



# Prospects for Judicial Review of Transnational Private Regulation: Singapore and Canada

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## Abstract

Transnational regulatory power is increasingly exercised by bodies with no formal accountability to states, although such bodies affect the way individuals, organizations, and states themselves conduct their affairs. As a general rule, courts have been reluctant to engage with these transnational private regulators. This article argues that courts in Singapore and Canada are gradually, if haltingly, fashioning public law principles that enable them to judicially review decisions of domestic private regulators. These principles tend to focus not on the formal status of the body exercising power but on the nature of that power, essentially articulating a functional test. The article argues further that, as it has developed in Singapore and Canada, administrative law contains within it legal tools and principles that would enable courts to judicially review the decisions of transnational private regulators and allow them to play an important role in shaping the emerging norms that govern transnational regulation.

## Keywords

Public law – constitutional law – administrative law – judicial review – transnational private regulation – global governance – Canada – Singapore

## 1 Introduction

With the rise of economic globalization, private and hybrid public-private bodies play an increasingly greater regulatory role in areas long considered the exclusive domain of the state – from sustainability standards to workplace health and safety codes to accounting and auditing standards. Even if states

participate in the formulation and development of these standards, whether directly or indirectly, they are no longer in the driver's seat nor completely in control of the process of implementation. Not only are private actors are playing an increasingly significant role in setting standards, private organizations such as International Social and Environmental Accreditation and Labelling (ISEAL) Alliance<sup>1</sup> are also developing higher-level or 'meta' norms that govern the procedures by which primary standards are created, monitored, and enforced. States have remained largely on the margins of these developments.

An important question arises as to whether domestic public law has the resources within it to engage with transnational private regulation and help shape the higher level norms that govern transnational regulatory processes. The article offers a partial answer to this general question by drawing on the experience of two jurisdictions, Singapore and Canada, and exploring what public law tools and principles are available in these jurisdictions to enable courts to supervise the regulatory activities of private actors. What this article seeks to show is that in both of these common law jurisdictions, the courts have been gradually, if haltingly, developing public law tools and principles that enable them to do so. Although the principles are still in flux, many leading cases have made it clear that the courts are less concerned about the formal status of the body exercising the power in question and more interested in the nature of that power, essentially articulating a functional test for public power. This functional approach, which allows the courts to judicially review the decisions of private regulators exercising a public function, could in principle be extended to transnational private regulators, although some doctrinal obstacles remain.

While both Singapore and Canada have strong claims to legal diversity within their borders,<sup>2</sup> neither has confronted as directly and relentlessly as the European Union (EU) has the complexities of multiple layers of legality and multiple sources of both public and private norms.<sup>3</sup> But this in itself gives us reason to take a closer look at how public law principles governing non-state

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1 ISEAL Alliance <<http://www.isealliance.org/>> accessed 11 June 2016.

2 This is demonstrated, in Singapore, by the Administration of Muslim Law Act 1966, and in Canada by the civil law tradition in Quebec and indigenous legal orders throughout the country.

3 There are far too many examples here, but for two examples of scholarship emanating from Europe that look at legal pluralism in Europe from private standard-setting perspective, see C. Scott, F. Cafaggi and L. Senden (eds.), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (Wiley Blackwell 2011); H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Market* (Hart Publishing 2005).

regulators have developed in the absence of the legal complexities and imperatives generated by the EU. The next part of this article (Part 2) considers a preliminary challenge posed by transnational private regulators to domestic legal orders. In an era dominated by the modern state, regulation is closely associated with state authority. One key challenge is therefore to understand the basis on which a regulator that is both private and transnational (in the sense of purporting to set rules of conduct irrespective of national borders) might have a plausible claim to legitimacy. Part 3 turns to Singapore and Canada (with some reference to the United Kingdom), and shows how recent developments in the case law have opened the door to judicial review of private regulation in the domestic context. Part 4 considers whether principles that are emerging in the domestic legal sphere to control private regulation could be extended to transnational private regulators. The article concludes with a brief discussion of why, should they eventually choose to engage with the transnational private regulation, domestic courts need to strike a delicate balance between deference and engagement.

## 2 The Rise and Challenge of Transnational Private Regulation

This article recognizes that we are now in an era marked by a broad proliferation of transnational regulation, much of which has a substantial impact on individuals and organizations. As John Gillespie and Randall Peerenboom observe,

[m]uch of the literature concerning the post-regulatory state seeks to correct the impression conveyed by some writers about the regulatory state that the state is central to regulatory governance and that state law is the central instrument of regulatory governance.<sup>4</sup>

One of the early works that mapped out, sector by sector, and critically assessed the many supra-national organizations that regulate business activity was John Braithwaite and Peter Drahos's influential book, *Global Business Regulation*, published in 2000.<sup>5</sup> The literature on transnational regulation has

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4 J. Gillespie and R. Peerenboom, 'Pushing Back on Globalization: An Introduction to Regulation in Asia' in J. Gillespie and R. Peerenboom (eds.), *Regulation in Asia: Pushing Back on Globalization* (Routledge 2009) 4–5.

5 J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge University Press 2000).

since developed into an interdisciplinary field in its own right, and many others have amplified the early research, providing additional surveys of global governance bodies, sector-specific inquiries into the regulation of supply chains, and meta-studies designed to encapsulate these developments under the banner of governance networks<sup>6</sup> or transnational governance.<sup>7</sup> While much of this research speaks of transnational regulation in general terms, more recent work has sought to isolate transnational private regulation for special analysis because of the unique challenges that it poses for legitimacy and accountability.<sup>8</sup> Transnational private regulation poses a particular challenge for legitimacy and accountability when states are not formally involved in governance and standard-setting. In the case of inter-governmental bodies that are not formal treaty bodies, such as the Financial Action Task Force,<sup>9</sup> states are formally represented and directly involved in the development of guidelines and standards. The same could be said for hybrid bodies, involving public and private actors – at least for those states that have a seat and a voice at the governance table. However, transnational private regulators pose a particular challenge from the perspective of the state because there is no line of accountability to a state or international (interstate) body.

