# DISCRETIONARY ADMINISTRATIVE DECISIONS AND THE *CHARTER OF RIGHTS*: *DORÉ* AND DETERMINING THE "PROPORTIONATE" BALANCE

by

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## ABSTRACT

This thesis examines the uncertainty in Canadian public law arising from the Supreme Court of Canada's decision in *Doré v Barreau du Québec* [*Doré*] regarding judicial review of rights-limiting administrative decisions. Prior to *Doré*, the courts applied differing approaches when reviewing the constitutionality of discretionary administrative decisions, vacillating between review under the *Charter* or an administrative law approach. With *Doré*, the Court has attempted to resolve the longstanding debate about the appropriate methodological approach to judicial review of administrative decisions for compliance with the *Charter*, holding that an administrative law approach should be applied. The "*Doré* approach" requires an assessment of whether the administrative decision reflects a proportionate balancing of the relevant *Charter* values with the statutory objectives.

I analyze the *Doré* approach, with reference to the historical jurisprudence and academic literature. I suggest that a number of questions and uncertainties are raised by the Court's lack of guidance on how this approach deals with some of the significant tensions in the relationship between administrative law and the *Charter*. In particular, the *Doré* approach does not guarantee that administrative decisions infringing on *Charter* rights and freedoms are subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (as required by section 1 of the *Charter*).

I propose an analytical methodology for judicial review of rights-limiting administrative decisions that is carried out within an administrative law framework but incorporates the spirit of section 1 of the *Charter* (and the proportionality analysis adopted by the Court in *R v Oakes*). This approach builds on the *Doré* "proportionate balancing" approach to create a review framework that: 1. Provides greater assurance that rights-limiting administrative

decisions will only be justified if the limit meets the rule of law principles underlying the section 1 "prescribed by law" requirement, and 2. Scrutinizes the decision in a more rigorous manner than the review undertaken in *Doré*. This recommended approach offers a more coherent and unified conception of the relationship between administrative law and the *Charter*, and better respects the requirements in section 1 of the *Charter*.

## PREFACE

This thesis is original, unpublished, independent work by the author, Sarah R. H. Parker.

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# 1 INTRODUCTION

The introduction of the *Canadian Charter of Rights and Freedoms* [the *Charter*][1] significantly expanded the role of the judiciary in reviewing both legislative and administrative action.[2] Contemporary legislation is often skeletal in nature, with the detail of the law being fleshed out in regulations, rules, or "expansive and vague grants of statutory discretion to administrative decision-makers".[3] *Charter* violations are also now typically removed from proposed legislation and regulations before enactment due to careful drafting and vetting.[4] This reliance on discretionary decision-making, and the emphasis on the *Charter* in the drafting of legislation, means that *Charter* violations are more likely to arise as a result of discretionary administrative action, rather than appearing explicitly in the wording of a legislative or regulatory enactment.[5] The approach taken to judicial review of administrative decisions that impact on *Charter* guarantees may therefore have a significant impact on the protection of individual rights and freedoms within Canada.

Since the introduction of the *Charter*, the Supreme Court of Canada [the Court] has struggled with conceptualizing the relationship between administrative law and the *Charter*.[6] In particular, uncertainty has persisted over the appropriate method or analytical approach to employ when reviewing discretionary administrative decisions that are challenged for unjustifiably infringing the *Charter*. The Court has diverged on whether the review should be

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[1] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
[2] Peter W Hogg, *Constitutional Law of Canada*, 2011 student ed (Toronto, Ont: Carswell, 2011) at 36.4(a).
[3] Audrey Macklin, "Standard of Review: Back to the Future?" in *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 279 at 318.
[4] Proposed regulations and legislation undergoes a *Charter* vetting process by the minister of justice: *Department of Justice Act*, RSC 1985, c J-2 [*Department of Justice Act*], s 4.1.
[5] Susan Gratton & Lorne Sossin, "In Search of Coherence: The Charter and Administrative Law under the McLachlin Court" in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law Inc, 2011) 145 at 147; Macklin, *supra* note 3 at 318.
[6] See, for example, Gratton & Sossin, *supra* note 5; Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?" in Lorne Mitchell Sossin & Colleen M Flood, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 407.

carried out under a "*Charter* approach", or using an "administrative law approach". The "*Charter* approach" to review involves consideration of whether the guaranteed right or freedom has been infringed and the use of the "*Oakes* test" to determine whether the exercise of statutory discretion complies with s. 1 of the *Charter*.[7] The *Oakes* test is a structured proportionality analysis, which requires that any limit on a right: is in pursuit of a sufficiently important objective; is rationally connected to the objective; minimally impairs the right; and does not have disproportionate effect.[8] The alternative method, the "administrative law approach", refers to the application of an administrative law analysis in assessing whether the administrative decision-maker took sufficient account of the *Charter* right.[9] In those cases adopting an administrative law approach, the Court has also applied different standards of review, at times reviewing the decision on a reasonableness standard and at others applying a correctness standard.[10]

In the recent case of *Doré v Barreau du Québec* (*Doré*),[11] the Court attempted to resolve the debate about how the courts should review administrative decisions that impact on *Charter*

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[7] See, for example, *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038; *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; *Eaton v Brant County Board of Education*, [1997] 1 SCR 241; *Multani v Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6; *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31.

[8] See *R v Oakes*, [1986] 1 SCR 103 at 138–139; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 104.

[9] This approach was followed in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772; *Chamberlain v Surrey School District No. 36*, [2002] 4 SCR 710; *Pinet v St. Thomas Psychiatric Hospital*, [2004] 1 SCR 528; *Lake v Canada (Minister of Justice)*, 2008 SCC 23.

[10] Reasonableness and correctness are now the two standards of administrative law review in Canada: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 32–34, 43–45. For reasons of deference to the competence, expertise, and constitutional legitimacy of administrative bodies, the courts typically adopt a "reasonableness" rather than a "correctness" standard of review. Under a reasonableness test, the court assesses whether the legislative or executive decision falls within a range of justifiable outcomes. A decision is reasonable if it is supported by reasons and is open to justification. Under a correctness test, the court assesses whether the legislative or executive decision is the correct one, which may involve substituting its view for that of the primary decision-maker.

[11] *Doré v Barreau du Québec*, 2012 SCC 12. The *Doré* case was brought by a lawyer who was reprimanded by his regulatory association for writing a critical letter to a trial judge (calling him, among other things, "loathsome", "arrogant", "fundamentally unjust", "having a chronic inability to master any social skills", and being "pedantic, aggressive and petty"). The lawyer challenged the decision as a violation of his right to freedom

rights or freedoms.[12] The *Doré* case arose out of a conflict between a lawyer and a judge. The appellant, Mr. Gilles Doré, was a lawyer practising in Québec. Mr. Doré appeared before Boilard J on a case, during which Boilard J made disparaging comments about Mr. Doré.[13] Mr. Doré then wrote a private letter to Boilard J,[14] in which he called the judge "loathsome", "arrogant" and "fundamentally unjust", and accused him of "hiding behind his status like a coward", "having a chronic inability to master any social skills", being "pedantic, aggressive and petty", and having a propensity to use his court to "launch ugly, vulgar and mean personal attacks".[15] Boilard J filed a complaint against Mr. Doré with the Barreau du Québec based on this letter alleging that Mr. Doré had violated art. 2.03 of the *Code of Ethics of Advocates* (which stated that the conduct of advocates "must bear the stamp of objectivity, moderation and dignity").[16] The Disciplinary Council of the Barreau rejected Mr. Doré's argument that that art. 2.03 violated his *Charter* right to freedom of expression,[17] and found that the letter had been in breach of art. 2.03. The Council reprimanded Mr. Doré and suspended his ability to practise law for 21 days.[18] Mr. Doré appealed the Council's decision.

The Supreme Court upheld the Council's decision, and took the opportunity to clarify the methodological approach the courts should take to determine whether administrative decision-makers have exercised their statutory discretion in accordance

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of expression.

[12] Fox-Decent & Pless, *supra* note 6 at 423.

[13] During the hearing, Justice Boilard said, referring to Mr. Doré: "an insolent lawyer is rarely of use to his client". In his written reasons, Boilard J accused Mr. Doré of "bombastic rhetoric and hyperbole" and said that the court must "put aside" Mr. Doré's "impudence". See *Doré*, *supra* note 11 at para 9. (All quotes in regarding the case are translations from the judgment).

[14] In this letter, Mr. Doré wrote: "I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions." He also noted as a postscript: "As this letter is purely personal, I see no need to distribute it."

[15] The (translated) letter is reproduced in full in the Supreme Court judgment: see *Doré*, *supra* note 11 at para 10.

[16] *Code of ethics of advocates*, RRQ 1981, c b-1, r 3 (Québec) [*Code of Ethics*].

[17] *Charter*, *supra* note 1 at s 2(b).

[18] See *Bernard c Doré (Penalty Decision)*, 2006 CanLII 53416 (Barreau du Québec, Disciplinary Committee) (available on http://www.canlii.org/fr/qc/qccdbq/doc/2006/2006canlii53416/2006canlii53416.html) at paras 148–170.

with *Charter* protections. The Court held that judicial review in such cases should proceed in accordance with an administrative law approach. The Court declared that it is unnecessary to undertake the structured proportionality analysis required by the *Oakes* test in order to protect *Charter* values.[19] Further, the administrative law review should proceed on a reasonableness standard of review (if that would otherwise be the applicable review standard for that decision).[20] In conducting the review, courts must assess whether the administrative decision reflects a "proportionate balancing of the *Charter* protections at play".[21] The decision will be found to be reasonable if the decision-maker "has properly balanced the relevant *Charter* value with the statutory objectives".[22]

### 1.1 Overview and structure of thesis

Different but related problems arise from the *Doré* decision and earlier jurisprudence reviewing rights-limiting administrative decisions, including: (1) whether *Charter* issues require review only according to constitutional methods; (2) whether *Charter* issues may be addressed through non-constitutional methods (such as an administrative law approach); (3) if 1 and 2 are not mutually exclusive, in which order matters should be addressed (for example, administrative law analysis followed by a *Charter* review); and (4) whether there is a unity between the branches of public law in the constitutional state. Although the *Doré* decision has resolved some of the uncertainty about the courts' approach to reviewing the constitutionality of administrative decisions, the Court has left many issues unresolved.[23] This

[19] *Doré*, *supra* note 11 at para 35.
[20] The Court confirmed that reasonableness remains the applicable review standard for disciplinary decisions and "the fact that *Charter* interests are implicated does not argue for a different standard": *Ibid* at para 45.
[21] *Ibid* at para 57.
[22] *Ibid* at para 58.
[23] See Colleen M Flood & Jennifer Dolling, "An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path" in Lorne Mitchell Sossin & Colleen M Flood, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 1 at 33; Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Lorne Mitchell Sossin & Colleen M Flood, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 39 at 80; Macklin, *supra* note 3 at 318;

thesis explores the uncertainty in Canadian public law arising from the Court's direction in *Doré* that judicial review of administrative discretionary decisions impacting on *Charter* guarantees should undertake a proportionality analysis that differs from the structured proportionality analysis of the *Oakes* test.[24]

In the *Doré* case before the Supreme Court, as the fact that the Council's decision infringed the *Charter* guarantee to freedom of expression was not in issue (the issue was instead whether the infringement on freedom of expression was justified), the Court did not examine the approach to be taken in cases where there is a dispute as to whether the *Charter* is infringed by an administrative decision. Therefore this thesis focuses on the approach to judicial review of discretionary decisions that *do* infringe upon a *Charter* guarantee, and the issue is therefore whether that infringement is justified. Likewise, as the *Doré* approach applies to discretionary decision-making (not to rules or orders or regulations),[25] this thesis does not focus on the approach to judicial review of non-discretionary decisions such as decisions made according to a rule, although this approach is discussed in relation to the implications of the *Doré* decision. This thesis also does not deal with the contentious issue of whether proportionality should be a freestanding ground of review within administrative law.[26]

The thesis proceeds in six parts: In this introductory chapter, I have briefly introduced the subject of the thesis, and discussed the key concepts explored in later chapters. Chapter 2 provides a historical overview of the relationship between the *Charter* and administrative law,

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Sheila Wildeman, "Pas de Deux: Deference and Non-Deference in Action" in Lorne Mitchell Sossin & Colleen M Flood, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 323 at 362; Fox-Decent & Pless, *supra* note 6 at 425–437.

[24] *Doré*, *supra* note 11 at para 35.

[25] Administrative discretion emerges from legislative provisions indicating an official "may" take certain action, thereby effectively delegating authority to the judgment of that official. The ambit of administrative discretion may be viewed as the "space ... between the legislature's word and the execution of the word": Cartier, Geneviève, "The Baker Effect: A New Interface Between the Canadian Charter of Rights and Freedoms and Administrative Law — The Case of Discretion" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) 61 at 84.

[26] See Aaron Baker, "Proportionality" in *Judicial Review*, 4th ed (London: LexisNexis, 2010) 241 at 287–291.

as articulated by the Court over time. Chapter 3 explores the *Doré* case, the rationale for the approach adopted in that case, and the nature of the proportionality analysis adopted. Chapter 4 turns to the potential implications of the *Doré* approach, in particular, the potential for inadequate justification of decisions impacting on *Charter* values and concerns about its impact on fundamental rule of law values. In Chapter 5, I suggest a methodological approach to review of administrative decisions engaging *Charter* protections that addresses these concerns, better reflects *Charter* values, and improves coherence between administrative and constitutional branches of public law. Chapter 6 offers some concluding comments.

I argue that it is questionable whether the *Doré* approach will provide adequate justification for decisions impacting on *Charter* rights. In particular, the Court's adoption of a reasonableness standard and rejection of a structured proportionality analysis raises concerns that the *Doré* approach will not ensure adequate justification for decisions that limit *Charter* rights. Furthermore, the approach taken in *Doré* risks disregard for the key rule of law values of certainty, accessibility, and predictability of law. That approach to review unjustifiably draws a distinction between "laws" and "decisions", and does not ensure that sufficient constraints on broad grants of discretion exist.

I conclude that, while review within an administrative law framework is advantageous, the *Doré* approach does not accord with the key requirements set out in s. 1 of the *Charter* that any limitation on *Charter* guarantees be prescribed by law and reasonable and demonstrably justified. I therefore propose some modifications to the *Doré* approach to ensure rights-infringing administrative decisions comply with s. 1 of the *Charter* and ensure that rights-limiting administrative decisions are "prescribed by law", "reasonable" and "demonstrably justified in a free and democratic society". My recommended approach requires that the reviewing court ensure that a rights-limiting decision meets the key rule of law principles

underlying the s. 1 "prescribed by law" requirement. It also requires the court to scrutinize the decision in a more rigorous manner than the review the Court undertook in *Doré*. To ensure that the rights-limitation is reasonable and demonstrably justified, the court should require the administrative decision-maker to provide reasons for his or her decision, which the court would use as a basis for carrying out a structured proportionality analysis. While this approach may involve a more interventionist approach to reasonableness review than usual, this modified approach will better respect and protect the fundamental values set out in the *Charter*. The recommended analytical framework also allows for constitutional and administrative law to be integrated, avoiding bifurcation of these two interrelated branches of public law.

### 1.2 Fundamentals of administrative law and the *Charter*

To ensure a solid foundation for understanding the subsequent analysis, it is helpful to briefly explain the fundamentals of administrative law review and review under the *Charter*. Administrative review and constitutional review both play a role in managing the complex balance of power between the branches of government: the legislature, the judiciary, and the executive (which includes administrative entities). A constitution is the regime which forms the foundation of the state, and is the ultimate legal source of the powers and duties of the state. The Canadian written constitution includes the *Constitution Act, 1982* (Part 1 of which is the *Charter*),[27] and the *Constitution Act, 1867*.[28] However, the Canadian Constitution is more than just the formal written constitution. The written constitution is "the skeleton … not the whole body": the "flesh, the muscles, the sinews, the nerves of our Constitution have been

[27] See *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*] at s 52(2).
[28] *The Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

added by legislation … by custom … by judgements of the courts … and by agreements between the national and provincial governments".[29]

### 1.2.1 Administrative law

The origins of judicial review of administrative decisions in common law countries lie in the old English "prerogative writs", which were a form of remedy for inappropriate administrative action or inaction.[30] In Canada, the sources of the courts' power to review administrative decisions are:[31]

1. "Original jurisdiction": ordinary courts have jurisdiction over administrative decisions when such a decision is challenged by way of a direct action by a citizen in contract or tort on the ground that the state has infringed an individual's private legal right;[32]
2. "Statutory right of appeal": courts have jurisdiction where a statutory right of appeal is provided for in the governing statute; and
3. "Court's inherent judicial review jurisdiction": superior courts have an inherent jurisdiction to review administrative decision-making, at least with respect to questions of jurisdiction.

The legislature cannot purport to remove the courts' judicial review jurisdiction altogether. In *Dunsmuir v New Brunswick* [*Dunsmuir*], the Court explained that the inherent power of superior courts to review administrative action, and to ensure that it does not exceed its

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[29] Eugene Forsey, *How Canadians Govern Themselves*, 8th ed (Ottawa: Minister of Public Works and Government Services Canada, 2012) at 10.
[30] These writs include certiorari (through which a court may quash the decision of an administrator and order that the decision be made again), prohibition (a form of injunction preventing a decision-maker from hearing a case), and mandamus (an order to compel a decision-maker to exercise their jurisdiction): see Harry Woolf, *De Smith's Judicial Review*, 6th ed (London: Sweet & Maxwell, 2007) at 45.
[31] Flood & Dolling, *supra* note 23 at 16–17.
[32] See, for example, *T1T2 Limited Partnership v Canada*, 1995 CanLII 7042 (Ont Gen Div). In that case, the Ontario Court (General Division) granted a declaration that the Liberal government had breached a contract in cancelling the agreement made by the previous Progressive Conservative government with developers for the renovation and privatization of an international airport.

jurisdiction, stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*.[33] Judicial review of administrative action is therefore constitutionally guaranteed, particularly with regard to the definition and enforcement of jurisdictional limits.[34]

The basis for this constitutional protection of judicial review is the courts' role in preserving the rule of law.[35] The rule of law principle requires that all exercises of public authority must find their source in law,[36] and the courts must therefore ensure that public authorities do not overreach their lawful powers.[37] It has been said that the Constitution "is the latticework on which the vines of the administrative state and administrative law grow".[38] Essentially, "administrative law" concerns the supervision by the courts of decision-making pursuant to statute or the royal prerogative,[39] with the goal of ensuring the legality, reasonableness and fairness of the administrative process and its outcomes.[40]

Over time, the Court has moved away from the traditional (or formalist/positivist) conception of administrative law as limited to scrutinizing the relationship between a government decision and its enabling legislation in order to protect democratic accountability (in other words, ensuring administrators are acting in compliance with legislation).[41] Instead, the Court has moved toward a model of judicial review within administrative law that is characterized by a focus on the respectful deference on the part of the judiciary to administrative decision-makers' expertise,[42] and a modern (or "functionalist"[43]) approach.

