and experiences can and should play a role in exercising discretion and which cannot and should not play such a role. As these dialogues lead to refinements in the criteria for discretion, they can in turn be captured in guidelines and other instruments of "soft law" which can clarify further the appropriate intersection of discretion and a representative public service. Unlike the majority's approach in *RDS*, discussed above, which acknowledged background and experience matter but criticized the judge for elaborating on these factors in her reasons, the setting of discretionary decision-making is where I would suggest such elaboration is legally necessary.

Paradoxically, legal standards aimed at ensuring fair and reasonable discretionary decision-making may actually undermine the incentives and opportunities for authenticity about the values underlying individual decisions. This is so for several reasons. First, given the fact that the Court has quashed on grounds of bias decisions of the sort in *Baker*, which did offer, if nothing else, a genuine view into the values of the decision-maker, such candour is less likely in future cases. Decision-makers may prefer to craft their reasons to avoid judicial challenge. Further, reasons are not generally required at all in situations where an application is granted, although the risk of arbitrary or biased decision-making is no less apposite when an application is granted as when it is denied. This reflects the purpose of administrative law guarantees in the first place. They are not designed to ensure administrative compliance with standards of fairness and reasonableness—they are designed to protect affected parties from adverse decisions which were not reached in a fair and reasonable fashion.[81]

Let me provide an example to show the missed opportunities for engaging with cultural values which result from the framework of administrative law regulating discretion. One immigration officer with whom I spoke was faced with a humanitarian and compassionate application from a young man who fled a Middle-East country with his family claiming refugee status owing to fear of persecution. This claim was rejected. While the rest of his family was scheduled to be deported, this young man filed a further H&C application alleging that he feared persecution from his own family because he was a homosexual and sought to remain in Canada on those grounds. There was absolutely no evidence in the file to substantiate this claim. The H&C officer noticed in a photo submitted as part of the original application that all the family members were frowning while the young man was smiling. The H&C officer explained "In that picture, I guess he sort of looked gay. I don't know many gays so it's hard for me to tell." On that basis, the application was granted. The H&C officer added, "Of course, that was just how it seemed to me based on what I know and what I've seen. I never would have rejected an application on such a gut instinct, but in this case, it seemed fair to give him the benefit of the doubt".[82]

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conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[81] This argument is further developed in Lorne Sossin, "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 28 Queen's L.J. 809.

[82] Interview notes on file with author.

One perspective on this story is that, as in *Baker*, the decision-maker here exercised discretion based on irrelevant factors; but, since no legal challenge follows positive decisions, this is an argument that would never reach a court. Another perspective is that the H&C officer here, like Judge Sparks in *RDS*, validly assessed credibility with reference to background, experience and values. Either way, I would suggest the H&C officer should be encouraged to share such instincts and to contribute to a dialogue about where these instincts come from and when they may legitimately influence discretion. This dialogue will and should include tensions which emerge from diverse cultural backgrounds, gender, age and regional perspectives. Consensus and shared purpose may emerge from subjecting such perspectives to explanation and justification, and, even if they do not, the resulting refinements of the constraints on the discretionary judgments arguably will be better informed and more responsive to the complexities of a multicultural society. This approach is not without risk for the public service (or administrative tribunals), but it seems to me nonetheless preferable to the "don't ask, don't tell" strategy implied by *Baker* and explicitly endorsed in *RDS*. The primacy of transparency in the exercise of discretion may also shed light on how representativeness and the merit system ought to reinforce one another. If discretion is an inherently pluralist site of administrative authority, and if reasoning is expected to lay bare the worldview underlying the exercise of that authority, then diversity itself may contribute to the skill-set that decision-makers bring to their determinations.

V. Conclusion

This paper has explored key decisions in Canadian administrative law relating to bias in order to raise questions about the federal government's drive to make the Canadian public service "representative". Assuming the purpose of a representative public service is to diversify administrative culture and the values and perspectives that animate public service decision-making, this must necessarily have an impact on the nature of discretion. In settings of broad discretion, which call upon public officials to make value-based judgments, such as the authority of immigration officers to exempt individuals from the consequences of the immigration restrictions where it is justified on humanitarian and compassionate grounds, cultural identification and culture based value systems may play a significant role in decision-making. Moreover, the legislation empowering administrative decision-makers is often crafted to allow such scope for value-based judgment, as in the example of the "humanitarian and compassionate" exemption to the operation of immigration legislation. How can representation play a meaningful role in such discretionary authority without shading into the perception of bias.

In order to reconcile this role with the legal requirements of impartiality, independence, fairness and reasonableness that operate on all discretionary decision-makers, I have suggested more transparency from those who exercise discretion is needed, both in terms of the reasons those decision-makers give for their decisions and in the resulting opportunities for refining guidelines-training and recognition of the various perspectives decision-makers might legitimately bring to individual cases. The more authentic the dialogue about the culture of discretion, the more robust and enriching will be the consequence of a representative public service. It is because culture and

values matter, in other words, that a representative public service may come to be seen as a condition of the fair and reasonable exercise of discretion, and by extension, of the merit system which underscores the legitimacy of the public service.

The challenge for countries such as Canada is how to achieve this difficult but necessary balance of a public service that upholds values of impartiality, independence, fairness and reasonableness on the one hand, and reflects the diversity of the country it serves on the other. Ideally, the scope of merit and impartiality themselves will evolve to accommodate and elaborate the ideal of a representative bureaucracy. When it comes to discretionary authority, one cannot avoid the challenges inherent in elaborating the culture of justice.