The distinction between public and private is not, however, as distinct as this discussion might suggest<sup>10</sup> and, as Cafaggi observes, the private sphere itself is not homogenous.<sup>11</sup> Some transnational private regulators ‘are mainly driven by industries; some are promoted by NGOs, others by joint endeavor of industry and NGOs, often complemented by public intervention, giving rise to tripartite or multiparty agreements.’<sup>12</sup> While these regulators are ‘governed by private actors, they pursue different objectives and incorporate multiple dimensions and degrees of public interest, depending on the composition of their respective governance bodies and the effects they have on the general public.’<sup>13</sup> Allowing for shades of grey between public and private, a focus on

6 A Slaughter, *A New World Order* (Princeton University Press 2005).

7 T. Hale and D. Held (eds.), *Handbook of Transnational Governance: Institutions and Innovations* (Polity Press 2011).

8 C. Scott, F. Cafaggi and L. Senden (eds.), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (Wiley-Blackwell 2011). See also Schepel (n 3).

9 See <<http://www.fatf-gafi.org/about/>> accessed 11 June 2016.

10 C. Harlow and R. Rawlings, *Law and Administration* (3<sup>rd</sup> edn, Cambridge University Press 2009) 21.

11 ‘New Foundations of Transnational Private Regulation’ in Scott and others (n 8) 31.

12 Ibid.

13 Ibid.

the private and transnational features of these regulators directs our attention to what makes them particularly controversial.<sup>14</sup>

Clearly, not every entity that purports to be a transnational regulator has the impact or legitimacy to be considered as such. Hence, attempts have been made in the recent literature to distinguish aspiring regulators from the serious candidates.<sup>15</sup> What is it about organizations such as the International Organization for Standardization (ISO) or the Forestry Stewardship Council (FSC) that allows them to be taken seriously and viewed as legitimate authorities by many industry actors, civil society organizations, and governments? On one level, questions about legitimacy are caught up in geopolitics. Some of the resistance to these forms of 'global' governance stems from a concern that they reflect the particular hegemonic interests of western powers, or rich or developed countries more generally.<sup>16</sup> Others see the counter-hegemonic potential of transnational private regulation as a means by which civil society groups can fill a regulatory gap where states are unable or unwilling to intervene. For example, the founding of the FSC, a certification body promoting sustainable forestry practices, has been described in these terms, as a response to the inability of governments to come to an agreement to prevent tropical deforestation.<sup>17</sup>

Whether transnational regulation is a positive or negative geopolitical force in particular fields of regulation, and from the perspective of differently situated communities, a more general concern is the legitimacy of these private actors as regulators. For instance, Bernstein has argued that only a small subset of organizations that purport to regulate transnationally can genuinely claim political legitimacy.<sup>18</sup> According to Bernstein, the normative element that distinguishes legitimate political governance from coercion is supplied by four key elements: 'authority, epistemic validity, a conception of good practices, and the

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14 Some observers question whether they are law at all: J. Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?' in J. Pauwelyn and others (eds.), *Informal International Lawmaking* (Oxford University Press 2012) 12561.

15 See, for example, S. Bernstein, 'When is Non-State Global Governance Really Governance?' (2010) *Utah Law Review* 91.

16 M. Sornarajah, 'Why 'No' to Transnational Legal Studies' in C. Pillard (ed.), *Why Transnational Legal Education?* (Center for Transnational Legal Studies 2010) 22–27; BS Chimni, 'Co-option and Resistance: Two faces of Global Administrative Law' (2005) 37 *New York University Journal of International Law & Politics* 799.

17 E. Meidinger, 'The Administration of Private-Public Regulation: The Case of Forestry' (2006) 17 *European Journal of International Law* 47.

18 Bernstein (n 15).

institution of rationality or practical reason.<sup>19</sup> This means that transnational regulators with the strongest claims to legitimacy would be broadly accepted by the community they purport to regulate, have a strong claim to expert knowledge, adhere to ‘good practices’ associated with procedural fairness,<sup>20</sup> and seek a reasoned and informed consensus in making decisions, remaining open to being persuaded.<sup>21</sup> So for Bernstein’s and others who have studied global regulators from a legal perspective, the strength of a body’s claim to be taken seriously as a transnational regulator is in large measure a function of their governance principles and the procedures they use to formulate standards.<sup>22</sup>

Bernstein’s ‘good practices’ are of particular interest to administrative lawyers. While recognizing that there could be reasonable disagreement over the content and limits of such values as accountability, responsibility, transparency, and representation in a supra-state context, Bernstein argues that ‘virtually all normative theories of global governance agree that “good” global governance must rest on these values, even while they may disagree on how they ought to be operationalized.’<sup>23</sup>

Understanding the link between claims of legitimacy and good administrative practices is important, not only because it provides us a way of assessing the claims of private regulators to the allegiance of the communities they seek to regulate, but it also helps us to see the importance of the relationship between domestic legal regimes and transnational private regulation. The meta-norms that organizations such as the ISEAL Alliance are developing at the transnational level can strengthen an aspiring regulator’s claim to legitimacy and allegiance. They also strengthen the argument for states to take their standards seriously by formally incorporating them into domestic law. But domestic legal regimes might be more than passive recipients of transnational legal norms. Domestic public law may well include principles of judicial review that would allow courts to engage with the decisions of private regulation, principles that might, in turn, enable domestic courts to shape the meta-norms governing transnational regulatory practices.<sup>24</sup> Taking Singapore and Canada as examples from the common law world, the next part of the article examines

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19 Ibid 99.

20 Ibid 102.

21 Ibid 103.

22 Compare B. Kingsbury, N. Krisch and R. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law & Contemporary Problems* 15.

23 Bernstein (n 15) 102.

24 The global administrative law literature does not ignore this dimension, but it is often pessimistic about its ability to impose legal discipline on transnational regulators: ‘It is too soon to know how the regular and robust application of domestic law to national

the tools and principles inherent in domestic law that might enable the domestic courts to do so.

### 3 Judicial Review of Private Regulation in Singapore and Canada

The principles of administrative law in Singapore and Canada were developed by judges as part of the evolution of the common law to enable the courts to supervise executive decision-making. In contrast with civil law jurisdictions that have created separate administrative tribunals, the common law tradition had no distinct legal regime for controlling the bureaucracy. Judges in the English courts therefore developed, largely in the latter half of the twentieth century, a set of principles to allow the courts to exercise a supervisory jurisdiction over the government to ensure that it does not act in a manner that is *ultra vires* – that is, in a manner that exceeds the powers given to it by Parliament. Since administrative law principles developed from within the common law, they did not originally distinguish sharply between the public and private sphere. However, modern constitutionalism has focused the attention of public lawyers on the constraint of government – leaving the administrative law principles governing private actors at the margins of the field. In recent years, the common law systems started to revive dormant principles that enable public law to control the regulatory functions of private actors, a development that is evident in the jurisprudence in Singapore and Canada.<sup>25</sup> In Singapore, these developments can be seen in administrative law cases on judicial review of formally private bodies; in Canada, they emerge in the case law on judicial review of governmental functions delegated or contracted out to private bodies, and in the constitutional law cases on the applicability of the *Canadian Charter of Rights and Freedoms*<sup>26</sup> (the *Charter*) to powers exercised by non-governmental bodies.