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[33] *Dunsmuir*, *supra* note 10 at para 31. See *Constitution Act, 1867*, *supra* note 28, ss 96–101.
[34] See *Crevier v A.G. (Québec) et al*, [1981] 2 SCR 220 at 234–238; *U.E.S., Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1090.
[35] *Bibeault*, *supra* note 34 at 1090; *Dunsmuir*, *supra* note 10 at para 27.
[36] *Dunsmuir*, *supra* note 10 at para 28.
[37] *Ibid* at para 29.
[38] Flood & Dolling, *supra* note 23 at 5.
[39] *Ibid*.
[40] *Dunsmuir*, *supra* note 10 at para 28.
[41] See, for example, Susan L Gratton, "Standing at the Divide: The Relationship between Administrative Law and the Charter Post-Multani" (2008) 53 McGill LJ 477 at 511.
[42] See Macklin, *supra* note 3 at 288.
[43] Sheila Wildeman, *Romancing Reasonableness: An aspirational account of the Canadian case law on judicial*

The modern approach views judicial review as a means of upholding the rule of law,[44] and the judicial role in reviewing administrative decisions as an expression of a wider constitutional project shared among the legislative, judicial and executive/administrative branches of government. This constitutional project can be considered one of public justification by all branches, whereby judicial review verifies that state action is grounded in law and can be publically justified as such.[45] In this model of constitutional ordering, all three branches of government participate in working out the legal norms governing the exercise of state power,[46] and in the determination of the values or principles that are considered fundamental to society.[47]

Linked to this is the recasting, or reinterpretation, of the principle of deference in administrative law and how it informs institutional relations. The idea of "deference as respect",[48] as articulated by David Dyzenhaus, has been endorsed by the Court in a number of cases.[49] In *Dunsmuir*, the Court adopted this characterization when conducting review on a

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*review of substantive administrative decisions* (LLM Thesis, University of Toronto (Canada), 2011) [unpublished] at 3–4. This model can be contrasted with the Diceyan model of the administrative state informed the traditional approach to judicial review of administrative action, with its view of the judicial role as ensuring administrative decision-makers remain within the limits of the law: see Liston, *supra* note 23 at 43–44, 49; Wildeman, *supra* note 23 at 326. Some judges do, however, take a more formalist vision of the separation of powers: see, for example, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 90–104, Cromwell J.

[44] *Dunsmuir*, *supra* note 10 at para 29.

[45] Wildeman, *supra* note 23 at 325. For further exploration of the role of justification, see below Section 3.3.1.2.3.

[46] David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2001) 27 Queen's LJ 445 at 487–489.

[47] *Ibid* at 451, 453 and 501. See also Peter M Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited - or Much Ado about Metaphors" (2007) 45 Osgoode Hall LJ 1 at 30.

[48] Dyzenhaus explains deference as respect as requiring "a respectful attention to the reasons offered or which could be offered in support of a decision" and that weight be given to the opinion of the decision-maker, rather than merely submission to the authority of the legislature or administrative agency. This can be contrasted with "deference as submission", which occurs when courts submit to the authority of the decision-maker: David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286. This conception rejects the formal vision of the separation of powers which rigidly distinguishes between the different functions of the legislature (making law), executive (implementing law) and judiciary (interpreting law): Dyzenhaus, *supra* note 46 at 450.

[49] See *Baker*, *supra* note 9 at paras 48, 65; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 13; *Dunsmuir*, *supra* note 10 at para 48.

"reasonableness" standard.[50] Following *Dunsmuir*, there are two standards of review in relation to the substance of a decision: correctness (that is, was it a correct decision according to the court?) and reasonableness (that is, does the decision fall within a range of reasonable alternatives?).[51]

Following *Dunsmuir*, the application of a correctness standard is required in four circumstances: questions of constitutional law and division of powers; a "true question of jurisdiction" (in the sense of whether or not the tribunal had the authority to make the inquiry); a question of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; and questions regarding jurisdictional lines between two or more competing specialized tribunals.[52] The justification for applying a correctness standard in these circumstances is based on rule of law values such as universality, consistency, uniformity, predictability, and stability.[53] Despite the clarification regarding standards of review in *Dunsmuir*, the courts still struggle to achieve consensus on whether particular cases should attract a correctness or reasonableness standard of review.[54] However, it appears that the courts' position is now one of deference (that is, reasonableness review) as the default position, unless one of the four circumstances listed above applies.[55]

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[50] *Dunsmuir*, *supra* note 10 at para 48.
[51] *Ibid* at paras 32–34, 43–45.
[52] *Ibid* at paras 58–61. See also *Smith v Alliance Pipeline*, 2011 SCC 7 at para 26. Whether "true questions of jurisdiction" actually exist is the subject of some debate: see *Alberta Teachers' Association*, *supra* note 43 at paras 38–43.
[53] Liston, *supra* note 23 at 74–75.
[54] David Quayat, "The Correctness Battle Rages: Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association" (2012) 25:2 Can J Admin L & Prac 179. See, for example, *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35. The majority held that the correctness standard of review should be applied in this case because the Society operates within statutory scheme under which both a tribunal and a court may decide the same legal question at first instance (see para 18-20). However, Abella J (in concurring reasons) held that the reasonableness standard of review should apply: she pointed out that "If concurrent jurisdiction with the courts in interpreting and applying something as legally transcendent as the *Charter* does not affect the deference to which tribunals are entitled in interpreting their own mandate, surely it is hard to justify carving out copyright law for unique judicial 'protection'" (para 73).
[55] Macklin, *supra* note 3 at 302. To identify the standard of review, the reviewing court first checks whether the jurisprudence has already ruled on the degree of deference applicable to the issues. If not, it is necessary to

Review according to a reasonableness standard requires that administrative decision-makers are accorded "a margin of appreciation within the range of acceptable and rational solutions", and the judicial role is to ensure the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[56] The nature of the reasonableness standard of review is explored further in Section 3.3.3.

### 1.2.2 The Charter

Before the enactment of the *Charter*, the Court reviewed federal and provincial legislation to ensure that the division of legislative power between the federal and the provincial governments was respected, as well as enforcing other components of the *Constitution Act, 1867*.[57] With the adoption of the *Charter*, the Court took on a new role in determining the validity of governmental action, both federal and provincial, to ensure the protection of the rights and freedoms guaranteed by the *Charter*.[58] The *Charter* applies:[59]

> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The *Charter* therefore operates as a limitation on the powers of the legislative and executive branches of government.

The combination of s. 52 of the *Constitution Act, 1982*,[60] and s. 24(1) of the *Charter*,[61] establish that the violation of the rights and freedoms guaranteed by the *Charter* gives rise to a remedy, and therefore grant the judiciary the power to review the constitutionality of laws.

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analyze the factors set out in *Dunsmuir*: the presence or absence of a privative clause, the nature of the question at issue, and the nature and level of expertise of the tribunal: *Dunsmuir*, *supra* note 10 at paras 52–55, 62–64.

[56] *Dunsmuir*, *supra* note 10 at para 47.

[57] For example, *Constitution Act, 1867*, *supra* note 28, ss 96–100, 125 and 133.

[58] See *Charter*, *supra* note 1, ss 52 and 24.

[59] *Ibid*, s 32.

[60] *Constitution Act, 1982*, *supra* note 27, s 52(1).

[61] *Charter*, *supra* note 1, s 24.

Section 52 of the *Constitution Act, 1982* provides that the Constitution (which includes the *Charter*)[62] is "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".[63] The courts have granted a range of remedies for breaches of the Constitution, including: striking down or declaring invalid particular laws; severing offending parts of provisions; reading in omitted words or reading down the scope of a limitation on a right; authorizing exemptions from particular laws; and temporarily suspending a declaration of invalidity.[64]

Section 24 of the *Charter* provides that a person claiming his or her *Charter* rights or freedoms have been infringed "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just". Remedies granted under s. 24(1) include: declarations,[65] costs,[66] and damages,[67] as well as the common law prerogative writs. The purpose of judicial review under the *Charter* is thus to protect individuals from unjustified infringements by the state of the fundamental rights and freedoms set out in the *Charter* and to enable the reviewing court to craft an appropriate remedy in the event that such an infringement is held to have occurred.[68]

Throughout this thesis, I use "*Charter* rights" as shorthand for the rights and freedoms guaranteed by the *Charter*, and "*Charter* guarantees" to refer to the rights and freedoms guaranteed in the *Charter* as well as the guarantee that these rights will only be limited under certain conditions (as contained in s. 1). The term "*Charter* values" encompasses the interests

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[62] See *Constitution Act, 1982*, *supra* note 27, s 52(2)(a).
[63] *Ibid*, s 52(1).
[64] See Hogg, *supra* note 2 at 40.1.
[65] *Canada (Prime Minister) v Khadr*, 2010 SCC 3.
[66] *R v 974649 Ontario Inc.*, 2001 SCC 81.
[67] Damages have been held to be an appropriate and just remedy when they serve to compensate the victim for his or her loss, and to vindicate *Charter* rights and to deter future *Charter* breaches: *Vancouver (City) v Ward*, 2010 SCC 27 at para 25. However, s. 24(1) is treated as a remedy of last resort, to be invoked only where a *Charter* breach cannot be remedied by the application of the general law: Hogg, *supra* note 2 at 40.2(g.5).
[68] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 156.

and principles that are referenced in s. 1 of the *Charter*,[69] as well as the rights and freedoms guaranteed by ss. 2-23 of the *Charter*. "Proportionality" is another term that has several meanings depending on the context, and that is the subject of much debate as an analytical and methodological doctrine to evaluate the limitation of rights.

### 1.3 Proportionality

Proportionality has emerged, globally, as the leading framework for evaluating the legitimacy of limits on rights.[70] In Canada, the Court adopted the concept of proportionality as the method of analysis when evaluating the limitation of rights under s. 1 of the *Charter*)[71] in the 1986 case of *R v Oakes*.[72] Section 1 of the *Charter* provides that *Charter* rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In *R v Oakes*, the Court laid down the criteria that must be satisfied to establish that a limit on a *Charter* right is justified under s. 1.[73] First, the objective of the limiting measure must be sufficiently important to warrant overriding a constitutionally protected right or freedom. Once a sufficiently important objective is recognized, the party invoking s. 1 must satisfy a proportionality analysis with reference to this objective by

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[69] The Court uses values interchangeably with interests and principles: Mark Antaki, "The Turn to 'Values' in Canadian Constitutional Law" in *The Limitation of Charter Rights: Critical Essays on R v Oakes* (Montreal: Éditions Thémis, 2009) 155 at 173. The values embodied in s. 1 of the *Charter* include the rule of law principles underlying the requirement that a limitation be "prescribed by law", and the values and principles of a free and democratic society as encompassed in the requirement that a limitation be "demonstrably justified in a free and democratic society".

[70] Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Colum J Transnat'l L 72; Mattias Kumm, "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4:2 Law & Ethics of Human Rights 142 at 142. The concept of proportionality in has been accepted in a number of countries, including: Argentina, Australia, Belgium, Brazil, Canada, Chile, Columbia, England, France, Greece, Hong Kong, India, Ireland, Italy, Mexico, New Zealand, Peru, Portugal, South Africa, Spain, Switzerland, Turkey: see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge Studies in Constitutional Law (Cambridge, UK; New York: Cambridge University Press, 2012) at 187–201; Moshe Cohen-Eliya & Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59 Am J Comp L 463 at 465.

[71] *Charter*, *supra* note 1. Section 1 provides that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[72] *Oakes*, *supra* note 8 at 138–139.

[73] *Ibid*.

showing that the measures adopted to achieve the objective are reasonable and demonstrably justified.[74] As noted above, the next three steps of the *Oakes* test require that: the measures adopted are rationally connected to the objective in question; the measures impair the right as minimally as possible; and there is proportionality between the objective and the effects of the measures, including between the deleterious and the salutary effects of the measures.

There are two key ways in which a proportionality analysis may be applied: as a test of fair balance (in the sense of ensuring the outcome does not disproportionately impact on an individual's rights) or as a structured test to examine whether interference by a public authority with a fundamental interest can be justified.[75] Proportionality as a fair balance test may be implicit in existing categories of unreasonableness in administrative law, such as failure to take into account a relevant consideration or an unreasonably onerous or oppressive decision.[76] The *Oakes* test is an application of the second form of proportionality (a structured test), as the courts examine whether legislation infringing on a *Charter* guarantee is justified by applying a four-step analysis. The *Oakes* test thus sets up a process of "reasoned demonstration",[77] with the onus on the government to demonstrate that a rights-limiting measure is justified. The advantages and disadvantages of using a structured proportionality analysis such as the *Oakes* test are, however, debated.

### 1.3.1 Benefits and criticisms of a structured proportionality test

#### 1.3.1.1 Benefits of a structured proportionality framework

The key benefits of the proportionality framework are said to be that it: "stresses the need to always justify limitation on human rights; it structures the mind of the balancer; it is

[74] *Ibid* at 139.
[75] Woolf, *supra* note 30 at 585–588.
[76] See, for example, *Baker*, *supra* note 9.
[77] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 129.

transparent; it creates a proper dialog between the political branches and the judiciary; and it adds to the objectivity of judicial discretion".[78]

Proportionality analysis is seen as reducing conflicts of interest and reliance on considerations that are irrelevant or unethical,[79] and ensuring the pertinent considerations are weighed in their proper context.[80] If a judge manipulates the proportionality framework to produce the desired result, some argue that this "distortion to the legal truth is evident in the written judgment".[81] Objectivity, and better decision-making, is thus seen as being enhanced by the structure and discipline provided by the proportionality analysis.[82] Further, the structure of the proportionality framework, properly adhered to, is seen to have "the great advantage" of explicitness: the test's discrete steps assist the court to state exactly how a measure runs afoul of the proportionality inquiry.[83] A framework for a proportionality analysis, such as that set out in the *Oakes* test, is therefore viewed as helpful in resolving the difficult question of whether a rights-limiting measure is reasonable and demonstrably justified in a free and democratic society.

However, not everyone agrees that a structured proportionality analysis is beneficial, and concerns have been raised about various aspects of the *Oakes* test and proportionality frameworks in general.

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[78] Aharon Barak, "Proportionality and Principled Balancing" (2010) 4:1 Law & Ethics of Human Rights 1 at 14–15.
[79] Barak, *supra* note 70 at 463.
[80] *Ibid* at 464.
[81] Amir Attaran, "A Wobbly Balance - A Comparison of Proportionality Testing in Canada, the United States, the European Union and the World Trade Organization" (2007) 56 UNBLJ 260 at 262.
[82] Kent Roach, "Section 7 of the Charter and National Security: Rights Protection and Proportionality versus Deference and Status" (2010) 42 Ottawa L Rev 337 at 341.
[83] Jamie Cameron, "The Original Conception of Section 1 and Its Demise: A Comment on Irwin Toy Ltd. v. Attorney-General of Quebec" (1989) 35 McGill LJ 253 at 265.

#### 1.3.1.2 Criticisms of proportionality frameworks

##### 1.3.1.2.1 Critiques relating to the Court's deferential application of the *Oakes* test

The Court has developed techniques for interpreting the *Oakes* test that are criticized for diluting the test and thereby showing too much deference to the government.[84] As explored further below (see Section 3.3.3.2.1), these techniques include deferring to the legislative and executive branches of the state in certain types of cases, emphasizing the importance of context in applying the test, and relaxing the standard of proof. Each of these techniques can result in the Court taking what some view as an inappropriately deferential approach.

Critics of the Court's deferential approach to the *Oakes* test have argued that it has no foundation in the language or structure of the *Charter*.[85] The language of s. 1, particularly the requirement that any limits on rights be "reasonable" and "demonstrably justified", is suggestive of a stringent justification requirement. Further, the judiciary is regarded as an institution that has the tools to impose rationality and reasonableness on other authorities, since it is relatively immune from populism and therefore is more attuned to principled and analytical reasoning.[86] The Court's deference in some cases is therefore accused of being "misplaced and highly inappropriate".[87] Deference can also be seen as providing judges with discretion in circumstances where discretion is unwarranted.[88] Thus deference is cast as simply "the code word for results-oriented reasoning",[89] a concept that courts resort to in order

[84] Christopher Bredt & Adam M Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001) 14 Sup Ct L Rev, online: <https://pi.library.yorku.ca/ojs/index.php/sclr/article/view/34773> at 187.
[85] Sara Weinrib, "The Emergence of the Third Step of the Oakes Test in Alberta v. Hutterian Brethren of Wilson Colony" (2010) 68 UT Fac L Rev 77 at 91.
[86] Cohen-Eliya & Porat, *supra* note 70 at 480. In contrast, Weinstock suggests that the *Oakes* test has the potential to vest a disproportionate amount of authority in courts, and there are "moral, epistemic and psychological reasons" for doubting that courts are up to the task of defining rights and their limits: Daniel M Weinstock, "Philosophical Reflections on the Oakes Test" in *The Limitation of Charter Rights: Critical Essays on R v Oakes* (Montreal: Éditions Thémis, 2009) 115 at 128.
[87] Christopher D Bredt, "The Right to Equality and Oakes: Time for Change" (2009) 27 NJCL 59 at 63.
[88] Barak, *supra* note 70 at 399.
[89] Bredt, *supra* note 87 at 63.

to "ramp up or down the stringency" of the *Oakes* test,[90] resulting in "an unpredictable jurisprudence".[91] The Court's reliance on "context" has likewise been criticized for turning adjudication into a "highly subjective exercise with little predictability".[92]

Some argue that it would be an abdication of the courts' constitutional responsibility to yield its authority to make decisions about the balance between rights and the public interest to the legislature or any other body.[93] The basis for this position is a conception of the judicial role as interpreters of the law and the ability of the judiciary to achieve harmony within the legislative and constitutional frameworks.[94] If the constitution were interpreted in accordance with the reasonableness of the interpretation offered by other governmental branches, this would lead to inconsistent interpretations and therefore "anarchy within the system".[95]

Deference is also potentially problematic because it results in the interpretive acts of judges aligning with the acts and interests of those in control,[96] which risks the courts deferring in cases of measures that are insensitive to individual or minority rights.[97] The deferential approach is criticized for ignoring the *Charter*'s purpose of withdrawing certain interests (constitutional rights and freedoms) from the ordinary political process.[98] The Court's approach to deference within the *Oakes* test has also been criticized for not adequately taking into account the democratic legitimacy of the challenged legislation.[99]

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[90] *Ibid* at 66.
[91] Hogg, *supra* note 2 at 38.11(b).
[92] Bredt & Dodek, *supra* note 84 at 185.
[93] See Barak, *supra* note 70 at 393–395; T R S Allan, "Human Rights and Judicial Review: A Critique of Due Deference" (2006) 65 Cambridge LJ 671.
[94] Barak, *supra* note 70 at 394.
[95] *Ibid*.
[96] Robert M Cover, "Foreword: Nomos and Narrative" (1983) 97 Harv L Rev 4 at 57.
[97] Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40 Osgoode Hall LJ 337 at 358.
[98] Lorraine E Weinrib, "Canada's Charter of Rights: Paradigm Lost?" (2001) 6 Rev Const Stud 119 at 173.
[99] Alana Klein, "Section 7 of the Charter and the Principled Assignment of Legislative Jurisdiction" (2012) 57 Sup Ct L Rev 59 at 70. Arguably, the executive does not have the same degree of democratic legitimacy as the legislature, and therefore the executive should be accorded less judicial deference than the legislature. On this view, the courts should therefore be more hesitant to find a breach of constitutional rights in legislation than in

A highly deferential approach by the courts is therefore viewed as disregarding the stringent terms of the limitation clause in the *Charter*, as well as permitting the courts to abdicate their constitutional responsibilities and ignore the role accorded to them by the people.[100] Extensive emphasis on deference, context, and varying standards of proof risks undermining the benefits of proportionality as an analytical tool and introduces an unwarranted measure of discretion into judicial decision-making.

1.3.1.2.2 Critiques of a universal, two-stage approach

The Court's application of the *Oakes* test is also criticized for incorporating justificatory criteria into the definition of rights; for requiring a two-stage analytical approach that does not fit with some rights; and for unjustifiably adopting a universal test to the review of limits on rights.

Judicial review under the *Charter* is a two-stage process whereby the court determines whether the challenged measure infringes on the *Charter* right then moves to consider whether the measure is justified under s. 1. However, particularly in cases dealing with rights that contain internal standards of reasonableness,[101] the Court has developed internal balancing tests that result in much of the justification for the limitation occurring before the second stage of analysis (the *Oakes* test) is reached. In these cases, the analytical process does not distinguish between the definition of the right and the justification of limits on that right.

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administrative decisions: T R S Allan, "Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review" (2010) 60:1 UTLJ 41 at 53.

[100] Weinrib, *supra* note 98 at 150, 170–171. As McLachlin J (as she then was) has stated: "To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.": *RJR-MacDonald*, *supra* note 77 at 132. See also *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791 at para 87, Deschamps J.

[101] For example, s. 7 contains the not to be deprived of right to life, liberty and security of the person "except in accordance with the principles of fundamental justice", and s. 8 guarantees the right to be secure against "unreasonable" search or seizure: *Charter*, *supra* note 1. See also ss. 6, 9 and 11. These rights may be contrasted with those in ss. 2, 3 and 14, which do not contain limiting language.

Incorporation of justificatory criteria into the act of defining the scope of the right has been criticized for shifting the evidentiary burden onto the party alleging a rights violation;[102] risking a less stringent standard of justification than that required by the *Oakes* test;[103] and obscuring the Court's value-based choices.[104] In some cases, the standards of internal reasonableness are interpreted very similarly to the standards set out in the *Oakes* test.[105] However, the Court's application of these standards has been criticized for being "very deferential",[106] and the Court generally either does not consider the steps set out in the *Oakes* test or applies the test in a cursory fashion.[107] This has led to criticism that the Court's reasoning in this stage is "more result-oriented than principled".[108] The Court's incorporation of justificatory criteria in defining the scope of the right has also been criticized for obscuring

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[102] Bredt, *supra* note 87 at 70–71; Hart Schwartz, "Making Sense of Section 15 of the Charter" (2011) 29:2 NJCL 201 at 227; Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substance Equality after Withler" (2011) 16 Rev Const Stud 31 at 58, 61.

[103] Hogg, *supra* note 2 at 38.13. See also *Lavoie v Canada*, [2002] 1 SCR 769 at para 49, McLachlin CJC, L'Heureux–Dubé and Binnie JJ, dissenting.

[104] Cameron, *supra* note 83; Bredt & Dodek, *supra* note 84 at 187; Bradley W Miller, "Justification and Rights Limitations" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge; New York: Cambridge University Press, 2008) 93 at 100.

[105] For example, the Court has held that an "arbitrary" deprivation of life, liberty and security under s. 7 is defined as a deprivation that "bears no relation to, or is inconsistent with, the objective that lies behind [it]": (*Chaoulli*, *supra* note 100 at para 130), and perhaps even requiring necessity. In *Chaoulli*, three justices preferred an approach that asked whether a limit was "necessary" to further the state objective: *Ibid* at para 131–132. Conversely, three other justices rejected the language of necessity, preferring the prior articulation of arbitrariness as where a deprivation of a right "bears no relation to, or is inconsistent with, the state interest that lies behind the legislation": *Ibid* at para 232, Binnie, LeBel and Fish JJ, dissenting. The Court also asks whether the effect of the limit on the right is "grossly disproportionate" to the benefit obtained by the measure: *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 133. As explained below (see Section 3.4.3), these steps closely resemble the *Oakes* test.

[106] See Sujit Choudhry, "So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 Sup Ct L Rev 501 at 531.

[107] *Chaoulli*, *supra* note 100 at paras 154–157; *Canada v PHS*, *supra* note 105 at para 137. This eclipse of the *Oakes* test occurred with the review of s. 15(1) equality rights. The relational character of the right to equality, and the requirement that the courts consider the needs and circumstances of persons and groups in addition to the claimant, resulted in the Court importing s. 1-like justification considerations into the s. 15 analysis: see Richard Moon, "Accommodation Without Compromise: Comment on Alberta v. Hutterian Brethren of Wilson Colony" (2010) 51 Sup Ct L Rev 95 at 113–114; Miller, *supra* note 104 at 99–100; Schwartz, *supra* note 102 at 211, 223–224, 227–228; Bredt, *supra* note 87; Koshan & Hamilton, *supra* note 102 at 58, 61. Accordingly, the first stage of the review considered contextual factors and the equivalent of the *Oakes* rational connection test (see *Withler v Canada (Attorney General)*, 2011 SCC 12.), resulting in the second stage/*Oakes* test consisting merely of a repetition of the considerations that led to its decision on whether the measure is discriminatory: Moon, *supra* note 97 at 366.

[108] Bredt & Dodek, *supra* note 84 at 187.

the choices that the Court would otherwise have to make more transparently under s. 1.[109] The consideration of justificatory criteria in the first stage, when establishing whether the *Charter* right has been infringed, may also shift a significant evidentiary burden onto the party alleging a rights violation.[110]

The issues with incorporating justificatory criteria into the definition of rights are relied upon by those who challenge the Court's adoption of a two-stage approach to rights-adjudication. While some suggest that it is preferable to keep the scope of the substantive rights clearly defined and distinct from the justification analysis,[111] others argue that the two-stage approach to determining whether a rights-limiting measure is justified is problematic. In particular, the two-staged approach is an awkward fit for some rights, resulting in the *Oakes* test being applied in a very deferential way, the exclusion of relevant contextual factors in determining whether there has been a first-stage infringement, or a collapse of the entire enquiry into either the first or second stage.[112]

Separating the enquiry into two stages is therefore criticized for severing the question of reasonable limits on the right from the inquiry into the meaning and scope of the individual

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[109] Cameron, *supra* note 83. Miller suggests that although the language of "defining" may suggest that the judge is making uncontroversial, value-free judgments, in reality the apparent judicial act of defining can obscure the value-laden and inevitably controversial nature of determining whether some legislation is discriminatory: Miller, *supra* note 104 at 100.

[110] Bredt, *supra* note 87 at 70–71; Schwartz, *supra* note 102 at 227; Koshan & Hamilton, *supra* note 102 at 58, 61.

[111] Bredt, *supra* note 87 at 70. The existence of s. 1 as a separate and distinct article of the *Charter* is relied upon to support this argument, as is the idea that undertaking a balancing test when defining the scope of the *Charter* right or freedom will inevitably lead to an understanding of that right or freedom that is weaker or narrower in scope: see *Ibid* at 71.

[112] Moon contends that the two-step adjudicative model does not work for certain rights, in particular those that do not simply protect an individual's autonomy or independence from interference by others: Moon, *supra* note 97 at 364–366. He explains that the two-step structure of *Charter* adjudication rests on the idea that rights protect different aspects of individual autonomy or liberty from state interference, and the *Oakes* test, in examining the "balance" between the separate and competing interests, depends on the idea that *Charter* rights protect individual autonomy. He argues that some rights, such as freedom of expression, fit awkwardly within the two-step adjudicative model, and the strain on the *Oakes* test manifests itself in the broad definition of the freedom's scope and the deferential approach to limits under s. 1. He suggests that this awkward fit has resulted in the *Oakes* test becoming "increasingly vague and flexible, or, as the critics see it, eroded or undermined": *Ibid* at 365. Similarly, Miller suggests that separating the decision-making process into two distinct stages results in either the exclusion of relevant contextual factors in determining whether there has been a first-stage infringement, or a collapse of the entire enquiry into either the first or second stage: Miller, *supra* note 104 at 98.

*Charter* guarantee, resulting in *Charter* guarantees being drained of their content and their underlying purposes and values being ignored.[113] Critics accordingly urge the courts to "abandon the myth of *Oakes'* universality", and to develop a range of distinctive approaches to the question of reasonable limits, tailored to the particular right in question.[114]

1.3.1.2.3 Critiques of proportionality frameworks in general

Some theorists claim that proportionality is the only way of resolving human rights issues because the very concept of human rights implies balancing and is inseparable from it.[115] However, many scholars have criticized the adoption of a proportionality analysis (particularly the balancing involved in the "proportionate effect" step), on the basis that it fails to adequately protect rights as supreme and non-violable, cannot be rational because the values balanced are "incommensurable", and perpetuates the fallacy of judicial objectivity.

Many have criticized the Court's *Charter* jurisprudence for failing to adequately protect rights.[116] These criticisms often stem from differing philosophical or moral conceptions of human rights, or the relationship between rights and the public interest. Given that proportionality is designed to protect both human rights and the public interest, it fits well

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[113] Brian Slattery, "The Pluralism of the Charter: Revisiting the Oakes Test" in *The Limitation of Charter Rights: Critical Essays on R v Oakes* (Montreal: Éditions Thémis, 2009) 13 at 23–25, 34–35. A rights-specific approach, it is argued, would instead develop a jurisprudence that is rooted in the social and political value of the protected right in each case, and the focus would be on whether the purposes behind the constitutional recognition are valuably served by its protection (rather than just whether the state has good reason to limit the right): John D Whyte, "The Charter at 30: A Reflection" (2012) 17 Rev Const Stud 1 at 12.

[114] Bredt & Dodek, *supra* note 84 at 187; Slattery, *supra* note 113 at 16. Advocates of a rights-specific application of the *Oakes* test point to the courts' approach of contextualizing each application of the test, and the volume of factors that may influence how the *Oakes* test is applied in a particular case, as evidence that a universal approach does not work: Bredt & Dodek, *supra* note 84 at 187; Bredt, *supra* note 87 at 66. They argue that, given the diversity in the form and character of the rights, a universal standard applicable to all *Charter* rights leads to ambiguity and inconsistency: Slattery, *supra* note 113 at 16; Constitutional Law Group, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery Publications, 2010) at 786.

[115] See Robert Alexy, *A Theory of Constitutional Rights* (Oxford ; New York: Oxford University Press, 2002); David M Beatty, *The Ultimate Rule of Law* (Oxford ; New York: Oxford University Press, 2004).

[116] See, for example, David Rangaviz, "Dangerous Deference: The Supreme Court of Canada in Canada v. Khadr" (2011) 46 Harv CR-CL L Rev 253; Roach, *supra* note 82; Catherine Dauvergne, "How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2012) 58 McGill LJ 663.

within some theories of rights, such as Alexy's theory of principles[117] and some communitarian or consequentialist approaches,[118] but perhaps not so well within other theories.[119] A key criticism is that a proportionality analysis fails to recognize the special, supreme status of the rights and freedoms included in the *Charter*.[120] Those subscribing to a theory of rights that requires the prioritization of rights over the public interest raise concerns that a proportionality analysis allows rights to be "balanced away".[121] The balancing approach inherent in proportionality review is criticized for reducing conflicts between rights, and between rights and the common good, to comparisons of relative weights, and therefore overlooking the moral status of a rights claim and the justification-blocking function of

[117] See Alexy, *supra* note 115. Alexy suggests that rights are principles and principles are optimization requirements.
[118] Consequentialists believe that the morally best action is always the action that maximizes the best consequences, as measured by some metric such as utility: Weinstock, *supra* note 86.
[119] Barak, *supra* note 70 at 468. In particular, proportionality analysis has been criticized for being incompatible with liberal theories of rights, which are based on the notion that every individual should be free to pursue his or her own happiness (the "good life") without interference.
[120] "The Constitution of Canada is the supreme law of Canada": *Charter*, *supra* note 1, s 52.
[121] Some view rights as moral rules that should never be infringed, at least absent extreme and special circumstances: For example, Dworkin views rights as "trumps" (R M Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 184–205.), trumping the public interest unless their limitation is necessary to prevent a catastrophe or "obtain a clear and major public benefit": R M Dworkin, "Rights as Trumps" in Jeremy Waldron, ed, *Theories of Rights* (Oxford ; New York: Oxford University Press, 1984) 153 at 191. Similarly, Habermas likens rights to "fire walls" (Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Studies in Contemporary German Social Thought (Cambridge, Mass: MIT Press, 1996) at 258–259.), and objects to rights being reduced to principles to be balanced: Jürgen Habermas, "Reply to Symposium Participants, Benjamin N. Cardozo School of Law" in Michel Rosenfeld & Andrew Arato, eds, *Habermas on Law and Democracy: Critical Exchanges* (Berkeley: University of California Press, 1998) 381 at 430. See also Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7:3 Int'l J Const L 468 at 492; Gregoire C N Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23 Can J L & Jurisprudence 179 at 198; Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65 Cambridge LJ 174 at 179; Barak, *supra* note 70 at 488.

rights.[122] The proportionality analysis thus denies categorical answers to rights-claims because every answer to a claim is contingent on the optimization of the constitutional right.[123]

Proportionality analysis necessarily entails comparisons among various interests, values and rights. Arguably, these interests, values and rights cannot be measured by a common denominator or on a single scale of measurement, and may therefore be viewed as "incommensurable" or "incomparable", and thus impossible to measure (or balance).[124] Some view this incommensurability as a strong reason in favour of abandoning proportionality as a rational form of judicial decision-making.[125] Responses to the incommensurability challenge include that rights and values can be commensurable and comparable in concrete situations,[126] perhaps with reference to the "marginal social importance" of fulfilling the objective compared with that of the importance of preventing the harm to the constitutional right.[127] However critics respond that values cannot be demonstrated to be commensurable without using a moral argument, or at least an argument that justifies the degree of priority accorded to

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[122] Tsakyrakis, *supra* note 121 at 489. Habermas argues that if the justifying norms are viewed as principles, a "court presents the general legal norms from which it derives a singular judgment as reasons that are supposed to justify its ruling on the case. If, however, the justifying norms are viewed as values that have been brought into an ad hoc transitive order for the given occasion, then the judgment is the *result* of a weighing of values. The court's judgment is then *itself* a value judgment that more or less adequately reflects a form of life articulating itself in the framework of a concrete order of values. But this judgment is no longer related to the alternatives of a right or wrong decision": Habermas, *supra* note 121 at 430.

[123] The constitutional right is seen as losing its status as a guarantee against *unacceptable* State action, as the proportionality analysis defends against unacceptable State action "only insofar as it does not satisfy the principle of proportionality", so that the guarantee is actually only against *disproportional* State action: Webber, *supra* note 121 at 199. Under this conception, judicial review just "maintain[s] an efficiency-based oversight to ensure that there are no unnecessary costs to rights, that sledgehammers are not used to crack nuts, or rather, that sledgehammers are only used when nutcrackers prove impotent": Rivers, *supra* note 121 at 180.

[124] Tsakyrakis, *supra* note 121 at 471. The very metaphors of weight and balance denote the necessity of measuring and comparing: Virgílio Afonso da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31:2 Oxford J Legal Stud 273 at 276.

[125] Webber argues that proportionality analysis fails because, without an identified common measure, the principle of proportionality cannot direct reason to an answer; it can merely assist in choosing between incommensurables. While there may be good reasons for two or more options, proportionality cannot provide good reasons for choosing between them, so that "any one alternative can be supported by good reason even if the choice between alternatives is not determined by reason": Webber, *supra* note 121 at 197. See also Habermas, *supra* note 121 at 430; da Silva, *supra* note 124 at 278.

[126] da Silva, *supra* note 124 at 286. da Silva also suggests that 'stalemates' can be resolved through judicial deference: *Ibid* at 292. See also Paul-Erik N Veel, "Incommensurability, Proportionality, and Rational Legal Decision-Making" (2010) 4:2 Law & Ethics of Human Rights 178.

[127] Barak, *supra* note 70 at 484.

the values in issue.[128] Thus critics argue that proportionality does not provide any rational basis for deciding one way rather than the other, so that the decision will ultimately depend on the fully subjective choice of judges.[129] Others argue that balancing is unavoidable because there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right.[130] There is also nothing about the proportionality framework that prevents recognition of the constitutional status of rights within that analysis.[131] Although the Court has not attempted to articulate a comprehensive moral and political theory thought to underlie the Canadian constitutional order,[132] the implementation of the proportionality analysis allows for an approach that recognizes that there is a core to each right that cannot be violated.