#### 3.1 *Singapore's Response to Private Regulation*

Practically speaking, an increasingly large part of the role of regional and global law firms (many of which have a significant presence in Singapore) is to

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participation in transnational or global administrative bodies, or directly to decisions of such bodies, would affect the functions of these bodies' (Kingsbury and others (n 22) 30).

25 F. Hoehn, 'Privatization and the Boundaries of Judicial Review' (2011) 54 *Canadian Public Administration* 73, 82.

26 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

advise corporate clients how to comply with multiple regulatory regimes in transboundary operations. This kind of advice typically points in the direction of international best practices, many of which can be found in the ready-made standards of transnational private bodies.<sup>27</sup> The more lawyers take these standards seriously and the further they seep into state law, the more difficult it is for administrative lawyers to ignore them or dismiss them as ‘non-law.’ If transnational private regulation has a real impact on the conduct of individuals and organizations by shaping the way they source their supplies or labour, report their profits, or ensure the safety of factories, domestic administrative lawyers have little choice but to embrace them. Fortunately, administrative law has already developed several legal tools and principles to respond effectively to these challenges even if these they have not yet been tested specifically in the context of transnational private regulation. This section will examine, with specific reference to Singapore, what these tools and principles are, setting the stage for a discussion in Part 4 of how they could be applied to transnational regulators.

### 3.1.1 Private Associations and Professional Discipline

One important line of cases in Singapore arises from the judicial oversight of the activities of social clubs, associations and professional self-disciplinary bodies. These cases typically involve a challenge to the suspension or removal of a member of the association on the ground that the club’s decision was procedurally unfair and in breach of the principles of natural justice. The courts have historically been reluctant to intervene in the affairs of the private bodies or domestic tribunals using the tools of administrative law. They tend to see these bodies as private and thus governed by principles of contract law. Nevertheless, in an increasingly wide range of cases, Singapore courts have been willing to intervene. What is less clear is whether the justification for judicial intervention arises from an implied term in the contract (e.g. the club’s constitution), from the seriousness of the interest at stake or from the regulatory function of the body.

One line of reasoning suggests that it is the threat to the ability to practice one’s trade or profession that provides the basis for intervention – where, for instance, membership in an association confers a license to practice a particular trade or profession and where a decision is taken by the association to suspend or expel the member. For example, when the Singapore Amateur Athletic Association (SAAA) held disciplinary proceedings in relation to the

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<sup>27</sup> J. Flood and F. Sosa, ‘Lawyers, Law Firms, and the Stabilization of International Business’ (2008) 28 *Northwestern Journal of International Law & Business* 489, 523.



alleged misconduct of athlete Haron Mudir, who was sponsored by the SAAA to go to Japan for training, the Court of Appeal insisted that ‘where the vocational future of a person, such as Haron’s in the present case, is at stake, the court must uphold the need for observance of the basic norms of fairness in the conduct of the disciplinary proceedings (...) although an amateur, athletics was an important part of Haron’s life.’<sup>28</sup> The case proceeded on the basis that Haron’s contract with the SAAA included an ‘implied term that any hearing or inquiry should be conducted fairly and in compliance with the rules of natural justice.’<sup>29</sup> In this case, the Court of Appeal affirmed that the function of the courts in reviewing the decisions of domestic tribunals is ‘to see that the rules of natural justice have been observed, and that the decision has been honestly arrived at.’<sup>30</sup>

But how important is the contractual basis of the relationship? In *Woon Kwok Cheng v. HR Hochstadt*,<sup>31</sup> a High Court case in neighboring Malaysia (whose case law is often considered in Singapore), a jockey who had been disqualified for five years from riding by the Malayan Racing Association (MRA), applied for reinstatement at the end of that period. The Licensing and Disciplinary Sub-Committee considered and rejected his application without reasons and the jockey sought judicial review on the basis that the decision was unfair. The threshold issue was whether decisions of the MRA – a private or domestic tribunal – can be subject to judicial review.<sup>32</sup> The judge observed that the MRA did not derive its authority from a statute and that, ‘by conducting and regulating the sport of horse racing (...) the MRA affects the lives of a sizable portion of the population’<sup>33</sup> thus placing ‘the conduct of the enterprise (...) largely in the hands of the MRA.’<sup>34</sup> Moreover, the MRA ‘monopolizes this trade which is significant to the public’ and there was ‘little doubt that (...) [it] does exercise a public law function or the exercise of its function has public law consequences.’<sup>35</sup> Nevertheless, drawing on an English case involving the Jockey Club,<sup>36</sup> Judge Foong found that in cases involving an established contractual relationship between the Jockey Club and the aggrieved party,

28 *Singapore Amateur Athletic Association v. Haron Mudir* [1993] 3 SLR(R) 407, para 76.

29 *Ibid* para 60.

30 *Ibid* para 57.

31 *Woon Kwok Cheng v. HR Hochstadt* (High Court, Kuala Lumpur) [1997] 2 MLJ 795.

32 *Ibid* 799.

33 *Ibid* 800.

34 *Ibid*.

35 *Ibid*.

36 *R. v. Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 2 All ER 853; *Law v. National Greyhound Racing Club Ltd.* [1983] 3 All ER 300 (CA).

decisions of the Jockey Club are not subject to judicial review.<sup>37</sup> On the facts of this case, there was no longer a contractual relationship between the jockey and the MRA, thus, no remedy was available under private law. A decision of the MRA was therefore subject to judicial review 'where no contractual relationship could be established between the parties, and where the livelihood of the plaintiff is affected particularly in the trade or profession controlled and regulated by the defendant and of which the plaintiff is trained or has chosen to enter.'<sup>38</sup>