Although some believe that a proportionality framework results in judges making objective decisions,[133] proportionality cannot guarantee complete objectivity, given that each of the steps in the proportionality framework entails an element of judicial discretion that can only be exercised with an element of judicial subjectivity.[134] Judges may be sincere in their efforts to be neutral and impartial, but moral and political value judgements lie at the heart of any inquiry into the justifiability of a government's implementation of a rights-limiting measure.[135] Given the often vague and ambiguous language in the *Charter*, judges have the

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[128] Tsakyrakis, *supra* note 121 at 474.
[129] See da Silva, *supra* note 124 at 278.
[130] Robert Alexy, "On Balancing and Subsumption. A Structural Comparison" (2003) 16:4 Ratio Juris 433 at 436.
[131] Barak, *supra* note 70 at 490.
[132] Miller, *supra* note 104 at 107. Alan Brudner suggests that *Oakes* test makes sense under the theory of rights proposed by Hegel: Alan Brudner, "What Theory of Rights Best Explains the Oakes Test?" in *The Limitation of Charter Rights: Critical Essays on R v Oakes* (Montreal: Éditions Thémis, 2009) 59 at 61. The Court has referred to the basic theory of the *Charter* as being to avoid subordinating individual choices to "any one conception of the good life": *R v Morgentaler*, [1998] 1 SCR 30 at 166, Wilson J, and that "the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass": *Ibid* at 164, Wilson J.
[133] Beatty, *supra* note 115 at 166.
[134] Barak, *supra* note 70 at 478. Although Barak insists that the decisions reached by judges are still rational: *Ibid* at 485-486.
[135] *R v Keegstra*, [1990] 3 SCR 697 at 845, McLachlin J (as she then was).

ability to exercise a large degree of discretion and choice in the interpretive process.[136] The Court's treatment of the *Oakes* test proportionality analysis is clearly value-laden.[137] The rational connection and minimal impairment tests can both be *presented* as "value-neutral", as a technical assessment of legislative means,[138] and a judgement about the effectiveness (rather than the value) of the restriction.[139] However, in reality these tests are not divorced from value judgements.[140] In determining the underlying values of a free and democratic society, the judge will inevitably be influenced by his or her moral and political philosophy.[141] Any attempt to evade the political and moral questions inherent in the process of rights reasoning is futile, as balancing is inevitably a normative undertaking.[142] Some critics of the proportionality framework go so far as to say that, even when a judge purports to be conducting a genuine proportionality analysis, in reality he or she is only justifying his or her decision using the language of the proportionality doctrine.[143] In this way, the proportionality framework may be seen as masking the underlying subjective judgements made in the

[136] Hogg, *supra* note 2 at 36.4(b); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 16.
[137] Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 UTLJ 383 at 395; Moon, *supra* note 97 at 346. As La Forest J (dissenting) stated in *RJR MacDonald*, the s. 1 inquiry "is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement": *RJR-MacDonald*, *supra* note 77 at para 62.
[138] Constitutional Law Group, *supra* note 114 at 778.
[139] *Ibid* at 780.
[140] When a judge interprets legislation alleged to be a justified limitation "in a free and democratic society", he or she must inevitably delineate some of the attributes of a democratic society: *Vriend v Alberta*, [1998] 1 SCR 493 at para 141. See also Bakan, *supra* note 136 at 29; Moon, *supra* note 97 at 362; Constitutional Law Group, *supra* note 114 at 778.
[141] A judge's background, and her or his social and institutional location, inevitably shapes the judge's decision-making: Bakan, *supra* note 136 at 31. See also David L Schwartz & Lee Petherbridge, "The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study" (2011) 96 Cornell L Rev 1345 at 1368; Richard Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1988) 87 Mich L Rev 2411 at 2441. Even within a proportionality framework, "identifying the interests that are to count and determining their weight cannot proceed apolitically and amorally": Webber, *supra* note 121 at 193.
[142] Webber, *supra* note 121 at 191–193. Moon suggests that the influence of different normative views is starkly shown in cases involving conflicts between religious practice and state law, where judges must decide whether religious individuals or groups should be exempted from public norms and permitted to live in accordance with their normative views: Richard Moon, "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality" (2012) 45 UBC L Rev 497 at 539.
[143] Terence G Ison, "The Operational Realities of the Charter*" (2012) 25:1 Canadian Journal of Administrative Law & Practice 1 at 15. Bredt suggests that a proportionality analysis such as the *Oakes* test is not applied to reach a principled judgment but rather is manipulated to reach the desired result: Bredt, *supra* note 87 at 63.

decision-making process yet putting up a façade of rationality, objectivity, and neutrality.[144] This leads some scholars to suggest that the judiciary should abandon the illusion of objectivity,[145] and focus instead on "the real moral issues" underlying rights cases.[146]

#### 1.3.1.3 Assessment of proportionality as a framework for review

The principal benefits of a proportionality framework for reviewing rights-infringements are the potential to increase transparency in judicial decision-making and facilitate a constitutional dialogue that enhances respect for constitutional rights. While no analytical process can guarantee objective decision-making (or make all subjective decision-making transparent), a doctrinal test can present a challenge to a judge's ideological views and reduce the likelihood of arbitrary decisions. Proportionality is a test of when, and to what extent, the state may encroach on a protected right, and is designed to ensure that rights are accorded appropriate weight in the balancing exercise. A proportionality test accords the constitutional right priority and requires that any infringement of that right be justified in a rational and transparent manner. The proportionality framework set out in the *Oakes* test is therefore helpful in resolving the issue of whether a rights-limiting measure is reasonable and demonstrably justified in a free and democratic society (as required by s. 1 of the *Charter*).

The stringent standard required by s. 1 is weakened, however, when the courts incorporate justificatory criteria into the definition of the *Charter* guarantees, and do not undertake the analytical process set out in the *Oakes* test. The key criticisms of the two-stage approach and of a universal test for determining reasonable limits are really about the need to reflect on the scope of the right in issue when ascertaining whether a limit is reasonable. This is a valid concern but does not necessarily require either a one-stage or rights-specific

[144] Tsakyrakis, *supra* note 121 at 474. See also Ison, *supra* note 143 at 16.
[145] Bakan argues that, while the s. 1 analysis may appear "legal rather than political", the appearance of legalistic constraint is "an illusion": Bakan, *supra* note 136 at 27.
[146] Tsakyrakis, *supra* note 121 at 493; Webber, *supra* note 121 at 201.

approach: the *Oakes* test is flexible enough to allow the Court to reflect on the scope of the right when considering the rights-limiting measure (particularly in the 'minimal impairment' and 'proportionate effect' steps).

Likewise, many of the criticisms raised regarding proportionality frameworks in general are inherent to judicial review of constitutional rights, so would not be remedied through an alternative approach (assuming the alternative approaches entail some balancing of interests). When considering whether a measure is a justified limitation on a *Charter* guarantee, the Court must respect society's choice to constitutionalize that right or freedom, so that the special status of the right is not disregarded when weighing that right or freedom against another, or against the public interest. This weighing or balancing exercise is at the heart of the proportionality approach, and judges must balance the deleterious and the salutary effects of the rights-limiting measure for the individuals involved, and for the community or society in general. In doing so, judges necessarily weigh incommensurable rights and interests, and make subjective judgements about the value of those rights and interests. Subjectivity in applying a proportionality analysis can be tempered, however, by respecting the initial decision-maker's rationale for limiting the constitutional right or freedom, and intervening only where this reasoning is flawed. Greater recognition of the inherent subjectivity involved in applying a proportionality analysis (and in judicial review of constitutional rights in general) would also further enhance both transparent decision-making and society's dialogue about the appropriate balance between rights and freedoms and the broader interests of society.

The *Oakes* test, the distinction between an "ordinary" administrative law review and *Charter* analysis, and the nature of proportionality analysis are explored more fully in Section 3.4. Now that the framework and key terms of the debate have been outlined, however, we

can turn to Chapter 2's analysis of the changing conceptions of the relationship between the two bodies of public law.

# 2 CHANGING CONCEPTIONS OF THE RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND THE *CHARTER*

In *Doré*, the Court justified revising its approach to judicial review on the basis that there is now a revised relationship between the *Charter*, the courts, and administrative law than that which existed when the *Charter* was first enacted.[147] Prior to *Doré*, the courts had explored different ways of reviewing the constitutionality of administrative decisions, "vacillating between the values-based approach in *Baker* and the more formalistic template in *Slaight*".[148] This chapter explores the jurisprudence in which this debate has played out, to discern how the Court has conceptualized the relationship between administrative law and the *Charter* over time. Drawing on key Supreme Court cases dealing with both administrative law and the *Charter*, I analyze how the Court has articulated this relationship and the inherent tensions in the relationship.

While my focus is on judicial review of administrative decisions alleged to violate the *Charter*, I will also look to cases dealing with administrative agencies' jurisdiction over the *Charter* for evidence of the Court's views. These "jurisdiction" cases relate to administrative bodies' jurisdiction to decide the constitutionality of statutory provisions under s. 52(1) of the *Constitution Act, 1982*,[149] and whether administrative bodies are "court[s] of competent jurisdiction" that can grant s. 24 *Charter* remedies.[150] These cases allow a deeper understanding of the administrative law/*Charter* relationship, and the reasons for the Court's

[147] *Doré*, *supra* note 11 at para 30.
[148] *Ibid* at para 31. Citing *Baker*, *supra* note 9; *Slaight*, *supra* note 7. Both of these cases are explored in the following sections.
[149] *Constitution Act, 1982*, *supra* note 27, s 52(1). Section 52(1) provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
[150] *Charter*, *supra* note 1, s 24. See further below, Section 2.3.1.

apparent move toward greater recognition of the legitimacy of administrative decision-making in recent cases.[151]

After setting out the tensions inherent in the relationship between administrative law and the *Charter*, I consider the Court's initial conceptions of the relationship as revealed in early cases. I then explore the Court's subsequent diverging approaches and the struggle to conceptualize the interrelationship between administrative law and the *Charter*. In the final section, I analyze recent cases in which the Court has attempted achieve a more coherent and unified approach to cases involving the *Charter* and administrative law.

## 2.1 Relationship between administrative law and the *Charter*

### 2.1.1 The unity of public law thesis

As noted above, the traditionalist or positivist conception of administrative law is that the role of the courts is to ensure that administrative decision-makers are acting in compliance with legislation. This conception regards a legislative body as the only legitimate source of fundamental legal values, and therefore other branches of government should apply those values only when such values are articulated in a legislative enactment.[152] This encompasses a formal conception of the separation of powers between the branches of government whereby the legislative has a monopoly on making law and the judiciary has a monopoly on interpretation of the law. The executive is viewed as exercising "purely instrumental functions" whose role is to give effect to legislative statements.[153] On this view, public law as compartmentalized in traditional ways, into constitutional and administrative law (and international law).

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[151] Fox-Decent & Pless, *supra* note 6.
[152] David Dyzenhaus, "Baker: The Unity of Public Law?" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) 1 at 3.
[153] Cartier, Geneviève, *supra* note 25 at 81.

In contrast, the unity of public law theory posits that the same fundamental values underpin the whole of public law and that all branches of government, as well as individuals, have a legitimate role in the articulation of those values.[154] This conception considers administrative law a part of constitutional law, with the only difference being that the values in administrative law are unwritten.[155] Constitutional law, in the sense of written law, is merely an explicit articulation of that set of values (rather than their source), and so fundamental values (as unwritten constitutional values) have an impact even when the written texts of the constitution do not cover an exercise of public power. The shared fundamental values of administrative law and the *Charter* thus "form the heart of public law conceived as a unity".[156]

The unity of public law thesis therefore supports a substantive value-laden role for administrative law.[157] Further, actors other than legislatures and constituent assemblies are seen as having a legitimate role in articulating the fundamental values of the society,[158] so the executive is viewed as having a role to play in the articulation of the values underlying the grant of discretion.[159]

### 2.1.2 Key tensions in the relationship

The relationship between the common law of administrative law and the constitutional law of the *Charter* gives rise to some significant tensions. As a result of the expansion of the administrative state, and well before the enactment of the *Charter*, administrative law struggled to construct a coherent relationship between courts and the other branches of

[154] See David Dyzenhaus, *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004); Cartier, Geneviève, *supra* note 25 at 78–85.
[155] David Dyzenhaus, "Baker: The Unity of Public Law?" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) 1 at 4.
[156] Cartier, Geneviève, *supra* note 25 at 86.
[157] Gratton & Sossin, *supra* note 5 at 157.
[158] Dyzenhaus, *supra* note 155 at 4–5.
[159] Cartier, Geneviève, *supra* note 25 at 81.

government, and with the modern administrative state.[160] The introduction of administrative bodies (which include boards, tribunals, commissions, officials and ministers, hospitals, school boards, Aboriginal bands, municipalities, and police officials), which were granted substantial powers to make decisions on matters relating to individual rights, raised concerns about accountability,[161] and was seen by some as a threat to both parliamentary sovereignty and to the rule of law.[162] The powers conferred on these bodies are often conferred in discretionary terms, and are protected by statutory privative clauses that assert that the administrative body's decision is to be final and unreviewable by any court.[163] Furthermore, these bodies are often not independent, as the executive can control the membership of the bodies, control members' salaries, and exert significant influence over the delegated policy areas.[164] The courts responded to these issues by developing methods of judicial review grounded in common law presumptions that the legislature always intends that statutorily delegated decision-makers act reasonably and fairly.[165]

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[160] Mary Ann Catherine Liston, *Honest Counsel: Institutional Dialogue and the Canadian Rule of Law* (PhD Thesis, University of Toronto (Canada), 2007) [unpublished] at 245.
[161] *Ibid* at 244. See also Gus Van Harten, David J Mullan & Gerald P L R Heckman, *Administrative Law: Cases, Text, and Materials*, 6th ed (Toronto: Emond Montgomery, 2010) at 951–952.
[162] On the other hand, those who supported the development of the administrative state were concerned that judicial review of administrative decisions would hinder the flexible regulation necessary to implement statutory schemes in the public interest: see Liston, *supra* note 160 at 243. Discretion allows the administrative state the flexibility needed to make individual decisions adapted to particular situations and to adopt rules to structure the way in which a legislative scheme is implemented: Genevieve Cartier, "Administrative Discretion: Between Exercising Power and Conducting Dialogue" in *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 381 at 403.
[163] Liston, *supra* note 160 at 243. Furthermore, robust oversight by Parliament and the courts is impossible due to their lack of specialized policy knowledge and the quantity of cases that the administrative state generates: *Ibid*.
[164] See, for example, *Saskatchewan Federation of Labour v Saskatchewan (Attorney General)*, 2013 SKCA 61 (CanLII).
[165] Liston, *supra* note 160 at 243. The inherent power of superior courts to review administrative action stems from *Constitution Act, 1867*, *supra* note 28, ss 96–101. The Court has interpreted ss. 96-101 to mean that an administrative body cannot perform the function of a superior court, so the executive branch cannot displace the judicial branch through the creation of these bodies. Judicial review of administrative decision-makers is thus constitutionalized in that the Court has applied s. 96 of the Constitution Act 1867 to strike down legislation which sought to grant the power to make final decisions on questions of jurisdiction to an administrative body: *Crevier*, *supra* note 34 at 234–238.

The introduction of the *Charter* challenged the delicate balance the courts maintained within administrative law,[166] giving rise to tensions and challenges in conceptualizing the relationship between administrative law and the *Charter*. The concerns about accountability, separation of powers and the appropriate institutional role of administrative bodies remain,[167] and these concerns are highlighted in the Court's jurisprudence considering how these bodies should interpret and apply the fundamental rights and freedoms guaranteed by the *Charter*.

The discretion exercised by administrative bodies also gives rise to rule of law concerns about the potential for arbitrariness,[168] and lack of accessibility, predictability and precision.[169] These concerns are especially troubling in relation to discretionary decisions that infringe on human rights given their importance to individuals. The Court has thus struggled to balance this tension between the exercise of discretion and the rule of law, particularly in regards to the compatibility between discretionary decisions and the requirement in s. 1 of the *Charter* that any limits on *Charter* guarantees are "prescribed by law".[170]

A further site of particular tension in the relationship between administrative law and the *Charter* is the extent to which administrative law and the *Charter* can be "merged" or brought within a coherent legal framework. The courts struggle with how to respect the supremacy and fundamental nature of *Charter* guarantees while also adhering to administrative law principles. In particular, review under the "*Charter* approach" raises concerns about the

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[166] As Professor Mary Liston put it, the enactment of the *Charter's* set of guaranteed rights "enabled citizens to disrupt this judicial fancy footwork" of ensuring administrative accountability without disrupting institutional relationships, as "the possibility emerged of preventing administrative bodies from exercising their previously robust regulatory and decisionmaking capacity": Liston, *supra* note 160 at 246.

[167] See, for example, Liston, *supra* note 23; Dyzenhaus, *supra* note 46.

[168] For example, Dicey's view that "wherever there is discretion there is room for arbitrariness, and … must mean insecurity for legal freedom on the part of its subjects": Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan, 1959) at 188. Courts have thus recognized constraints on the exercise of discretion even if no express standards are prescribed: *Roncarelli v Duplessis*, [1959] SCR 121 at 140, Rand J. See also *Baker*, *supra* note 9 at para 53.

[169] See Van Harten, Mullan & Heckman, *supra* note 161 at 951–953. See also *Vancouver Transit*, *supra* note 7 at para 50.

[170] Section 1 of the *Charter* states that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": *Charter*, *supra* note 1, s 1 [emphasis added].

"constitutionalization of administrative law", a critique stemming from the potential for individualist *Charter* values to prevail over the democratically underwritten public purposes underlying the administrative state.[171]

These three aspects of the relationship between administrative law and the *Charter*, as particular sites of tension, appear to have especially influenced the Court's conception of the relationship. In my analysis of the Court's jurisprudence on the relationship between administrative law and the *Charter*, I therefore explore each of these tensions further: the appropriate institutional roles of the branches of government, discretionary decision-making and the rule of law, and the coherence of the approach to integrating *Charter* and administrative law principles and purposes.

### 2.2 Initial conceptions of the relationship: *Slaight*

In the 1989 case of *Slaight Communications Inc. v Davidson* [*Slaight*],[172] the Court first addressed the application of the *Charter* to a discretionary administrative decision.[173] At issue in *Slaight* was a provision of the *Canada Labour Code* conferring broad discretion on labour arbitrators to impose equitable remedies for unfair dismissal. A labour arbitrator, exercising his discretion under that provision, had ordered an employer to give an unfairly dismissed employee a letter of reference containing specified text and to say nothing further about the employee. The employer alleged that this order violated its freedom of expression as guaranteed by the *Charter*.[174]

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[171] Wildeman, *supra* note 23 at 378. The concern is that a *Charter*-focused approach prioritises individual rights over other important public interest and public law values that play a role in constraining the exercise of administrative discretion and encouraging high-quality decision-making, such as fairness, consistency, legitimate expectations and principles of sound administration: see Murray Hunt, "Against Bifurcation" in David Dyzenhaus, Murray Hunt & Grant Huscroft, eds, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart Publishing, 2009) 99 at 106–107.
[172] *Slaight*, *supra* note 7.
[173] Fox-Decent & Pless, *supra* note 6 at 424.
[174] *Charter*, *supra* note 1, s 2(b).

Lamer J (as he then was) set out an analytical framework for review of administrative decisions under the *Charter* (which Dickson CJC for the majority adopted), as follows:[175]

> 1. [If the] disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right [it is] necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.
> 2. [If the] legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*, [it is] necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society;
>    - if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;
>    - if it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

In summary, if the decision or order was made pursuant to legislation that conferred (expressly or impliedly) the power to infringe a protected right, the reviewing court should subject the *legislation* to the *Oakes* test.[176] However, if the empowering legislation conferred an imprecise discretion that does not confer the power to limit a protected right, the decision is the source of the limitation so the reviewing court should subject the *decision* to the *Oakes* test.

Thus, with *Slaight*, the Court established that any exercise of statutory discretion must comply with the *Charter* and that an administrative body exercising delegated powers does not have the power to make an order that would result in an unjustifiable infringement of the *Charter*. *Slaight*, and subsequent cases applying the *Slaight* framework, highlight many of the aspects of the Court's conception of the relationship between administrative law and the *Charter* that play out in later cases.

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[175] *Slaight*, *supra* note 7 at 1079–1080 [emphasis in original].
[176] In order to justify an infringement, the state must satisfy the proportionality test set out by the Court in *Oakes* (see above, Section 1.3).

### 2.2.1 Relationship between administrative law and the *Charter* in early cases

#### 2.2.1.1 Institutional roles

The basic principles that Lamer J (as he then was) relied on in developing the *Slaight* framework was that an administrative decision-maker derives all its powers from statute (is "a statutory creature"),[177] and may not exceed this legislative authority.[178] Since legislatures may not enact laws that infringe the *Charter*, neither can they authorize or empower another person or entity to do so. The legislation is presumed to comply with the *Charter*, so the decision-maker may not violate the *Charter* when acting under authority granted by that legislation.[179] The framework thus relies on a conception of administrative decision-makers as mere creatures of statutes, empowered and bound by legislation. In *Eaton v Brant County Board of Education* [*Eaton*],[180] Lamer CJC (in a concurring judgment) clarified his *Slaight* framework, stating that any open-ended or vague language in the enabling statute should also be interpreted so as to not authorize breaches of the *Charter*.[181] In *Eldridge v British Columbia (Attorney General)*,[182] the Court also applied the *Slaight* framework but recognized at the remedy stage the administrative body's role and discretion in how to achieve *Charter* compliance.[183]

#### 2.2.1.2 Discretion and the rule of law

Cases prior to *Slaight* had insisted that precise standards for the exercise of discretion

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[177] *Slaight*, *supra* note 7 at 1081.
[178] *Ibid* at 1080.
[179] *Ibid* at 1080–1081. An adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so.
[180] *Eaton*, *supra* note 7.
[181] *Ibid* at para 3. This presumption of constitutionality is informed by ideas about the proper role of the courts in reviewing legislation under the *Charter*: see *Ibid* at para 48.
[182] *Eldridge*, *supra* note 7. That case arose out of the provincial government's delegation to the Medical Services Commission of the power to define what constitutes a "medically required" service for the purpose of the provincial health insurance program. The Court conducted a s. 1 *Oakes* analysis of the Commission's decision not to fund sign language interpretation, and concluded that this decision violated the right to equality guaranteed by s. 15(1) of the *Charter*.
[183] The Court held that the "appropriate and just remedy" in that case was to grant a suspended declaration that the failure to fund sign language interpretation as part of medical services was unconstitutional, given that it is not "this Court's role to dictate how this is to be accomplished": *Ibid* at paras 95–96.

impacting on *Charter* rights be contained in statutory or regulatory form, reflecting concerns about the foreseeability of a limit on rights,[184] a "chilling" effect on the exercise of rights,[185] and a lack of constraints on administrative action.[186] The *Slaight* approach, however, does not insist that *Charter* rights can only be limited by precise general rules. The Court held that, in spite of the broad grant of discretion granted to the arbitrator by the enabling legislation, the s. 1 "prescribed by law" condition was met where the adjudicator's order fell within the authority conferred on him by statute.[187]

The *Slaight* framework also requires that the court choose whether its analysis should be directed at a law or at an administrative decision made pursuant to the law.[188] The analytical or methodological approach taken on judicial review differs depending on whether the statute (expressly or by necessary implication) confers a power to infringe the *Charter*, or whether the decision is made under a statute that does not confer a power to limit *Charter* rights.[189] The *Slaight* framework therefore results in most cases passing the prescribed by law threshold,[190] so this approach to the prescribed by law requirement arguably does not place any rule of law-type restrictions on the exercise of discretion.[191]

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[184] See June M Ross, "Applying the Charter to Discretionary Authority" (1991) 29 Alta L Rev 382 at 408–410.
[185] See *Ibid* at 411–413.
[186] See *Ibid* at 402–408.
[187] See also *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 at 95.
[188] As Ross puts it: "If the law does not mandate the action, that is the end of the matter. If the law does mandate the action, and the law is reasonable, then the action is reasonable": Ross, *supra* note 184 at 407.
[189] See also *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 at 983. Ross suggests that the Court's lack of concern about precise standards in *Irwin Toy* may be attributed to the fact that judicial discretion was involved, and there may be less concern about the control of judicial discretion "as judges are obviously trained and independent decision-makers … guidelines to the proper exercise of the discretion will be established in published case law, so that foreseeability is less of a problem than in the administrative context": Ross, *supra* note 184 at 409.
[190] Gratton, *supra* note 41 at 494.
[191] Statutory authority can almost always be found for the actions of an administrative actor: see, e.g. *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 244, McLachlin J. The *Slaight* framework therefore leaves open the possibility that limitations on rights resulting from discretionary decisions may be unforeseeable due to the broad or undefined scope of the discretion, as it does not allow for any inquiry into whether the statutory authority is properly framed.

#### 2.2.1.3 Coherence of approach

In *Slaight*, Dickson CJC noted that the "precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases",[192] but suggested that the courts should rely on *Charter* review rather than administrative law in cases raising *Charter* issues.[193] In his view, because the patent unreasonableness standard of review "rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis" as analysis under s. 1 of the *Charter*, "in the realm of value inquiry" the courts should rely on s. 1 of the *Charter*.[194] The Court was clearly of the view that *Charter* review focuses the analysis and provides a structure developed for the purpose of protecting rights.

In *Ross v New Brunswick School District No. 15* [*Ross*],[195] the Court applied the *Slaight* framework and interpreted it as indicating that there is "no need for an administrative law review of values that had been dealt with pursuant to a *Charter* examination under s. 1".[196] The Court therefore examined some aspects of the tribunal's decision (those "untouched by the *Charter*")[197] on an administrative law review, and then undertook a review of the

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[192] *Slaight*, *supra* note 7 at 1049. This preference for developing the relationship between the *Charter* and administrative law in an incremental way was also shown in *Reference re ss. 193 and 195.1 of the Criminal Code (Man.)* [*Prostitution Reference*], [1990] 1 SCR 1123 at 1176–1177.

[193] *Slaight*, *supra* note 7 at 1049. Dickson CJC therefore applied only the above framework when reviewing the adjudicator's decision, and concluded that the arbitrator's order was not in breach of the *Charter*: *Ibid* at 1057. Lamer J, on the other hand, first undertook an administrative law review of the arbitrator's orders, and then conducted a *Charter* review of the orders using the above framework and applying the *Oakes* test. He concluded that part of the order was a patently unreasonable decision (because the arbitrator had no statutory authority to make an order that the employer say nothing more than was in the letter) but the order that the letter contain specified content was not unreasonable (in an administrative law sense) and was reasonable and justified under *Charter* analysis.

[194] *Slaight*, *supra* note 7 at 1049.

[195] *Ross*, *supra* note 7. In that case, the Court upheld a decision by a Human Rights Commission Board of Inquiry that ruled a Board of School Trustees acted in a discriminatory manner by failing to take appropriate action against a teacher who make repeated public attacks on Jewish people.

[196] *Ibid* at para 32. LaForest J asserted that it was "obvious" that a review on an administrative law standard "should not impose a more onerous standard upon government than under the *Charter* review": *Ibid*.

[197] *Ross*, *supra* note 7 at para 33.

tribunal's discretionary order to determine compliance with the *Charter* guarantee of freedom of expression by conducting an *Oakes* test analysis.[198] Similarly, in *Eaton*, the Court concluded that, given the finding that the reasoning and decision of the Tribunal did not discriminate contrary to s. 15 of the *Charter*, it was "unnecessary and undesirable" to consider the constitutional validity of the enabling legislation or regulations.[199] The *Slaight* framework, as interpreted in *Ross* and *Eaton*, therefore suggests that administrative review and constitutional review exist in "watertight compartments" and that either review can be conducted without any attention to the other.[200] The Court considered that the analysis of the *Charter* values involved could only be adequately analyzed under the constitutional standard of s. 1, suggesting a "hierarchical view" of the relationship between the *Charter* and administrative law that rejects the ability of administrative law to deal adequately with issues of fundamental values.[201] Protection of rights was ensured through the application of the same justificatory standard whether a *Charter* infringement was located in the "law" or in an individualized decision. In both cases, judicial review proceeded on the court's view of the "correct" interpretation of the *Charter*.

In a "trilogy" of cases in 1990 and 1991, *Douglas College*,[202] *Cuddy Chicks*,[203] and *Tetreault-Gadoury*[204] (the *Cuddy Chicks* trilogy), the Court made clear that administrative

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[198] *Ibid* at paras 96–108. The Court concluded that one aspect of the order was not a justifiable infringement of the *Charter* "and is therefore in excess of the Board's jurisdiction": *Ibid* at paras 105–107. The Court held that the appropriate remedy in this case was severance as "any part of the order that is inconsistent with the *Charter* is beyond the jurisdiction of the Board and cannot stand": *Ibid* at para 110.

[199] *Eaton*, *supra* note 7 at para 80.

[200] Paul Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms," (2013), online: <http://ssrn.com/abstract=2357453> at 22.

[201] Cartier, Geneviève, *supra* note 25 at 68.

[202] *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570. In *Douglas College*, a labour arbitrator was called upon to determine whether a mandatory retirement provision in a collective agreement violated s. 15(1) of the *Charter*. The Court held that s. 52(1) does not, in itself, confer the power to an administrative tribunal to find a legislative provision to be inconsistent with the *Charter*. Therefore whether a tribunal has this power will depend on the mandate given to the particular tribunal by the legislature. Thus, as the arbitrator was empowered to interpret and apply any Act intended to regulate employment, and "Act" must include the *Charter*, the arbitrator had authority to apply the *Charter: Ibid* at 596.

[203] *Cuddy Chicks Ltd. v Ontario (Labour Relations Board)*, [1991] 2 SCR 5. The issue was the Ontario Labour

bodies that are empowered to decide questions of law have the authority (and duty) to decide the constitutionality of provisions in their own statutory schemes. The Court held that the supremacy of the Constitution, as expressed in s. 52(1) of the *Constitution Act, 1982*, means that administrative bodies have a duty to subject their enabling statute to *Charter* scrutiny and treat any offending provisions as having no force or effect because of constitutional invalidity.[205] In the *Cuddy Chicks* trilogy, the Court shed more light on how it viewed the role of administrative decision-makers in relation to the *Charter*. The Court emphasized that one of the advantages of recognizing this power is that it promotes respect for the Constitution because constitutional issues may be raised "at an early stage in the context in which it arises without the citizen having first to resort to another body, a court which will often be more expensive and time-consuming".[206] The Court also suggested that this approach reinforces the importance of governmental decisions focusing on the values enshrined in the *Charter*.[207] However, despite recognizing administrative bodies' expertise, the Court was clear in the *Cuddy Chicks* trilogy that constitutional decisions by administrative bodies would receive no

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Relations Board's jurisdiction to determine, in the course of proceedings before the Board, the constitutionality of a provision of its enabling statute. The Court held that the Board's enabling statute granted the Board authority to decide questions of law, and the Board had jurisdiction over the parties, subject matter and remedy requested (certification). Wilson J (with L'Heureux-Dubé J) again added the qualification that the absence of legislative authority to deal with the *Charter* issue in the governing statute should not necessarily be determinative of a tribunal's jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere: *Ibid* at 20.

[204] *Tétreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22. In this case, the Court decided that the absence of a statutory provision granting a power to decide questions of law to a Board of Referees meant that the Board did not have jurisdiction to consider the constitutional validity of a section of its enabling statute. The Court also looked at the administrative scheme the Board was a part of, in particular that the respondent had the ability to appeal to an umpire who was empowered to consider constitutional questions (under the legislative scheme, umpires would be authorized to resolve constitutional issues): *Ibid* at 36–37. L'Heureux Dubé J once again suggested that, where the statute is silent or unclear there are many "other factors" to be considered when determining whether the constitutional subject matter should be considered by an administrative tribunal (at 49).

[205] *Douglas College*, *supra* note 202 at 594; *Cuddy Chicks*, *supra* note 203 at 19.

[206] *Douglas College*, *supra* note 202 at 604.

[207] *Ibid* at 605.

curial deference.[208] Courts could therefore "correct" the body's constitutional interpretation on judicial review.

### 2.3 The struggle for coherence: diverging approaches emerge

Initial cases dealing with *Charter* and administrative law issues took a cautious approach but nonetheless set out some clear guidance on the impact of the enactment of the *Charter* on administrative law principles. However, despite general unanimity in the Court's initial cases dealing with *Charter* and administrative law issues, from the mid-1990s members of the Court diverged on the appropriate approach to both the application of the *Charter* to discretionary administrative decisions and administrative bodies' jurisdiction over the *Charter*. In cases involving administrative decisions impacting on *Charter* values, the Court diverged on whether such decisions should be reviewed through the application of *Charter* review, or according to traditional administrative law/judicial review grounds (and, in those cases, whether to apply a correctness or reasonableness standard of review). In addition, cases in the mid-1990s on administrative bodies' jurisdiction highlighted the diversity of views among members of the Court about the appropriate institutional role of such bodies.

#### 2.3.1 Debate over administrative agencies' jurisdiction

The 1995 case of *Weber v Ontario Hydro* was the first Supreme Court case to consider the jurisdiction of administrative bodies under s. 24(1) of the *Charter*, which provides that a person claiming his or her *Charter* rights or freedoms have been infringed "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and

[208] *Ibid*; *Cuddy Chicks*, *supra* note 203 at 17. Furthermore, the administrative agency's ruling on the constitutionality of a statutory provision would be limited to the case before it because a declaration of invalidity is a remedy only exercisable by the superior courts: see *Ibid* at 17. The Court explained that while s. 52(1) does not, in itself, confer on an administrative tribunal the power to find a legislative provision inconsistent with the *Charter*, a power to interpret law must include the power to determine whether that law is constitutionally valid. Administrative bodies may therefore decline to apply unconstitutional provisions because they are "of no force or effect" under s. 52 of the *Constitution Act.* Because an administrative actor's power derives only from its enabling statute, its determination of constitutionality is limited to the particular case before it rather than the statutory provision in general: see *Ibid*.

just".[209] The majority applied the test the Court had previously applied to courts,[210] explaining:[211]

> The power and duty of [labour] arbitrators to apply the law extends to the *Charter*, an essential part of the law of Canada: ... In applying the law of the land to the disputes before them, be it the common law, statute law or the *Charter*, arbitrators may grant such remedies as the Legislature or Parliament has empowered them to grant in the circumstances. …

The majority concluded that the arbitrator in that case had jurisdiction over the parties, the subject matter, and the power to award the remedies claimed (damages and a declaration).

However, in dissent, Iacobucci J (with LaForest and Sopinka JJ) expressed the view that the arbitrator was neither a "court" nor of "competent jurisdiction" for the purpose of granting *Charter* remedies under s. 24(1).[212] They asserted that fundamental differences between courts and tribunals mean that administrative bodies are not suitable bodies to adjudicate *Charter* claims. These differences include that tribunals are not bound by *stare decisis* (which is particularly important in the area of *Charter* adjudication),[213] tribunals often have "simplified or altered" procedures that may not include a hearing, tribunal members are not trained in determining appropriate remedies for a constitutional violation and often have no formal legal training, and tribunals do not "have the same guarantee of independence as a court".[214] In

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[209] *Charter*, *supra* note 1, s 24. Section 24(1) provides: "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[210] See *Mills v The Queen*, [1986] 1 SCR 863. In that case, the Court noted that the *Charter* did not create jurisdiction for a court, so jurisdiction had to exist independently of the *Charter*: *Ibid* at 261. The Court held that the test for jurisdiction to grant s. 24(1) remedies was that the court must possess jurisdiction over the person, over the subject matter, and to grant the remedy (the "*Mills* test"): *Ibid* at 271. In *Weber*, the Court stated that it follows from *Mills* that statutory tribunals may be courts of competent jurisdiction to grant *Charter* remedies, provided they have jurisdiction over the parties and the subject matter of the dispute and are empowered to make the orders sought": *Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 66, McLachlin J (as she then was).

[211] *Weber*, *supra* note 210 at para 61.

[212] In their view, the use of the word "court" was deliberate, and was meant to correspond to an adjudicating body with specific characteristics that enable it to grant *Charter* remedies: *Ibid* at para 10.

[213] "As the *Charter* forms part of the supreme law of the country, it is in keeping with its status to have *Charter* claims decided by a system of adjudication that tries to be relatively uniform (both in the interpretation of *Charter* rights and *Charter* remedies), that is to say, by the courts of justice": *Ibid* at para 14.

[214] *Ibid* at paras 15–16. This concern about administrative bodies granting remedies was also evident in *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75. In that case, the Court considered whether the National Parole Board was a court of competent jurisdiction for the purpose of excluding evidence under s. 24(2) of the *Charter*, which provides that where a court concludes that evidence was obtained in a manner that infringed or

their view, an administrative body cannot remedy the fact that the law is invalid, it "can only remark that it is so" because "the drafters of the Constitution have decided that such a task, like declaring a law invalid, is within the realm of the courts".[215]

This tension over administrative agencies' jurisdiction over *Charter* remedies and the institutional role of administrative agencies again came to the fore in the 1996 case of *Cooper v Canada (Human Rights Commission)* [*Cooper*].[216] In *Cooper*, the Court was asked to determine the jurisdiction of the Canadian Human Rights Commission to rule on the constitutionality of a provision of its enabling statute. The diverging approaches taken by the members of the Court highlight the conceptual debate about the institutional role of administrative bodies within the context of jurisdiction to rule on the validity of statutory provisions under s. 52 of the *Constitution Act, 1982*.

The majority held that the Commission did not have jurisdiction to decide *Charter* claims under s. 52 because it had no power to determine "questions of law". In their view, while all administrative bodies must have the power to interpret and apply their own enabling statutes, this does not amount to a power to determine general questions of law and "[t]o decide otherwise would be to accept that all administrative bodies and tribunals are competent to question the constitutional validity of their enabling statutes".[217] Administrative bodies and tribunals are "creatures of statute; the will of the legislature as it appears therein must be

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denied any *Charter* rights or freedoms, the evidence shall be excluded (if admission would bring the administration of justice into disrepute). The majority considered the third step of the *Mills* test determinative, and concluded that the Board could not exclude evidence under s. 24(2) because the ability to exclude evidence would have been inconsistent with the intent and specific provisions of the Board's statutory scheme: *Ibid* at para 28. The dissent (Major J with McLachlin J), however, criticized the majority's implicit resurrection of the idea that only courts could be "courts of competent jurisdiction", and argued that the policy considerations underlying the Court's reasoning in the *Cuddy Chicks* trilogy applied equally in cases arising under s. 24: *Ibid* at para 64.

[215] *Weber*, *supra* note 210 at paras 20–21.

[216] *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854.