However, recent cases in Singapore show clearly that the courts are more willing to intervene in a wide range of cases, not all of which can be understood as involving a threat to a person's livelihood or ability to participate in trade or profession. The Singapore courts have imposed a duty to act fairly not only in cases involving disciplinary proceedings involving doctors and lawyers, which have a statutory basis,<sup>39</sup> but also in cases involving expulsion from a political party<sup>40</sup> and suspension from a prestigious club.<sup>41</sup> In *Kay Swee Pin v. Singapore Island Country Club*,<sup>42</sup> a member was suspended for making a false declaration on her membership application. The key legal issue in this case was whether a social club's disciplinary proceedings were amenable to judicial review. In his reasons for judgment, Chief Justice Chan Sek Keong acknowledged that the 'legal relationship between the club and its members lies in contract' and the 'traditional approach of the courts to social clubs is to leave such clubs to manage their own affairs.'<sup>43</sup> But he went on to explain that 'where a club expels a member, it may only do so in compliance with the rules of natural justice.'<sup>44</sup> Although this case involved a suspension, not an expulsion, Chief Justice Chan observed that the membership was 'highly sought after for its social cachet as well as for the recreational, social and sports facilities (especially golf facilities)'. Moreover, its membership 'comes at a high price.'<sup>45</sup> The transferable membership had 'not only a social value but also an economic value.'<sup>46</sup> Although the Chief Justice did not delve deeper into the reasons for judicial intervention, it can be inferred from the reasons that it was the seriousness of

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37 *Woon Kwok Cheng* (n 31) 802.

38 *Ibid.*

39 *Tan Boon Chee David v. Medical Council of Singapore* [1980] 2 MLJ 116 (HC).

40 *Chiam See Tong v. Singapore Democratic Party* [1993] 3 SLR(R) 774 (HC).

41 *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 (CA).

42 *Ibid.*

43 *Ibid.* 2.

44 *Ibid.*

45 *Ibid* para 4.

46 *Ibid.*

the consequences of the club's disciplinary decision that necessitated judicial intervention.

It is not immediately obvious why in a case such as this, the contractual route is inadequate. Counsel's decision as to how to frame the legal issue may well be driven by procedural and remedial considerations.<sup>47</sup> But at least theoretically, a case such as this, which involves a private club, could be pleaded as a suit for breach of contract with an overlay of good faith. Counsel for the Singapore Island Country Club tried to argue, albeit unsuccessfully, that the club's general committee 'was not sitting in judgment over matters of trade or profession affecting an individual's economic or property rights.'<sup>48</sup> It was in response to this particular point that the court emphasized the serious social and economic consequences of the committee's decision.<sup>49</sup> The contractual basis of the relationship therefore fades into the background: the duty to act fairly becomes a general principle governing disciplinary cases whatever the source of the disciplinary body's authority might be. However, the difficulty here is that any private contractual relationship can have serious economic (and social) consequences for the parties. The more general the consequentialist argument, the less clear the line between a duty to act fairly in public law and a requirement of good faith in contract law becomes. This may or may not be a problem practically or jurisprudentially, but any judicial move in this direction should be made with the wider implications squarely in view.

### 3.1.2 Judicial Review of Domestic Private Regulation: Datafin and Yeap Wai Kong

There is, however, another way of thinking about these cases and the role of the courts in reviewing the decisions of private associations. Rather than focusing on the source of the association's authority, contractual or statutory, or on the seriousness of the consequences of the tribunal's decision, the court might instead consider the function played by the tribunal in question. The closer the tribunal's function is to that of a public regulator, the stronger the case for applying public law principles to the decision-making process. This was, in effect, the argument made by counsel but rejected by the Malaysian court in *Woon Kwok Cheng*. Counsel in that case was essentially arguing that the MRA, through its disciplinary function, was playing a public regulatory role in determining who may or may not practice a trade or profession. It had a regulatory monopoly and was the gatekeeper to a profession, a trade guild. Focusing on the public regulatory function played by these regulators allows us to reconcile

47 I am grateful to Swati Jhaveri for this point.

48 *Kay Swee Pin* (n 41) para 3.

49 *Ibid* paras 3–4.

the private association cases with another line of cases in Singapore relating to judicial review of private bodies associated with the English case *R v Panel on Takeovers and Mergers, ex parte Datafin*.<sup>50</sup>

In *Datafin*, the Court of Appeal for England and Wales had to decide whether a decision of the Panel on Takeovers and Mergers was amenable to judicial review. In the opening paragraph of its decision, the court describes the Panel as 'a truly remarkable body' which '[p]erched on the 20th floor of the Stock Exchange building in the City of London, both literally and metaphorically (...) oversees and regulates a very important part of the United Kingdom financial market.'<sup>51</sup> The problem for the court however, was that the Panel had no formal statutory authority yet its decisions had significant commercial and legal consequences for companies that came within its jurisdiction. However, the reasoning in the court's decision was driven not by the consequences themselves but by the role that the Panel played in the regulation of mergers and acquisitions in the City of London. Specifically, the court found that the policy of the government on takeovers was to entrust regulatory authority in 'a central self-regulatory body which would be supported and sustained by the periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where E.E.C. requirements called for statutory provisions.'<sup>52</sup>

Although the Panel's jurisdiction did not have a statutory basis, its significant role as a statutory body in the United Kingdom could not be disputed:

No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world wide.<sup>53</sup>

As far as the Court of Appeal was concerned, there was no doubt that the Panel was 'performing a public duty and an important one'<sup>54</sup> and the government's policy was to 'limit legislation in the field of take-over and mergers and to use

50 *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] 2 WLR 699 (CA).

51 *Ibid* 824H.

52 *Ibid* 835F.

53 *Ibid* 835G.

54 *Ibid* 838G.

the [Panel] as the centerpiece of his regulation of the market.<sup>55</sup> It was clear that the ‘rights of citizens are indirectly affected by its decisions, some, by no means all of whom, may in a technical sense be said to have assented to this situation.’<sup>56</sup> However, what was crucial for the court was that the source of the Panel’s power was ‘only partly based upon moral persuasion and the assent of institutions and their members since the Department of Trade and Industry and the Bank of England could step in where necessary.’<sup>57</sup> In these circumstances, Sir John Donaldson MR declared that he would be ‘very disappointed if the courts could not recognize the realities of executive power and allowed their visions to be clouded by the subtlety and sometimes complexity of the way in which it can be exercised.’<sup>58</sup> And since private law remedies were considered ineffective, the Master of the Rolls concluded that ‘the court has jurisdiction to entertain applications for the judicial review of decisions of the Panel.’<sup>59</sup>

Above all, the *Datafin* case stands for the proposition that the test for whether a tribunal is amenable to judicial review is determined not simply by looking at the source of its power – that is, whether it derives its authority from a statute – but also by considering the nature of its regulatory role. In Singapore, this line of reasoning was affirmed and adopted by the High Court in *Yeap Wai Kong v. Singapore Exchange Securities Trading Ltd.*<sup>60</sup> In this case, Justice Pillai introduced his discussion of *Datafin* by describing a transformation in the modern regulatory landscape. He observes that ‘[i]n the modern era, public policy is increasingly affected not only by government and statutory bodies but also through self-regulating entities in sectors where the domain nature and complexity of the sector requires front-line expertise coupled with back-line regulators to regulate the relevant sector.’<sup>61</sup> In Justice Pillai’s view, *Datafin* recognized the need to control the decision-making process and to prevent abuse by decision-makers irrespective of the source of their power. To restrict judicial review to bodies that derive their powers from a statutory source would be ‘to impose an artificial limit on the developing law of judicial review.’<sup>62</sup> On this approach, it is important to consider not only the source of

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55 Ibid.