[217] *Ibid* at para 54. The *Cooper* case arose from a complaint by two airline pilots to the Canadian Human Rights Commission in which they claimed that that s. 15(c) of the Canadian Human Rights Act (which provided that no discrimination occurred if persons were retired at the "normal age of retirement" for employees in similar positions) violated the s. 15 of the *Charter*.

respected".[218] In the majority's view, the Commission's determination of its jurisdiction over a given complaint through reference to the provisions of the Act (including division of powers questions) "is conceptually different from subjecting the same provisions to *Charter* scrutiny [because the] former represents an application of Parliament's intent as reflected in the Act while the latter involves ignoring that intent".[219]

In his concurring opinion in *Cooper*, Lamer CJC urged the Court to abandon the principles set out in the *Cuddy Chicks* trilogy. Lamer CJC suggested that those decisions "stand in contradiction to two fundamental principles of the Canadian constitution — the separation of powers and Parliamentary democracy".[220] In his view, "as a matter of constitutional principle", the power to question legislation must be reserved for the courts and should not be "given over to bodies that are mere creatures of the legislature".[221] The courts must have exclusive jurisdiction over challenges to the constitutional validity of legislation,[222] and particularly the *Charter*, because:[223]

> [O]nly courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some

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[218] *Ibid*. The majority was influenced by beliefs that: the Commission lacked expertise with respect to questions of law; that any gain in efficiency would be lost through the inevitable judicial review of a tribunal's constitutional determinations; that the tribunals' loose evidentiary rules and lack of procedural safeguards were unsuited to constitutional litigation; and that dealing with constitutional matters would interfere with one of the Commission's aims (the efficient and timely adjudication of complaints): *Ibid* at paras 60–61.

[219] *Cooper*, *supra* note 216 at para 57. The Court suggested that Commission's role as an administrative and screening body, with no adjudicative role, is a clear indication that Parliament did not intend the Commission to have the power to consider questions of law: *Ibid* at para 58. However, the majority also extended this analysis to the Tribunal, stating that "logic demands that it has no ability to question the constitutional validity of a limiting provision of the Act": *Ibid* at para 67.

[220] *Cooper*, *supra* note 216 at para 28, Lamer CJC. He feared that, by giving administrative tribunals access to s. 52, those decisions "may have misunderstood and distorted the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system, even in the post-*Charter* era": *Ibid* at para 3.

[221] *Cooper*, *supra* note 216 at para 2 [emphasis in original].

[222] In Lamer CJC's view, s. 52 "can only be used by the courts of this country, because the task of declaring invalid legislation enacted by a democratically elected legislature is within the exclusive domain of the judiciary": *Ibid* at para 3.

[223] *Ibid* at para 13.

> circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task.

Furthermore, Lamer CJC argued, when tribunals refuse to apply their enabling legislation under s. 52 they are improperly exercising the role of the courts.[224] To give administrative tribunals jurisdiction over the *Charter* "invert[s] this hierarchical relationship" because instead of being subject to the laws of the legislature, the executive can defeat the laws of the legislature.[225]

In dissent, McLachlin J (as she then was, with L'Heureux-Dubé J concurring) asserted that citizens have the same right to expect that the *Charter* will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police, and when the state "sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the *Charter*".[226] McLachlin J pointed out that the *Constitution Act, 1982* "does not speak in terms of bodies possessing power to invalidate laws. Rather, it pronounces the laws invalid, to the extent of their inconsistency with the *Charter*."[227] Therefore, while a tribunal can do only that which its constituent statute empowers it to do, if the tribunal is empowered to decide questions of law, that power extends to *all* the law.[228] McLachlin J summarized the dissent's view as follows:[229]

> "[E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-

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[224] *Ibid* at para 19.
[225] *Ibid* at para 25. He stated: "Surely, a legislature intent on passing a constitutionally suspect law would not plant within that law the seeds of its own demise": *Ibid* at para 7.
[226] *Cooper*, *supra* note 216 at para 78.
[227] *Ibid* at para 83.
[228] Furthermore, absent an indication that the legislature intended to exclude *Charter* issues from the tribunal's purview, "the courts should not do so by judicial fiat": *Ibid* at para 81.
[229] *Ibid* at para 70. The dissent found that the Commission's power to consider questions of law could be inferred from the statutory scheme. In particular, the Commission would not be able to accomplish many of its duties (as assigned by the legislature) without the power to consider issues of law: *Ibid* at para 93. They therefore concluded that both the Commission and the tribunal are empowered to assess the constitutionality of provisions in their enabling statute.

> makers that touch the people must conform to it. … If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. … if Parliament confers on the tribunal the power to decide questions of law, that power must, in the absence of counter-indications, be taken to extend to the *Charter*, and to the question of whether the *Charter* renders portions of its enabling statute unconstitutional."

This conception, and openness to administrative actors interpreting and applying the *Charter*,[230] was picked up in *Nova Scotia (Workers' Compensation Board) v Martin* [*Martin*].[231]

In *Martin*, the (unanimous) Court expressly rejected the *Cooper* majority and concurring judgments and affirmed the principles emerging from the *Cuddy Chicks* trilogy and the *Cooper* dissent. Gonthier J, writing for a unanimous Court, expressly rejected Lamer CJC's views in *Cooper* and the ratio of the majority judgment.[232] The Court thus affirmed the main principles emerging from the *Cuddy Chicks* trilogy, and concluded that, subject to an express contrary intention, an administrative agency given statutory authority to consider questions of law arising under a legislative provision is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.[233] In coming to this conclusion, the Court explained that s. 52(1) provides that any law that is inconsistent with the Constitution is of no force and effect so, in principle, such a provision is invalid from the moment it is enacted.[234] All levels and branches of government have an obligation not to

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[230] Van Harten, Mullan & Heckman, *supra* note 161 at 896.
[231] *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 SCR 504.
[232] Particularly insofar as it distinguished between limited and general questions of law or that it suggested that an adjudicative function is a prerequisite for a tribunal's constitutional jurisdiction: *Ibid* at para 47.
[233] The relevant question is whether the empowering legislation grants the tribunal the jurisdiction to interpret or decide *any* question of law. The *Charter* is not invoked as a separate subject matter that the tribunal must be found to have "jurisdiction" over but rather is a controlling norm in decisions over matters within the tribunal's jurisdiction: *Ibid* at paras 35–39. This presumption is rebutted if the tribunal's enabling statute clearly demonstrates that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction: *Ibid* at paras 35–42. Applying this test in *Martin*, the Court concluded that the Workers' Compensation Board, as well as the Appeals Tribunal, had the jurisdiction to review the constitutional validity of its enabling statute, since both statutory bodies had authority to decide questions of law.
[234] *Martin*, *supra* note 231 at para 28.

apply invalid laws,[235] and Canadians should be entitled to assert their *Charter* rights and freedoms in the most accessible forum available, without the need for parallel proceedings before the courts.[236] Further, *Charter* disputes require a "thorough understanding of the objectives of the legislative scheme being challenged, as well as of the practical constraints it faces and the consequences of proposed constitutional remedies",[237] so administrative bodies' consideration of *Charter* issues allows courts to "benefit from a full record established by a specialized tribunal fully apprised of the policy and practical issues relevant to the *Charter* claim".[238] The Court also suggested that allowing administrative agencies to decide *Charter* issues does not undermine the role of the courts as "final arbiters of constitutionality in Canada" because administrative decisions on the *Charter* are subject to judicial review on a correctness standard.[239] The appropriateness of a correctness or reasonableness standard of review in the context of administrative decisions impacting on *Charter* guarantees was, however, a matter of some debate, as seen in the following cases.

### 2.3.2 Debate over a *Charter* or administrative law approach

#### 2.3.2.1 A move toward unity

In a string of cases from 1999 to 2003, the Court appeared to move away from the *Slaight* framework, and declined to undertake a *Charter* review despite arguments by the parties that the impugned administrative decision infringed the *Charter*. In *Baker v Canada (Minister of Citizenship and Immigration)* [*Baker*],[240] although the appellant raised *Charter* arguments, L'Heureux-Dubé J (for the majority) held that it was "unnecessary consider the

[235] He stated: "[T]he consistency of a provision with the Constitution is a question of law arising under that provision. It is, indeed, the most fundamental question of law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded": *Ibid*.
[236] *Ibid* at para 29.
[237] *Ibid* at para 30.
[238] *Ibid* at para 56. See also *Ibid* at para 30.
[239] *Martin*, *supra* note 231 at para 31.
[240] *Baker*, *supra* note 9.

various *Charter* issues" because "the issues raised can be resolved under the principles of administrative law and statutory interpretation".[241] The Court therefore adjudicated the appellant's claims solely by reference to common law principles.[242]

Similarly, in *Trinity Western University v British Columbia College of Teachers* [*Trinity Western*],[243] Iacobucci and Bastarache JJ (for the majority) adopted the appellant's description of the case as "really an administrative law case",[244] and therefore declined to follow the *Slaight* approach. Except for noting that the administrative law approach is "convenient",[245] the majority did not expand upon this refusal to review the College's decision under the *Charter* but appear to have been unconvinced that a *Charter* right was infringed.[246] The majority focused on the College's lack of expertise in relation to human rights matters in coming to the conclusion that they should apply a correctness standard of review,[247] and

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[241] *Ibid* at para 11. The Court did, however, note that "discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*": *Ibid* at para 56. The Court's failure to consider the *Charter* in this case potentially "short changed" the applicant: David Mullan, "Deference from Baker to Suresh and Beyond – Interpreting the Conflicting Signals" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) 21 at 35. While Mullan acknowledged that it could be said that the applicant's success compensated for this omission, he argued that the way in which the outcome was achieved was "troubling" in that it failed to answer whether the applicant's *Charter* rights were engaged.

[242] Iacobucci and Cory JJ dissented on the point of the effect of international law on the exercise of ministerial discretion but noted that, had the Court concluded that the appellant's claim fell within the ambit of rights protected by the *Charter*, the Court the presumption that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms: *Baker*, *supra* note 9 at para 81.

[243] *Trinity Western*, *supra* note 9. This case arose from the British Columbia College of Teachers' refusal to grant the Trinity Western University permission to assume full responsibility for its teacher-training program on the basis that the University was promoting a culture of discrimination. In particular, the University required faculty and students to sign a document that described homosexual behaviour as a "sexual sin": *Ibid* at paras 4–6.

[244] *Trinity Western*, *supra* note 9 at para 8.

[245] *Ibid*.

[246] *Ibid* at para 36. The Court did note that the College's decision involved determining the scope of freedom of religion and weighing that freedom against the right to equality; however, they did not review the decision under the *Charter*. The majority further noted that "[t]he issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system": *Ibid* at para 28. It is possible that issues of standing also influenced majorities in *Trinity Western* (and *Chamberlain*) to opt for review under admin law rather than the *Charter*: see Fox-Decent & Pless, *supra* note 6.

[247] In particular, the majority noted that: the College's expertise does not qualify it to interpret the scope of human rights nor to reconcile competing rights; the College relied on someone else's expertise (a legal opinion); the decision on discrimination was based on interpretation of documents and human rights values and principles, so was a question of law concerned with human rights and not essentially educational matters; and, the College is not particularly well equipped to determine the scope of freedom of religion and conscience and to weigh these

concluded the College had erred by not taking into account the impact of its decision on the right to freedom of religion.[248] In contrast, L'Heureux-Dubé J disagreed that the College lacked the necessary expertise,[249] and argued that the College's decision should be reviewed both on a patent unreasonableness standard and then under the *Charter*.[250]

Members of the Court diverged once again in their approach in *Chamberlain v Surrey School District No. 36* [*Chamberlain*],[251] disagreeing on the level of deference appropriate where the administrative agency was an elected body with some expertise (a school board) considering a question with a "human rights dimension". The majority held that the case "does not fall to be determined on the basis of the *Charter*",[252] and that the decision should be reviewed on a standard of reasonableness simpliciter.[253] In dissent, Gonthier and Bastarache JJ agreed that the case should be dealt with under an administrative law approach but expressed concern about the majority's assumption that courts possess greater expertise on all questions with a human rights component.[254] LeBel J took another approach again. In his view, the Board was authorized to make decisions not because it has any special expertise but

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rights against the right to equality in the context of a pluralistic society: *Trinity Western*, *supra* note 9 at paras 17–19.

[248] *Ibid* at para 43.

[249] L'Heureux Dubé J stated that it was "a misconception to characterize the [body's] decision as being a balancing or interpretation of human rights values, an exercise that is beyond the tribunal's expertise": *Ibid* at para 59.

[250] *Ibid* at para 51. After finding that the College's decision was not patently unreasonable (*Ibid* at para 91.), L'Heureux Dubé J undertook a *Charter* review and that there was no violation of s. 15 (110), and while finding a violation of s. 2(b), the College's decision is justified under s. 1: *Ibid* at para 93.

[251] *Chamberlain*, *supra* note 9. This case arose from a challenge to a resolution passed by the Surrey School Board refusing to authorize three books for classroom instruction on the ground that they depicted families in which both parents were the same sex.

[252] *Ibid* at para 73.

[253] In the majority's view, courts "are well placed to resolve human rights issues", and deference is not appropriate when the courts expertise equal to or better than that of the board relative to the particular human rights issue that is faced: *Ibid* at para 11. The majority concluded that the Board's decision not to approve the proposed books was unreasonable because the Board failed to act in accordance with the School Act: *Ibid* at para 73.

[254] *Chamberlain*, *supra* note 9 at para 143. However, they concluded that the Board's decision was reasonable as the decision was intra vires the Board under the School Act and was "clearly reasonable" and "respectful of ss. 2(a), 2(b) and 15 of the *Canadian Charter*": *Ibid* at para 76. In their view, the decision "reflects a constitutionally acceptable balance": *Ibid* at para 132.

because it represents the community,[255] and so the Board should be answerable to the community not to the courts.[256] Therefore, the Board's educational policy decisions, as long as they are made validly pursuant to its powers, should be entitled to a very high level of deference.[257]

A further case in which the Court undertook an administrative law review despite the clear relevance of the *Charter* was *Suresh v Canada (Minister of Citizenship and Immigration)* [*Suresh*].[258] While the (unanimous) Court recognized that the question of whether a refugee constitutes a danger to the security of Canada engages s. 7 of the *Charter*, the Court stated "it is our view that a deferential standard of ministerial review will not prevent human rights issues from being fully addressed, provided proper procedural safeguards are in place and provided that any decision to deport meets the constitutional requirements of the *Charter*".[259] In the Court's view, a deferential approach was appropriate because the Minister's decision in

[255] *Chamberlain*, *supra* note 9 at para 193. LeBel J stated that "both a school board and a municipality are unlike a legislature, which has plenary law-making power within the limits of the Constitution" (at para 196).
[256] LeBel J explained that it is important to keep the line dividing the role of a local government body from that of a reviewing court distinct, for it helps to maintain the separation between the judiciary and representative government. Courts should not be tempted to replace the decisions of such bodies with their own view of what is reasonable, or to "become unduly involved in the management of towns, cities and schools": *Ibid* at para 205.
[257] *Ibid* at para 201. LeBel J concluded, however, that the Board's decision was so clearly contrary to an obligation set out in its enabling statute that it was not just unreasonable but illegal: *Ibid* at para 189.
[258] *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3. This case involved a challenge to the Minister's decision that a Convention refugee detained on a security certificate constituted a danger to the security of Canada and should be deported, notwithstanding an acknowledgement that he would face a risk of torture upon his return to Sri Lanka. See also *Pinet*, *supra* note 9. In that case, Binnie J used a reasonableness standard to review a decision of the Ontario Review Board to return the appellant to a maximum-security hospital for compliance with s. 7 of the *Charter*. The Court observed that a reasonableness review best reflected "the expertise of the members appointed to Review Boards" (at para 22). The Court made clear that the liberty interest of the individual should be "a major preoccupation" of the Review Board, suggesting that the Court would be justified in intervening if the Board failed to take the s. 7 rights adequately into account in balancing the various considerations bearing upon its decision: see David Mullan, "Section 7 and Administrative Law Deference — No Room at the Inn?" (2006) 34 Sup Ct L Rev 227 at 247.
[259] *Suresh*, *supra* note 258 at para 32. Mr. Suresh also challenged the legislative provision granting the Minister the discretionary authority to deport but the Court concluded that the statute does not violate s. 7 of the *Charter*, so "[w]hat is at issue is not the legislation, but the Minister's obligation to exercise the discretion s. 53 confers in a constitutional manner": *Ibid* at para 79.

that context requires a fact-driven inquiry involving the weighing of various factors and possessing a "negligible legal dimension".[260]

Genevieve Cartier suggested that, following these cases, the public law branches of administrative law and constitutional law were moving towards unification.[261] She suggested that the approach taken in *Baker* undermines the hierarchical view of relationship between the *Charter* and administrative law set out in *Slaight* and *Ross*, and paved the way for a more unified and coordinated relationship. However, the Court did not consistently apply a unified approach,[262] and there existed the possibility of review under the *Charter* if the decision survived preliminary scrutiny under the administrative law approach (as L'Heureux-Dubé J did in *Trinity Western*).[263] The case of *Multani v Commission scolaire Marguerite-Bourgeoys* [*Multani*][264] provides an excellent illustration of the struggle within the Court about the appropriate analytical approach in cases involving administrative decisions that impact on *Charter* rights or freedoms.

#### 2.3.2.2 Pinnacle of the debate: *Multani*

In *Multani*, a majority of the Court applied a *Charter* analysis to a school board's decision to ban a student from wearing a religiously-significant dagger to school. The majority approach relied upon the purpose of the judicial review exercise before the Court,[265] holding

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[260] *Suresh*, *supra* note 258 at para 39. In balancing a variety of factors (including concerns of national security and fair process to the Convention refugee), however, the Minister must exercise his or her discretion in conformity with the values of the *Charter*: *Ibid* at para 106. In this case, the Minister's decision was unreasonable because Mr. Suresh was not provided with an adequate level of procedural protections. Regarding the relationship between s. 7 procedural protections and common law procedural fairness, the Court stated: "At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case": *Ibid* at para 114.

[261] Cartier, Geneviève, *supra* note 25 at 72–86. See above, Section 2.1.1 for an explanation what Cartier means by "unification".

[262] See, for example, *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [*Little Sisters*], [2000] 2 SCR 1120.

[263] See also cases in which the requested outcome was achieved through an administrative law review, so turning to the *Charter* was unnecessary: *Baker*, *supra* note 9; *Chamberlain*, *supra* note 9.

[264] *Multani*, *supra* note 7.

[265] See *Ibid* at paras 18–21.

that "the central issue in the instant case is best suited to a s. 1 analysis".[266] In contrast, Abella J (with Deschamps J) argued that an administrative analysis should be conducted because the Court was assessing an administrative decision rather than a rule or "norm of general application".[267] They proposed that the general principles of judicial review of administrative action should apply to all exercises of discretion, including those that engage *Charter* rights and freedoms. They cited two main reasons for this conclusion: first, the purpose of constitutional justification is to assess a norm of general application, so the *Charter* approach is "not easily transportable where what must be assessed is the validity of an administrative body's decision"; second, problems result from blurring the distinction between the principles of constitutional justification and the principles of administrative law, and retaining the distinction prevents the impairment of the analytical tools developed specifically for each of these fields.[268] LeBel J essentially agreed with the majority that a constitutional analysis was appropriate but proposed a revised *Oakes* test for cases involving administrative decisions.[269] He suggested that, when reviewing administrative decisions impacting on *Charter* guarantees, "[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed".[270] Despite the different approaches taken, however, all members of the Court concluded that the school board's decision was "null",[271] or "unreasonable".[272]

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[266] *Ibid* at para 31.
[267] *Ibid* at para 103, Deschamps and Abella JJ.
[268] *Ibid* at para 85.
[269] *Ibid* at paras 140–155.
[270] *Ibid* at para 155.
[271] *Ibid* at para 82.
[272] *Ibid* at para 99. Abella and Deschamps JJ concluded that the school board's decision was unreasonable because the board failed to take into consideration Multani's rights.