56 Ibid.

57 Ibid 838H.

58 Ibid 838H-839A.

59 Ibid 839C.

60 *Yeap Wai Kong v. Singapore Exchange Securities Trading Ltd.* [2012] SGHC 103 (High Court, per J. Pillai).

61 Ibid 9.

62 Ibid 14.

the decision-maker's power, but also its function, taking into account factors such as 'the nature of the function, the extent to which there is any statutory recognition or underpinning of the body or the function in question and the extent to which the body has been interwoven into a system of governmental regulation.'<sup>63</sup> However, also following *Datafin*, the courts in Singapore exclude from the scope of judicial review decision-makers in respect of which the sole source of their power is 'contractual or consensual.'<sup>64</sup>

Applying these principles to the Singapore Exchange, Justice Pillai observed that although it was not a statutory body, it was nevertheless, as a self-regulatory organization, interwoven into the regulatory scheme.<sup>65</sup> Moreover, it was an 'approved exchange' under the Securities and Futures Act that was required to 'have particular regard to the interests of the investing public' and 'not to act contrary to the interests of the public.'<sup>66</sup> The Singapore Exchange was also obliged to maintain 'business and listing rules which make satisfactory provision for a fair, orderly and transparent market' and to 'enforce compliance' with those rules.<sup>67</sup> In short, the court found a 'statutory underpinning of the reprimand power. The nature of the reprimand function (...) [would] properly be characterized as a public function' having regard to the nature of its power and 'consequently subject to judicial review for minimum compliance with the standards of 'legality, rationality and procedural propriety.'<sup>68</sup> The insistence on a statutory underpinning of the regulatory scheme is important and, as we shall see, poses a potential obstacle to the extension of judicial review to transnational private regulators. But the general principle in *Yeap Wai Kong*, which recognizes an important role for the courts in reviewing decisions of private entities exercising a public regulatory function,<sup>69</sup> provides the necessary foundation on which to construct an argument.

63 Ibid 15, citing C Lewis, *Judicial Remedies in Public Law* (4<sup>th</sup> edn, Sweet & Maxwell 2009) paras 2–3.

64 Ibid 16. In support of this proposition, J Pillai refers in para 17 to *Public Service Commission v. Lai Swee Lin Linda* [2001] 1 SLR 644, *UDL Marine (Singapore) Pte. Ltd. v. Jurong Town Corp.* [2011] 3 SLR 94, and *ACC v. CIT* [2010] 1 SLR 273, all of which consider both the source and the nature of the decision-maker's power.

65 Ibid 18, 20.

66 Ibid 21.

67 Ibid.

68 Ibid 28.

69 For similar developments in other jurisdictions, see, in Hong Kong, *Pearl Securities Ltd. v. Stock Exchange of Hong Kong Ltd.* [1999] 2 HKLKD 243 [1999] 1 HKC 448; and in South Africa, *Dawnlaan Belgings v. Johannesburg Stock Exchange* 1983(3) SA 344 (W).

### 3.2 *Canadian Courts, Contracting Out and the Impact of the Charter*

Canadian courts too have started to consider how to respond to the role of private actors in public regulation, but from a slightly different angle and with an additional layer of constitutional complexity. First of all, while in *Datafin*, the English court was confronted with a private regulatory body with no specific statutory authorization, the Canadian courts have approached the problem through the lens of delegated governmental powers, where governments ‘contract out’ public services to private bodies – a practice sometimes described as ‘new public management.’<sup>70</sup> This means that, from the start, the issue has been framed as understanding the meaning and limits of the explicit delegation of power from public to private actors, instead of coming to terms with a body such as the Panel on Takeovers and Mergers that was not a creature of statute. Second, the Canadian landscape is complicated by a messy intermingling of constitutional and administrative law cases without a clear explanation of first principles and the different considerations that might influence the understanding of the reach of public law. This section will review these two themes in the Canadian jurisprudence, laying the foundation for an exploration of the prospects of judicial review in Singapore and Canada of the decisions of private transnational regulators.

#### 3.2.1 Judicial Review, Contracting Out and the Public-Private Divide

*Société de l'assurance automobile du Québec v. Cyr*<sup>71</sup> is the leading case on judicial review of governmental functions that have been contracted out to private actors. In this case, the Supreme Court of Canada framed the issue in these terms: ‘In an era of increased privatization of public services and the rise of public-private partnerships, this case provides an opportunity to consider whether a government body will avoid public law duties when delegating its functions by way of contract or other form of agreement.’<sup>72</sup> This way of framing the issue makes it clear that the starting point is the reservoir of public functions in the state, functions that prompt an extension of public law principles when delegated to private actors. Less visible to the courts, however, are powers exercised by private bodies that have public regulatory consequences even without an explicit delegation of governmental power. These sorts of cases, found at the margins of modern administrative law, are not directly considered by the Supreme Court of Canada in *Cyr*. Thus, the overall approach of the

<sup>70</sup> Hoehn (n 25) 77.

<sup>71</sup> *Société de l'assurance automobile du Québec v. Cyr*, 2008 SCC 13.

<sup>72</sup> *Ibid* para 25.

decision, despite its aspiration to rethink public law in an era of privatization and public-private partnerships, is particularly narrow.

On the particular facts of *Cyr*, the Société de l'assurance automobile du Québec (SAAQ) had the exclusive responsibility in the province of Quebec for ensuring the mechanical safety of motor vehicles. SAAQ authorized a private entity, the Centre de vérification mécanique de Montréal (CVMM), to conduct vehicle inspections on its behalf. Yvan Cyr, a mechanic employed by the CVMM, was designated an 'accredited mechanic' under the provincial Highway Safety Code. This case came to the purview of the courts after Cyr's accreditation was revoked and as a result, he lost his job with the CVMM. Cyr sought judicial review of the revocation.