2.3.2.2.1 Institutional roles

In conducting the *Charter* review, the majority in *Multani* did not recognize any need for deference to the school board's decision in the administrative law sense. While acknowledging that the courts "must accord some leeway" to the decision-maker, and that the decision must come "within a range of reasonable alternatives",[273] the majority engaged in its own assessment of the evidence and arguments.[274] In contrast, Abella J explicitly recognized the school board's expertise, stating that "[w]here safety in the schools under its responsibility is concerned, the respondent school board unquestionably has greater expertise than does a court of law reviewing its decision".[275] She highlighted the changes in the Court's approach to review of administrative decisions, which "were meant to acknowledge the expertise and the specific nature of the work of administrative boards and should not be disregarded simply because a party argues that a constitutional justification analysis is instead appropriate".[276]

Abella J also highlighted problems she foresaw with the constitutional approach, in particular that administrative bodies, "like the courts", "cannot be treated as parties with an interest in a dispute".[277] She envisioned problems with placing the burden of proof onto administrative bodies, and with requiring an administrative body with quasi-judicial functions to adduce evidence to justify its decision under s. 1 "in light of the fact that it is supposed to be independent of the government".[278] Thus Abella J concluded that the same rules should not apply to the review of legislative action as to the review of the exercise of adjudicative authority.[279]

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[273] *Ibid* at paras 50–51.
[274] As Mullan says, "with not a whiff of deference or suggestion that there might be room for another opinion or assessment of the situation": Mullan, *supra* note 258 at 241.
[275] *Multani*, *supra* note 7 at para 96.
[276] *Ibid* at para 101.
[277] *Ibid* at para 123.
[278] *Ibid* at para 132.
[279] *Ibid*. The approach proposed by Abella and Deschamps JJ can be traced back to cases applying the *Slaight* principles to judicial discretion. For example, in *Dagenais*, where Lamer CJC (for the majority on this issue)

2.3.2.2.2 Discretion and the rule of law

In *Multani*, the majority held that a limit of a guaranteed right resulting from the decision maker's actions is "prescribed by law" within the meaning of s. 1 of the *Charter* when the delegated power is exercised in accordance with the enabling legislation. Charron J explained that any infringement of a guaranteed right that results from the decision maker's actions is also a limit "prescribed by law" within the meaning of s. 1 but when the delegated power is not exercised in accordance with the enabling legislation, that decision is not authorized by statute, so is not a limit "prescribed by law".[280]

Abella and Deschamps JJ disagreed with this reasoning, instead arguing that the expression "law" should not include the decisions of administrative bodies,[281] and advocating a distinction between general norms and individualized decisions. In their view, an administrative decision is not a law or regulation but rather "the result of a process provided for by statute and by the principles of administrative law in a given case" and "[e]stablishing a norm and resolving a dispute are not usually considered equivalent processes".[282] They suggested that the fact that justification of a limit under s. 1 of the *Charter* is based on the collective interest also suggests that the expression "law" should be limited to rules of general application.[283] They were concerned that, if administrative decisions were included in the concept of "law", it would be necessary in every case to begin by assessing the validity of the statutory or regulatory provision on which the decision is based.[284] Therefore, in their opinion, while a *Charter* analysis must be carried out when reviewing the validity or

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stated that a judge's discretion to order a publication ban was subject to the *Slaight* principle, and thus had to be "exercised within the boundaries set by the principles of the *Charter*": *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 875.

[280] *Multani*, *supra* note 7 at 22.

[281] *Ibid* at para 125. Leckey suggests that this debate cannot be understood without an appreciation of both the French and English language versions of s. 1: see Robert Leckey, "Prescribed by Law/Une Regle de Droit" (2007) 45 Osgoode Hall LJ 571.

[282] *Multani*, *supra* note 7 at para 112.

[283] *Ibid* at para 119.

[284] *Ibid* at para 118.

enforceability of a norm (such as a law or other rule of general application), the administrative law approach should be retained for administrative decisions.[285] In his concurring opinion, LeBel J raised concerns about the "norm-decision" duality preferred by Abella and Deschamps JJ, which he suggested underestimates the problems that arise in applying the classifications and "entails a risk of narrowing the scope of constitutional review of compliance with the *Canadian Charter* and its underlying values".[286]

2.3.2.2.3 Coherence of approach

The majority in *Multani* warned against allowing the fundamental values contained in the *Charter* to be reduced into "mere administrative law principles".[287] Charron J emphasized that the rights and freedoms guaranteed by the *Charter* "establish a minimum constitutional protection that must be taken into account by the legislature and by every person or body subject to the *Canadian Charter*", and the "role of constitutional law is therefore to define the scope of the protection of these rights and freedoms".[288] Furthermore, it is of little importance to an individual whose *Charter* rights or freedoms are infringed whether that infringement "derives from the actual wording of a normative rule or merely from the application of such a rule".[289] Therefore, the same requirements should apply to both laws and individualized decisions in order for them to be found to be constitutional.

Abella and Deschamps JJ disagreed that there is any advantage in adopting this "unified approach" to reviewing laws and administrative decisions.[290] Abella J asserted that, if an

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[285] *Ibid* at para 103. They were also concerned that administrative decision-makers would engage in "formalistic" analysis if their decisions were reviewed for compliance with the *Oakes* test: *Ibid* at para 120.
[286] *Multani*, *supra* note 7 at para 151.
[287] *Ibid* at para 16. The *Multani* majority approach can thus be seen as a rejection of the unity of public law thesis, which supports a substantive value-laden role for administrative law: Gratton & Sossin, *supra* note 5 at 157.
[288] *Multani*, *supra* note 7 at para 16.
[289] *Ibid* at para 21.
[290] *Ibid* at para 109. They stated that "it is difficult to imagine a decision that would be considered reasonable or correct even though it conflicted with constitutional values". This reference to "unified approach" does not refer to the "unity of public law" thesis (explained in Section 2.1.1) but rather to taking a unified or identical approach

administrative body makes a decision or order that conflicts with fundamental values, "the mechanisms of administrative law are readily available to meet the needs of individuals whose rights have been violated", by seeking to have the decision be quashed through a court declaration that it is unreasonable or incorrect.[291] In their view, the separate constitutional law and administrative law approaches are conceptually distinct,[292] and, if the constitutional law and administrative law approaches were not kept distinct, the "lack of coherence in the analysis can only be detrimental to the exercise of human rights".[293]

LeBel J, however, was of the view that the different legal methodologies raised by the case, while engaging "diverse legal concepts belonging to fields of law that are in principle separate", must form part of a coherent legal framework.[294] He suggested that it is not always necessary to resort to the *Charter* and it is better to begin by attempting to solve them by means of administrative law principles. However, when the context of a dispute makes a constitutional analysis "unavoidable", the courts should take a hybrid approach.[295] In his view, the flexibility in the way s. 1 of the *Charter* can be applied makes it possible to apply the *Charter* to a wide range of administrative acts without necessarily being confined by the norm-decision duality.[296] Accordingly, LeBel J suggested that when applying s. 1 of the *Charter* the analytical approach established in *Oakes* need not be followed in its entirety. In particular, it would be "pointless to review the objectives of the act" where the statutory

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when reviewing legislation and when reviewing administrative decisions. I note, however, that it is entirely possible to envision approaches to the review of legislation and administrative decisions that differ in methodology (such that there is not a "unified approach") but nonetheless draw upon the shared fundamental values that the unity of public law thesis posits underlie administrative and constitutional law.

[291] *Ibid* at para 128.

[292] *Ibid* at para 132. See below Section 4.1 for an exploration of this concern.

[293] *Ibid* at para 134. Abella J also raised concerns that requiring that decisions of administrative bodies be justifiable under the *Oakes* test distracts the reviewing court from the objective of the analysis, which relates to the substance of the decision and consists of determining whether it is correct or reasonable in light of the statute, its purposes and context: *Ibid* at para 120.

[294] *Multani*, *supra* note 7 at para 141.

[295] *Ibid* at para 144.

[296] *Ibid* at para 151.

authority for the decision is not itself challenged, so the issue "becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed".[297] Noting that the burden of proving the rights infringement is justified lies with the respondent school board, LeBel J concluded that the school board had not shown that its prohibition was justified.

### 2.3.3 Increasing coherence?

Since *Multani*, and prior to *Doré*, the Court did not confront the debate about the appropriate method of review for administrative decisions that impact on *Charter* guarantees. For example, in *Lake v Canada (Minister of Justice)* [*Lake*],[298] the (unanimous) Court undertook an administrative law review despite the appellant's argument that the Minister's decision to extradite him would unjustifiably infringe on his rights under s. 6(1) of the *Charter*. The Court rejected the suggestion that the decision as to whether surrender would unjustifiably infringe an individual's *Charter* rights is fundamentally a legal matter and therefore should be subject to judicial review on a correctness standard.[299] The Court held that, in the extradition context:[300]

> Whereas the Minister's discretion must be exercised in accordance with the *Charter*, his assessment of any *Charter* infringement that could result from ordering an individual's surrender is closely intertwined with his responsibility to ensure that Canada fulfills its international obligations. … the Minister's assessment of whether the infringement of s. 6(1) is justified rests largely on his decision whether Canada should defer to the interests of the requesting state. This is largely a political decision, not a legal one.

The reviewing court thus owes deference to the Minister's decision, "including the Minister's assessment of the individual's *Charter* rights".[301] The Minister must apply the proper legal

[297] *Ibid* at para 155.
[298] *Lake*, *supra* note 9.
[299] *Ibid* at para 39.
[300] *Ibid* at para 37.
[301] *Ibid* at para 49.

principles and carry out the proper analysis,[302] but the decision should be upheld unless it is "unreasonable".[303] The court must determine whether the Minister's decision falls within a range of reasonable outcomes but must not re-weigh the relevant factors and substitute its own view.[304] The Court asserted that this approach "does not minimize the protection afforded by the *Charter*", but rather reflects that the assessment is primarily a fact-based balancing test that the Minister is in the best position to carry out.[305] However, the Court was clear that the Minister's "discretion will be interfered with in only the clearest of cases, such as where there is evidence of bad faith or improper motives".[306]

In *Canada (Prime Minister) v Khadr* [*Khadr*],[307] the Court also adopted an administrative reasonableness review, expressing the need to respect the separation of powers. While finding that Mr. Khadr's s. 7 rights were being breached on an ongoing basis,[308] the Court held that the decision not to request Mr. Khadr's repatriation was "made in the exercise of the prerogative over foreign relations",[309] and therefore courts had only a limited power to review this exercise of the prerogative power for constitutionality.[310] Therefore, in light of "the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations", the Court concluded that the proper remedy for the breach of Mr. Khadr's

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[302] *Ibid* at para 41.
[303] *Ibid* at para 49.
[304] *Ibid* at para 41. The court must determine whether the Minister carried out the proper analysis, considered the relevant facts, and reached a defensible conclusion on those facts: *Ibid*.
[305] *Lake*, *supra* note 9 at para 41.
[306] *Ibid* at para 30.
[307] *Khadr*, *supra* note 65. This case considered the Prime Minister's decision not to request Mr. Khadr's repatriation from the United States military base at Guantanamo Bay.
[308] *Ibid* at para 30.
[309] *Ibid* at para 35.
[310] *Ibid* at paras 35–37. The Court stated at para 37: "judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options [and] it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken."

rights was to grant a declaration that his *Charter* rights have been infringed, "while leaving the government a measure of discretion in deciding how best to respond".[311]

However, the Court has not consistently conducted an administrative law review in the post-*Multani* cases raising *Charter* and administrative law issues. For example, in *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component* [*Vancouver Transit*],[312] the Court distinguished between discretionary decisions and "law", finding that transit authorities' policies were "law" for the purposes of s. 1 of the *Charter*.[313] On this basis, the Court conducted a *Charter* review of the policies.

In the 2011 decision of *Canada (Attorney General) v PHS Community Services Society* [*Canada v PHS*],[314] the Court also undertook a *Charter* analysis of a discretionary decision. In that case, the applicants argued that the criminal prohibition of possession was, in its application to Insite (a safe injection site), an infringement of s. 7 of the *Charter*.[315] The Court held that the legislation itself did not infringe s. 7. The Court held that the legislation did infringe upon the "liberty" of the staff and patients of the clinic, as well as the "life" and "security of the person" of Insite's clients. However the legislation itself was not in breach of s. 7 as it conformed with the principles of fundamental justice because the Minister has the power to grant exemptions to the application of that legislation and this discretion to grant an

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[311] *Ibid* at para 2. In deciding that the proper remedy was to "leave it to the government to decide how best to respond to this judgment in light of current information, its responsibility for foreign affairs, and in conformity with the *Charter*" (*Ibid* at para 39), the Court highlighted "the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive": *Ibid* at para 46.

[312] *Vancouver Transit*, *supra* note 7. This case arose from the decision of the Greater Vancouver Transportation Authority and British Columbia Transit (the "transit authorities") refusing to post the respondents' political advertisements on the sides of buses on the basis that their advertising policies permitted commercial but not political advertising. The respondents argued that this violated their right to freedom of expression (guaranteed by s. 2(b) of the *Charter*).

[313] *Ibid* at para 58.

[314] *Canada v PHS*, *supra* note 105. The Minister of Health had refused to grant an exemption (by his discretionary authority under the *Controlled Drugs and Substances Act,* SC 1996, c 19, s. 56) to a Vancouver safe injection site from federal laws prohibiting possession and trafficking of drugs.

[315] Section 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice": *Charter*, *supra* note 1 at s 7.

exemption "acts as a safety valve that prevents [the legislation] applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects".[316] However, the Minister of Health's decision to deny Insite an exemption to the legislation was in breach of s. 7. The Court held that the Minister's decision was a denial of the principles of fundamental justice because it disregarded the evidence that Insite had saved lives and prevented injury and disease,[317] without any countervailing adverse effects on public safety (or anything else). The effect of the Minister's decision (the closure of Insite) was "grossly disproportionate" to any state interest in maintaining an absolute prohibition of possession of illegal drugs on Insite's premises. The Minister's decision was also "arbitrary, undermining the very purposes of [the Act], which include public health and safety".[318] The Court noted that the Minister was obliged to exercise his discretion under s. 56 in compliance with s. 7, and had failed to do so. In reviewing the Minister's decision for compliance with s. 7 of the *Charter*, the Court made no reference to showing the Minister any deference.

### 2.3.4 A merging of "universes": *Conway*

In the 2010 case of *R v Conway* [*Conway*],[319] the Court sought to resolve the diverging approaches evident in the Court's jurisprudence on administrative bodies' jurisdiction to decide *Charter* issues. The Court historically applied different tests to determine whether a tribunal had jurisdiction under s. 24 of the *Charter* compared to jurisdiction under s. 52 of the *Constitution Act, 1982*.[320] In *Conway*, the Court "merged" these tests. Abella J (for the Court) traced the history the three *Charter*/administrative law "jurisprudential waves",[321] pointing out

[316] *Canada v PHS*, *supra* note 105 at para 114.
[317] The Minister was of the view that the scientific evidence with respect to Insite's effectiveness was mixed and that it was "a failure of public policy": *Ibid* at para 122. The Court disagreed, pointing to the trial judge's findings indicating that Insite in fact furthers the legislative objectives of public health and safety.
[318] See *Ibid* at para 116–140.
[319] *R v Conway*, 2010 SCC 22.
[320] These tests are outlined in Section 2.3.1.
[321] That is, those cases considering administrative bodies' jurisdiction under s. 24(1), jurisdiction under s. 52, and

that the jurisprudence has confined constitutional issues relating to administrative tribunals to "three discrete universes".[322] She suggested that, "after 25 years of parallel evolution, it is time to consider whether the universes can appropriately be merged".[323] Abella J suggested that the cases "show how the Court increasingly came to expand the application of the *Charter* in the administrative sphere".[324] Furthermore, the jurisprudence "has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals".[325] Bifurcating claims is undesirable because it would be "inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction", and would deny early access to remedies for *Charter* violations.[326]

In light of this evolution, the Court concluded that it was no longer helpful to limit the inquiry to whether a tribunal is a court of competent jurisdiction only for the purposes of a particular remedy: the question should be "institutional".[327] The Court therefore "merged" the jurisdictional tests such that administrative tribunals with the authority to decide questions of law (and whose constitutional jurisdiction has not been clearly withdrawn) have the corresponding authority and duty to consider and apply the *Charter* when answering legal questions on matters properly before them.[328] This jurisdiction does not, however, expand the

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the application of the *Charter* to discretionary decisions.
[322] *Conway*, *supra* note 319 at para 7.
[323] *Ibid*.
[324] *Ibid* at paras 23, 41. The Court explained that this "jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*": *Ibid* at para 21.
[325] *Conway*, *supra* note 319 at para 79.
[326] *Ibid*.
[327] *Ibid* at para 22.
[328] *Ibid* at paras 77–78, 81. This applies to both s. 52 and s. 24(1): *Ibid* at para 80. This approach is not without

range of remedies the tribunal can award, so the second question is whether the tribunal can grant the remedy sought given the relevant statutory scheme.[329] It is against this background that the Court issued the *Doré* decision.

### 2.4 Conclusion

It was in the context of the push for coherency in *Conway*, and the divergence within the Court on the approach to reviewing administrative decisions for compliance with the *Charter*, that the Court considered the *Doré* case. As noted in the above historical overview of the relationship between administrative law and the *Charter*, tensions inherent in the relationship between administrative law and the *Charter* have caused the Court to diverge on the extent of administrative bodies jurisdiction under s. 24 and s. 52, and how the *Charter* applies to administrative decisions.

In terms of the relationship between administrative bodies and the constitution, the Court has moved toward an approach to the jurisdiction of administrative tribunals that affirms deference as respect. However, the Court has vacillated in its approach to the relationship between administrative law and constitutional law, struggling to employ a methodology that achieves conceptual harmony and coherence between the two branches of public law. A core group of scholars have commented on the issue of the method the courts should employ in reviewing administrative decisions that infringe constitutional rights. Many of these scholars

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critics; for example, Macklin suggests that authority to determine questions of law seems a tenuous hook upon which to hang *Charter* jurisdiction: Audrey Macklin, "The State of Law's Borders and the Law of States' Borders" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) 173 at 186. See also Christopher D Bredt & Ewa Krajewska, "R. v. Conway: UnChartered Territory for Administrative Tribunals" (2011) 54 Sup Ct L Rev, online: <http://pi.library.yorku.ca/ojs/index.php/sclr/article/view/34642>.