The majority of the Supreme Court reasoned that although Cyr was not a party to the main contract between the SAAQ and the CVMM, the mechanism by which he was appointed as an accredited mechanic was governed by public law 'because it constitutes an administrative authorization.'<sup>73</sup> It was therefore subject to Quebec administrative law, including its 'procedural requirements.'<sup>74</sup> The court specifically held that in 'delegating to him the power to conduct vehicle inspections, the SAAQ [granted Cyr] the authorization to act on its behalf, as an employee of its mandatory, CVMM, in a manner that would otherwise contravene the law.'<sup>75</sup> Such authorizations 'are typically accompanied by conditions which must be observed' the breach of which is subject to the remedy of 'revocation.'<sup>76</sup> The court took pains to explain that this was not simply a case involving the state's obligations to its employees which might be governed by private law.<sup>77</sup> The accreditation granted in this case could be 'considered an administrative authorization'<sup>78</sup> such that Cyr was entitled to procedural fairness under Quebec's administrative law regime.<sup>79</sup>

According to Felix Hoehn, a solid majority of the Supreme Court of Canada in *Cyr* recognized 'the increased role of the private sector in governance challenges the traditional scope of administrative law' but it 'provides little guidance to the lower courts on how to determine the ambit of public law.'<sup>80</sup> However, Hoehn argues on the basis of the court's decision in the 2008 case of

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73 Ibid para 29.

74 Ibid.

75 Ibid para 36.

76 Ibid para 37.

77 These relationships may well be governed by private law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9.

78 *Cyr* (n 71) para 51.

79 Ibid para 52.

80 Hoehn (n 25) 87.



*Dunsmuir v. New Brunswick*<sup>81</sup> that the court is moving in the direction of a functional approach.<sup>82</sup> The Supreme Court of Canada in *Dunsmuir* had to decide whether the dismissal of an employee of the Department of Justice in New Brunswick was governed by private law and thus subject to the terms of the contract as supplemented by general employment law principles, or by public law and thus subject to a duty of procedural fairness. After a comprehensive review and restatement of the principles governing public employment in Canada, including a reconsideration of the distinction between public office holders and contractual employees, the court concluded that ‘the existence of a contract of employment, not the public employee’s status as an office holder, is the crucial consideration.’<sup>83</sup> As a matter of principle, the court held that what was ‘important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship.’<sup>84</sup> Hence, while the ‘dismissal of a public employee should generally be viewed as a typical employment law dispute (...) there may be occasions where a public law duty of fairness [would] still apply.’<sup>85</sup> For instance, in situations where a public employee is not protected by a contract – as in the case of judges, ministers, and others who ‘fulfill constitutionally defined state roles’ or who are deemed to hold their office ‘at pleasure’ of the Crown – ‘procedural fairness is required to ensure that public power is not exercised capriciously.’<sup>86</sup> For Hoehn, a close reading of *Dunsmuir* suggests that the Supreme Court of Canada is likely to take ‘a functional approach to determining the extent of the public realm.’<sup>87</sup> As in the Malaysian jockey case *Woon Kwok Cheng*,<sup>88</sup> the key consideration appears to be ensuring that employees have a remedy in case of abuse.

This apparent shift to a functional approach is underlined by a more recent decision of the Federal Court of Appeal in *Air Canada v. Toronto Port Authority*,<sup>89</sup> in which the status in public law of policy bulletins issued by the Toronto Port Authority was in question. The court acknowledged that how a decision is characterized is particularly important since duties of procedural fairness do not arise ‘where (...) the relationship is private and commercial,

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81 *Dunsmuir* (n 77).

82 *Cyr* (n 71) 87.

83 *Dunsmuir* (n 77) para 102.

84 *Ibid* para 112.

85 *Ibid* para 115.

86 *Ibid*.

87 Hoehn (n 25) 87.

88 *Woon Kwok Cheng* (n 31).

89 *Air Canada v. Toronto Port Authority*, 2011 FCA 347.

not public.<sup>90</sup> The court listed a number of factors to consider in determining whether a matter ‘is coloured with a public element, flavor or character sufficient to bring it within the purview of public law.’<sup>91</sup> These factors include: first, the ‘character of the matter for which review is sought’; second, the ‘nature of the decision-maker and its responsibilities’; third, the ‘extent to which a decision is founded in and shaped by law and opposed to private discretion’; fourth, the ‘body’s relationship to other statutory schemes of other parts of government (...) [and whether] the body is woven into the network of government and is exercising power as part of that network’; fifth, the ‘extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity’; sixth ‘the ‘suitability of public law remedies’; seventh, the ‘existence of a compulsory power’; and lastly, ‘an ‘exceptional’ category of cases where the conduct has attained a serious public dimension (...) [where] a matter has a very serious effect on the rights or interests of a broad segment of the public.’<sup>92</sup> Although these factors are varied, they indicate a shift away from an exclusive focus on the source of the body’s power toward a more holistic assessment of the nature and context in which the power is exercised and its impact on those affected by its decisions.<sup>93</sup>

### 3.2.2 Constitutional Dimensions: Section 32 and the Scope of the Charter

While the normative unity of public law is seen by many theorists as a worthwhile aspiration, there are times when a modicum of caution is necessary. For instance, importing into Canadian administrative law principles developed in the context of Section 32 of the *Charter* (which ostensibly limits the application of the *Charter* to governmental action) might unnecessarily restrict the court’s latitude to engage in judicial review. Section 32 provides that the *Charter* applies ‘(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament’<sup>94</sup> and ‘(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.’<sup>95</sup> An important question in the interpretation of Section 32 concerns its application to delegated decision-makers.<sup>96</sup> Adopting

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90 Ibid para 82, citing *Dunsmuir* (n 77).

91 Ibid para 60.

92 Ibid.

93 Ibid.

94 *Eldridge v. British Columbia* [1997] 3 SCR 624.

95 Ibid.

96 Ibid.

the reasoning of Professor Peter Hogg, the Supreme Court of Canada has accepted the basic principle that since Canadian lawmakers cannot ‘pass a law in breach of the *Charter*,’ neither can they ‘authorize action which would be in breach of the *Charter*.’<sup>97</sup> Thus, ‘the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action – whether legislative, administrative or judicial – that depends for its validity on statutory authority.’<sup>98</sup>

In *Eldridge v. British Columbia*,<sup>99</sup> a case concerning an equality challenge to the failure of a hospital in British Columbia to provide sign language interpretation for the deaf, the Supreme Court of Canada clarified the scope of Section 32 and the application of the *Charter* to the ‘private’ or ‘commercial’ arrangements of government. On this point, the court affirmed its earlier position that ‘when an entity is determined to be a part of the fabric of government, the *Charter* will apply to all its activities, including those that might in other circumstances be thought of as “private” – the rationale being that ‘governments should not be permitted to evade their *Charter* responsibilities by implementing a policy through the vehicle of private arrangements.’<sup>100</sup>

More complicated, however, is the Supreme Court of Canada’s attempt to explain in more general terms the scope of the *Charter*’s application in respect of non-governmental entities. While the jurisprudence is clear that governments ‘are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other ‘private’ arrangements’ or ‘by delegating the implementation of their policies and programs to private entities’,<sup>101</sup> the Supreme Court of Canada has nevertheless imposed qualifications. First, for the *Charter* to apply, the entity must not merely perform a ‘public function’ but must also implement ‘a specific governmental policy or program.’<sup>102</sup> Second, the *Charter* can apply to a private entity only if it can, ‘by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as ‘government’ within the meaning of (...) [Section] 32(1)’ or by virtue of ‘a particular activity that can be ascribed to government.’<sup>103</sup>

97 Ibid para 21, citing P. Hogg, *Constitutional Law of Canada* (3<sup>rd</sup> edn, looseleaf) 34–8.3, 34–9.

98 Ibid.

99 Ibid.

100 Ibid para 40.

101 Ibid para 42.

102 Ibid para 43, citing *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, 269.

103 Ibid para 44.

#### 4 Prospects for Judicial Review of Transnational Private Regulation

In Singapore and Canada, the courts have been gradually developing legal tools and principles to enable them to regulate private actors engaged in public regulatory functions. But, with one exception to be considered later in this discussion, the ability of the courts to extend these principles to transnational private regulators has not been tested directly in litigation. What are the prospects?

In Singapore, the courts have long assumed that they are empowered to intervene in cases where private bodies, such as clubs or associations, take decisions that affect the livelihood or economic interests of their members. More recently, drawing in part on developments in the United Kingdom, the courts have embraced the notion that non-statutory regulators, including formally private bodies, are amenable to judicial review if they perform a public regulatory function. But even in a promising case such as *Yeap Wai Kong*, the court insists on a statutory anchor, a clear link or nexus between the public regulatory regime and the private body. On its face, this requirement would make it difficult for courts to assert their judicial review power over a transnational private regulator without some kind of link, perhaps even an indirect link, to a domestic regulatory scheme. This might not always be possible. Some fine-tuning of the principles in *Yeap Wai Kong* may be necessary.

The Canadian position is more complicated. There is some evidence in the case law of a willingness on the part of the courts to apply administrative law principles to private entities not only when they are exercising delegated governmental powers, but also, potentially, when they exercise powers that have a serious effect 'on the rights or interests of a broad segment of the public' – as in the case of *Air Canada*<sup>104</sup> – or where the 'nature of the activity (...) is truly 'governmental' in nature' – as in *Eldridge*.<sup>105</sup> However, although in administrative law cases, the courts seem to be moving toward a functional test to decide whether to review the exercise of power by a private entity, in constitutional law, the Supreme Court of Canada's reasoning is tightly linked to the wording of Section 32, which seeks to limit the *Charter's* application to the federal and provincial governments and matters within the scope of their respective authority. The courts have been cautious, insisting (e.g. in *Eldridge*) that the applicability of the *Charter* to private actors depends on the existence of a specific governmental scheme or program.<sup>106</sup> As in *Yeap Wai Kong*, this insistence that the application of public law principles to private law actors depends not

104 *Air Canada* (n 89) para 60.

105 *Eldridge* (n 94) para 44.

106 *Ibid* para 43.

only on the nature of the function, but also on the presence or implementation of a governmental scheme or program, may well limit the ability of the courts to engage with transnational private regulators.

The 2009 case of *Sagen v. VANOC*<sup>107</sup> is an example of a missed opportunity. The courts were invited to extend their constitutional law jurisdiction to a transnational private entity, but declined to do so. It is worthwhile to consider the facts of *Sagen* and the reasoning of the British Columbia courts in order to better understand how difficult it might be for the courts to adapt to a changing regulatory landscape. The litigation in *Sagen* arose in the year preceding the Vancouver Winter Olympic Games scheduled in 2010. The facts of the case reveal that the IOC declined to stage women's ski jumping as an event at the Games. A group of women ski jumpers challenged this decision, which was to be implemented by the Vancouver Organizing Committee (VANOC), alleging that the decision was in breach of the women ski jumpers' equality rights under Section 15 of the *Charter*. In the Supreme Court of British Columbia (equivalent to the High Court in some jurisdictions), Justice Fallon held that staging the Games was a governmental activity and found substantive discrimination.<sup>108</sup> However, she found that the decision not to stage the event was the IOC's decision, and as a 'private, Swiss-based organization' the IOC was not subject to the *Charter*.<sup>109</sup> The question then was whether there was any remedy against VANOC for implementing the IOC's decision. The judge held that there was none.<sup>110</sup> The Court of Appeal dismissed the appeal, but for different reasons. According to the Court of Appeal, there was no need to decide whether VANOC was engaged in a governmental activity because it was 'clear on the facts that neither government nor VANOC had any authority to make or alter the decision of the IOC not to include a women's ski jumping event in the 2010 Games.'<sup>111</sup> Since that decision was 'not an activity to which the *Charter* applies', the claim of discrimination under the *Charter* failed.<sup>112</sup> However, considering that the matter was fully argued, the Court of Appeal went on to consider the merits of the discrimination claim and, in particular, whether

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107 *Sagen v. Vancouver Organizing Committee (VANOC)*, 2009 BCSC 942 (trial) 2009 BCCA 522 (appeal). Note that in the province of British Columbia, Canada, the Supreme Court is the court of first instance or trial court; the Court of Appeal is the appellate court and the highest court in the province.

108 *Ibid* para 103.

109 *Ibid* para 104.

110 *Ibid* paras 104–129.

111 *Sagen* (n 107), Court of Appeal decision, para 49.

112 *Ibid* para 50.

VANOC's decision not to hold the women's ski jumping event on the basis of its contractual commitments to the IOC, could be considered an instance of a 'governmental body attempting to circumvent the *Charter* by exercising power through contract instead of through legislation.'<sup>113</sup> The Court of Appeal concluded that it was not. It was rather 'a case in which a nongovernmental body is brought before the court as a result of policies which neither it nor any Canadian authority has the power to change.'<sup>114</sup>

The reasoning of the two courts is open to three criticisms. First, in the Supreme Court of British Columbia, Justice Fallon assumed, without further clarification, that the IOC was a 'private, Swiss-based organization' and for that reason alone, was not subject to the *Charter*. As we have seen, the Canadian jurisprudence is starting to acknowledge the reality that private entities are playing an increasingly significant role as regulators. The earlier analysis suggests that the mere fact that a private entity regulates entities that are outside Canada does not, or perhaps should not, end the matter. Second, both levels of court reasoned that even if the IOC's decision is in breach of the *Charter*, no remedy is available. Here we have the ultimate legal vacuum – a violation of a right without a remedy. It might be argued in response that a remedy could be sought elsewhere, although it is difficult to imagine where that would be. In Switzerland under Swiss law? In the Lausanne-based Court of Arbitration for Sport (CAS)? The problem is that the alleged violation is a breach of Canadian constitutional law – over which the Swiss courts and the CAS would have no jurisdiction. Assuming for the sake of argument that the CAS could apply Canadian law, it is likewise unclear whether it would be a better forum than a Canadian court. Finally, the deep constitutional principle underlying the Canadian cases we considered earlier is that the government should not be able to avoid its *Charter* responsibilities by contracting out. However, what the courts in *Sagen* seem to be saying is that to avoid their *Charter* obligations the government could either contract these responsibilities out to, or passively leaving them in the hands, of an entity based outside the territory of Canada,<sup>115</sup> even if that

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113 Ibid para 65.

114 Ibid para 66.

115 The problem here is not a classic problem of extraterritoriality, where State A purports to apply its laws to conduct in State B on the basis of international law principles. In this situation, both parties are modern territorially-bound states. Rather, what we have here is a transnational private regulatory body that purports to be able to operate irrespective of national borders, in a manner that conflicts with a supposed exclusive territorial jurisdiction of State A and State B. This novel situation requires an analytic framework not contemplated by classic principles of public international law.

entity carries out its activities in Canada in breach of Canadian constitutional principles. The courts' refusal in *Sagen* to claim jurisdiction shows just how invisible the rise of transnational private regulation is to the courts. But if the earlier analysis is correct, the case law provided another option.

## 5 Conclusion

As domestic public law adapts, however haltingly, to the challenge of domestic private regulation, it becomes increasingly difficult to justify excluding the activities of transnational private regulators from its purview. Considering the impact that transnational private regulators have on individuals, organizations, and even state agencies themselves, within the jurisdiction of the domestic courts, they should, in principle, be subject to judicial review. And this extension is important, in turn, because domestic engagement with transnational regulation gives state actors a say in the formulation of the higher order principles that govern transnational regulation. And yet, there are also reasons to proceed with caution.

Domestic engagement with transnational regulators is a double-edged sword. Excessive domestic engagement prevents these bodies from operating effectively in the transnational legal space. An early note of caution along these lines was sounded by Kingsbury, Krisch, and Stewart. If global regulatory bodies were

subject to diverse national requirements, procedural as well as substantive, [they] might have great difficulty operationalizing the commonality necessary for effective regulation and management. Varying domestic controls might also hamper the ability of domestic regulatory officials to participate effectively in global regulatory decision-making.<sup>116</sup>

It is wise to be mindful of this danger, particularly since transnational private regulators are often able to take action when states are unable or unwilling to do so.

At the same time, the engagement of domestic courts with global regulators, if undertaken with a measure of deference or comity, might encourage transnational regulators, even preemptively, to develop or refine procedural norms to strengthen their internal and external legitimacy. As Bernstein argues, it is

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<sup>116</sup> Kingsbury and others (n 22) 31.

precisely those bodies that have adopted good practices within their governance and standard-setting practices that have a strong claim to legitimacy in their particular regulatory sphere.<sup>117</sup> And this is precisely what meta-regulatory bodies such as ISEAL Alliance seek to do.<sup>118</sup>

It may be that in the years to come, transnational meta-regulators such as ISEAL Alliance will also strengthen their legitimacy to the point that their meta-standards are considered sufficiently robust as to warrant a measure of deference or comity on the part of domestic legal orders. For its part, ISEAL Alliance reports that recent years have 'seen engagement between governments and standards increase and many examples of ISEAL member standards systems and other schemes being incorporated into public policy.'<sup>119</sup> If ISEAL Alliance is able to realize in the practices of its members its ten credibility principles – sustainability, improvement, relevance, rigor, engagement, impartiality, transparency, accessibility, truthfulness, and efficiency – it may eventually develop, at the transnational level, model administrative practices that national regulators could themselves adopt: 'Perhaps most suggestive for administrative lawyers, however, is the prospect that the laboratories of innovation in global administrative law may generate new ideas for domestic administrative law.'<sup>120</sup>

As they begin to engage with transnational regulators, domestic courts will find themselves in an increasingly complex legal space. Although it might be tempting to resist this kind of engagement, as the British Columbia courts did in *Sagen*, many abuses of regulatory power will be left without a remedy. As the transnational regulatory space continues to grow, conflicts between domestic and transnational legal orders will increase apace. As they do, domestic courts will find it increasingly difficult to refuse jurisdiction. Entering the transnational regulatory space means having to make sense of a vast and complicated legal landscape, and domestic courts will be forced to confront the reality of

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117 See, for example, Bernstein (n 15) 15; Meidinger (n 17). Some private regulators such as the ISO that have been active for decades and have fine-tuned their standard-setting practices, earning themselves a measure of deference on the part of domestic rule-makers. A good example is the Standards Council of Canada, established as a Crown corporation by federal statute in 1970 with a mandate to encourage the adoption of 'voluntary standards' in Canada: see Standards Council of Canada <<https://www.scc.ca/en/about-scc/history>> accessed 23 November 2014.

118 See, for example, A. Loconto and E. Fueilleux, 'Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance' [2014] 8 Reg. & Gov. 166.

119 See *Increasing uptake with governments* <[www.isealliance.org/our-work/increasing-uptake/governmentengagement](http://www.isealliance.org/our-work/increasing-uptake/governmentengagement)> accessed 14 May 2016.

120 Kingsbury and others (n 22) 55.



overlapping legal orders. But engaging in the transnational regulatory space also gives domestic legal orders an opportunity to contribute to its development. Domestic administrative law in Singapore and Canada has reached a point where courts are increasingly able to review decisions by private regulators operating domestically. As transnational regulators continue to proliferate, it remains only for those courts to take the next logical step.