[329] This requires a determination of legislative intent as to "whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal": *Conway*, *supra* note 319 at para 82. In this regard, the Court drew on its unanimous decision on the issue of administrative agency jurisdiction over s. 24 remedies in *Dunedin*, *supra* note 66. In that case the Court held that the third branch of the *Mills* test is determined by looking to the function and structure of the tribunal: *Ibid* at para 75.

have advocated for greater harmony between administrative law and constitutional law,[330] generally arguing that the courts should not bypass administrative law.[331] The Court thus relied on the "consistently critical" academic commentary following *Multani* in order to justify the approach taken in *Doré* (the "*Doré* approach).[332] The following chapter explores the Court's rationale for adopting this approach.

[330] Cartier, Geneviève, *supra* note 25 at 63.
[331] See J M Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall LJ 51 at 73; Cartier, Geneviève, *supra* note 25; David Mullan, "Administrative Tribunals and Judicial Review of Charter Issues After Multani" (2006) 21 NJCL 127 at 145. However, others have advocated for a *Charter* approach: see, e.g. Gratton, *supra* note 41.
[332] *Doré*, *supra* note 11 at para 33. Citing Gratton & Sossin, *supra* note 5 at 157; Mullan, *supra* note 331.

# 3 THE *DORÉ* APPROACH

In this chapter, I will explore the approach taken in *Doré* to the judicial review of administrative decisions that impact on *Charter* guarantees (the "*Doré* approach"), focusing on the Court's rationale for adopting this approach and the guidance the Court provides on the form of proportionality analysis to be applied to administrative decisions. I analyze the *Doré* approach with reference to existing doctrine used by the Court to determine compliance of legislation with the *Charter* and in the *Charter*'s application to the common law, which may be seen as variations of a proportionality analysis. I then offer some conclusions about what the *Doré* approach requires of reviewing courts.

## 3.1 Case history

The facts of the *Doré* case are set out in the Introduction to this thesis. In brief, Mr. Doré wrote a letter to a judge (Boilard J), in which he insulted the judge.[333] Boilard J filed a complaint against Mr. Doré with the Barreau du Québec alleging that Mr. Doré had acted in breach of art. 2.03 of the *Code of Ethics of Advocates*, which directed that the conduct of lawyers "must bear the stamp of objectivity, moderation and dignity".[334] The Disciplinary Council of the Barreau found that the letter was likely to offend, rude and insulting,[335] and that the judge's conduct (which had led to a reprimand from the Canadian Judicial Council) could not be relied on as justification for Mr. Doré's actions.[336] The Disciplinary Council rejected Mr. Doré's argument that art. 2.03 violated s. 2(b) of the *Charter*. While acknowledging that the provision infringed on freedom of expression, the Council found that the limitation on

[333] Including calling the judge: "loathsome", "arrogant" and "fundamentally unjust", accusing him of "hiding behind his status like a coward", "having a chronic inability to master any social skills", being "pedantic, aggressive and petty", and having a propensity to use his court to "launch ugly, vulgar and mean personal attacks": see *Doré*, *supra* note 11 at para 10.
[334] *Code of Ethics*, *supra* note 16, art 2.03.
[335] *Bernard c Doré*, 2006 CanLII 53416 (Barreau du Québec, Disciplinary Committee) (available on http://www.canlii.org/fr/qc/qccdbq/doc/2006/2006canlii53416/2006canlii53416.html) at para 58.
[336] *Ibid* at paras 64–77.

freedom of expression is "entirely reasonable, even necessary, in the Canadian legal system, where lawyers and judges must work together in the interest of justice".[337] While the rules may be seen as restrictions imposed on lawyers in comparison to the freedom enjoyed by other Canadian citizens, the restrictions are imposed in exchange for "the privileges conferred on lawyers as members of an 'exclusive profession'".[338] The Disciplinary Council, taking into consideration the seriousness of Mr. Doré's conduct and his failure to show remorse (and therefore the potential for similar conduct in the future), reprimanded Mr. Doré and suspended his ability to practise law for 21 days.[339]

Mr. Doré appealed the Disciplinary Council's decisions to the Tribunal des professions (the Tribunal) on several grounds.[340] He did not challenge the constitutionality of art. 2.03 but rather argued that the manner in which the relevant legislation was applied by the Council was unconstitutional because his comments were protected by s. 2(b) of the *Charter*; in other words he appealed the Council decision on the basis that the *decision* violated his freedom of expression. The Tribunal des professions upheld the Council's decision. The Tribunal classified the Council's decision on whether Mr. Doré's *Charter* right to freedom of expression was justifiably limited as one of law that, according to the *Multani* majority judgment, must be subjected to a constitutional analysis.[341] However, citing LeBel J's judgment in *Multani*,[342] the Tribunal held that a full *Oakes* analysis under s. 1 of the *Charter* was inappropriate where a decision was judicial in nature and only applied to one person, and "[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the

[337] *Ibid* at para 88.
[338] *Ibid* at paras 109–110.
[339] *Bernard c Doré (Penalty Decision)*, *supra* note 18 at paras 148–170.
[340] See *Doré c Avocats (Ordre professionnel des)*, 2007 QCTP 152 (Tribunal des Professions) (available on www.canlii.org/fr/qc/qctp/doc/2007/2007qctp152/2007qctp152.html).
[341] *Ibid* at paras 21–22, 28.
[342] *Multani*, *supra* note 7 at para 155.

guaranteed right".[343] In the circumstances, the Tribunal found that the Council's decision to sanction Mr. Doré was a minimal restriction on freedom of expression.[344] Though the Tribunal noted that the penalty imposed by the Council of suspension "seems harsh",[345] it held that the penalty was not unreasonable, given the gravity of Mr. Doré's conduct and his lack of remorse.[346]

On appeal, the Superior Court of Québec upheld the constitutionality of the disciplinary body's decision and the 21-day suspension.[347] The Superior Court found the Tribunal had "implicitly" held that the restriction was "justified in a free and democratic society",[348] and concluded that the Tribunal's reasoning was "unassailable" and therefore "reasonable and correct".[349]

The Québec Court of Appeal also upheld the suspension, concluding that, while Mr. Doré's right to free expression had been violated, the breach was minimal and could be justified in light of the professional body's obligation to protect the public interest, including the integrity of its judiciary.[350] The Court of Appeal applied a full s. 1 analysis, albeit in the context of its finding that Mr. Doré's letter had "limited importance . . . compared to the values underlying freedom of expression, which are the pursuit of truth, participation in the community, individual self-fulfillment, and human flourishing".[351] The Court of Appeal held that protecting the public and the maintenance of the integrity of the legal system are important objectives, particularly given that lawyers play an important role in the preservation

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[343] *Doré c Avocats (Ordre professionnel des)*, *supra* note 340 at para 69.
[344] *Ibid* at para 76.
[345] *Ibid* at para 123.
[346] *Ibid* at para 135. The Tribunal characterized the Council's decision on penalty as requiring the application of the reasonableness standard: *Ibid* at para 31.
[347] *Doré c Tribunal des professions*, 2008 QCCS 2450 (available on http://www.canlii.org/fr/qc/qccs/doc/2008/2008qccs2450/2008qccs2450.html).
[348] *Ibid* at para 104.
[349] *Ibid* at paras 105 and 149.
[350] *Doré v Bernard*, 2010 QCCA 24 (available on http://www.canlii.org/en/qc/qcca/doc/2010/2010qcca24/2010qcca24.html).
[351] *Ibid* at para 36.

of the integrity of the system of justice.[352] The Disciplinary Council's decision had a rational connection with that objective, especially given the importance of a judge's position in the judicial system.[353] On minimal impairment, assessing both the decision and the sanction, the Court of Appeal held that both were "measured" and, while the sanction was "significant", it was not unreasonable.[354] The Court of Appeal concluded by finding that the effects of the decision on freedom of expression are proportional to the objective of the protection of the public and the maintenance of the integrity of the legal system.[355] In the Court of Appeal's view, the infringement was justifiable, as it "sanctions behaviour that is nothing more than insulting, but it does not restrict, any more than necessary, the appellant's freedom of expression as a member of a professional order".[356]

Having already served his 21-day suspension, Mr. Doré did not appeal this penalty to the Supreme Court. Instead, he focused on whether the Barreau du Québec had given sufficient weight to his freedom of expression.

### 3.2 Supreme Court: administrative law or *Charter* approach?

In the Supreme Court's decision, the Court noted that there was "some confusion about the appropriate framework to be applied in reviewing administrative decisions for compliance with *Charter* values".[357] As outlined in Chapter 2, some courts used the same s. 1 *Oakes* analysis used for determining whether a law complies with the *Charter*, others used an administrative law approach, and still others used a modified *Oakes* analysis. As the Court put it in *Doré*, the courts have explored different ways of reviewing the constitutionality of

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[352] *Ibid* at para 41.
[353] *Ibid* at paras 44–46.
[354] "The impugned decision appears to be measured and, in the present case, is a correct application of section 2.03 of the *Code of ethics*. The sanction is significant (suspension of the right to practice for twenty-one days). It also involves the stigma attached to disciplinary guilt. It is not, however, unreasonable. In my view, it is a measured sanction of a lawyer who has been found guilty of a serious ethical offence.": *Ibid* at para 47.
[355] *Ibid* at para 50.
[356] *Ibid* at para 51.
[357] *Doré*, *supra* note 11 at para 23.

administrative decisions, "vacillating between the values-based approach in *Baker* and the more formalistic template in *Slaight*".[358] With the *Doré* decision, the Court has attempted to resolve the longstanding debate about the appropriate methodological approach to judicial review of administrative decisions for compliance with the *Charter*.[359] Judging from the content and tone of the judgment in *Doré*, and the length of time the decision was under reserve,[360] addressing this issue did not prove a particularly easy task for the Court.

After canvassing the problems associated with applying the *Oakes* test to discretionary decisions, the unanimous Court concluded that it was possible to reconcile the "administrative" and "constitutional" regimes by using an administrative law approach that recognizes statutory discretion must be exercised in accordance with *Charter* protections. This approach ("the *Doré* approach") requires that, when considering *Charter* values in the exercise of statutory discretion, an administrative decision-maker must ask how the *Charter* value at issue will best be protected in light of the statutory objectives, and "balance the severity of the interference of the *Charter* protection with the statutory objectives".[361] On judicial review, the fact that *Charter* interests are implicated does not argue for a different standard of review than would otherwise apply (in this case, reasonableness), and the principles set out in the *Dunsmuir* case should be applied to determine the appropriate standard of review.[362] When reviewing a discretionary decision that impacts on *Charter* guarantees, the court must assess whether the decision reflects a proportionate balancing of the *Charter* rights and values at play, and the decision will be found to be reasonable if the decision-maker "has properly balanced the relevant *Charter* value with the statutory

[358] *Ibid* at para 31. Referencing *Baker*, *supra* note 9; *Slaight*, *supra* note 7.
[359] Fox-Decent & Pless, *supra* note 6 at 423.
[360] The Supreme Court heard Mr. Doré's appeal on January 26, 2011 yet did not release its decision until March 22, 2012.
[361] *Doré*, *supra* note 11 at para 56.
[362] *Ibid* at para 57. Which, for disciplinary decisions, is reasonableness: *Ibid* at paras 52–56.

objectives".[363] The nature of the balancing exercise required of administrative decision-makers, and the proportionality analysis conducted on judicial review, is explored further below in Section 3.4.

### 3.3 Rationale for choosing the administrative law approach

In this Part, I explore the Court's preference for the administrative law approach, and the shift from its earlier preference in *Slaight* for the *Charter* approach. To justify the shift in approach, the Court suggests that there is now "a completely revised relationship between the *Charter*, the courts, and administrative law than the one first encountered in *Slaight*".[364] The Court cited three key interrelated reasons for its preference for the administrative law approach.

First, the Court argued that this approach would open "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship".[365] Secondly, the Court proposed that *Charter* analysis is "poorly suited" to review of discretionary decisions, in particular because there are issues with conceptualizing and applying the *Oakes* test to administrative decisions and because difficulties arise from the "prescribed by law" requirement in the context of administrative decisions. Thirdly, the Court suggested that a deferential approach to review of administrative decisions is appropriate, particularly when *Charter* values are applied in relation to a particular set of facts.[366] In the next sections, I explore each of these reasons and offer some conclusions on the Court's conception of the "revised relationship" between administrative law and the *Charter*.

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[363] *Doré*, *supra* note 11 at para 58.
[364] *Ibid* at para 30.
[365] *Ibid* at para 35. Quoting Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Lorne Mitchell Sossin & Colleen M Flood, eds, *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2008) 77 at 100.
[366] *Doré*, *supra* note 11 at para 37. See *Dunsmuir*, *supra* note 10; *Suresh*, *supra* note 258.

### 3.3.1 Institutional dialogue

#### 3.3.1.1 Dialogue theory

In Canada, the concept of judicial review as part of an institutional dialogue has its origins in Peter Hogg and Allison Bushell's "dialogue theory",[367] which provides an explanation of the relationship between the courts and the legislature in the context of judicial review under the *Charter*. Dialogue theory has been adopted by the Supreme Court as an explanation for and justification of judicial review under the *Charter*,[368] and to describe the relationship among the legislative, executive, and judicial branches of governance.[369] Dialogue is said to occur through the process of judicial review of legislation, particularly the process whereby the legislature may respond by enacting a new, less rights-intrusive law following a judicial decision striking down legislation on *Charter* grounds.[370] This dialogue is seen as being enhanced by the courts' approach in requiring government justification for limits on rights under s. 1 of the *Charter* (the *Oakes* test),[371] as the courts' articulation of the way in which the rights-limiting measure failed (that is, at which step) will allow the legislature to

[367] Peter W Hogg & Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35 Osgoode Hall LJ 75.

[368] See Hogg, Thornton & Wright, *supra* note 47 at 5. Originally conceived of as an answer to the anti-majoritarian objection to judicial review (Hogg & Bushell, *supra* note 367 at 105.), the Court has also used dialogue theory to justify judicial review and in considering whether to "read down" an unconstitutional statute, guide remedial discretion, and inform judicial discretion in "second look" cases (see Hogg, Thornton & Wright, *supra* note 47 at 9–25.) In *Charter* jurisprudence, institutional dialogue refers to a set of linked problems: the scope and resulting legitimacy of judicial review; the preferred approach to interpretation in public law; the place of the courts in the doctrine of the separation of powers (or "deference" to the legislature); and, institutional routes to obtaining government accountability: Liston, *supra* note 160 at 78.

[369] See for example, *Vriend*, *supra* note 140; *M v H*, [1999] 2 SCR 3; *R v Mills*, [1999] 3 SCR 668; *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559; *Sauvé v Canada (Chief Electoral Officer)*, [2002] 2 SCR 519. The Court has described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect: *Vriend*, *supra* note 140 at paras 136–142.

[370] Roach, *supra* note 82 at 359. The concept of dialogue purports to describe the process by which judicial review constitutes the "beginning of a dialogue as to how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole": Hogg & Bushell, *supra* note 367 at 105. Other dialogue scholars, such as Kent Roach, see dialogue as "an interchange ... between judges and legislators in which the former focus on rights and the latter are allowed to explain why they believe it is necessary to limit rights in the circumstances": Kent Roach, "Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience" (2004) 40 Tex Int'l LJ 537 at 543.

[371] The s. 1 "*Oakes* test" requires that any limit on a right is in pursuit of a sufficiently important objective, is rationally connected to the objective, minimally impairs the right, and does not have disproportionate effect: *Oakes*, *supra* note 8 at 138–139.

implement a new measure that is less rights-invasive.[372] Clearly articulated and specific judicial reasoning may thus facilitate a constitutional "dialogue".[373]

While institutional dialogue has generally been used to describe the relationship between the judicial and legislative branches of government,[374] dialogue theory emerged from a legal process tradition that situates the judicial role in an ongoing collaborative enterprise of democratic governance involving the three branches of governance, and the people.[375] Mary Liston has thus advocated for a conception of institutional dialogue that refers to the system of relationships or practices among all participants in the Canadian constitutional order that seeks to minimize legislative, judicial and executive arbitrariness in order to protect the rule of law in a democratic society.[376] One aspect of this institutional dialogue is the relationship between the judiciary and the administrative state, as it plays out in administrative law.

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[372] Hogg, *supra* note 2 at 36.5; Barak, *supra* note 70 at 465–467. For example, in *Canada (Attorney General) v JTI-Macdonald Corp.*, [2007] 2 SCR 610, the Court reviewed legislation restricting the advertising of tobacco products, which was designed to achieve the same purpose as an earlier Act that had been struck down by the Court for not satisfying the minimal impairment test.

[373] See Hogg & Bushell, *supra* note 367; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "A Reply on Charter Dialogue Revisited" (2007) 45 Osgoode Hall LJ 193 at 194.

[374] See *Vriend*, *supra* note 140; *M v H*, *supra* note 369; *R v Mills*, *supra* note 369; *Bell ExpressVu*, *supra* note 369; *Sauvé*, *supra* note 369.

[375] See Lon L Fuller, *The Morality of Law*, Revised ed (New Haven: Yale U.P, 1969) at 192; Kent Roach, "A Dialogue about Principle and a Principled Dialogue: Justice Iacobucci's Substantive Approach to Dialogue" (2007) 57 U Toronto LJ 449 at 455. For a dialogic model of administrative discretion conceived through the metaphor of a dialogue between individuals and the state, with judicial review promoting a process of communication between the decision maker and the individual concerned, see Genevieve Cartier, "Administrative Discretion and the Spirit of Legality: From Theory to Practice" (2009) 24 CJLS 313 at 321; Cartier, *supra* note 162 at 404–405.

[376] Liston, *supra* note 160 at 18, 21, 75. Liston suggests that there are four dimensions of institutional dialogue that occur among participants in the Canadian constitutional order. First, horizontal dialogue occurs among co-equal branches of government: the legislature, the executive, and the judiciary. Second, horizontal dialogue also takes place among co-equal partners in the constitutional order: federal and provincial governments, the Crown, and Aboriginal peoples. Third, vertical dialogue occurs among superior and subordinate bodies in the constitutional order such as between the judiciary and the bureaucracy. Fourth, citizens and the state engage in vertical dialogue through a variety of institutional processes, including public law litigation. See also Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall LJ 169 at 188–189; Genevieve Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (or: from Theology to Secularization)" (2005) 55 UTLJ 629.

#### 3.3.1.2 Dialogue in administrative Law

Historically, the courts' stance toward administrative agencies has been negative: to limit, reign in, supervise, oversee and constrain.[377] Courts have struggled to find a standard of review that balances the underlying tension between the rule of law (requiring that state action be grounded in law) and respect for the foundational democratic principle of legislative supremacy.[378] The Diceyan model of administrative state ordering informed the traditional approach to judicial review of administrative action, whereby the legislature is the proper source of the laws conferring authority on the administrative decision-makers, and the judicial role is to ensure administrative decision-makers remain within the limits of the law.[379] However, this model no longer explains the judiciary's dominant approach to review of administrative action.[380] As outlined above (see Section 1.2.1), a new approach has emerged, characterized by a focus on respectful deference to administrative decision-makers' expertise.[381] As Liston has put it, the relationship of courts to other branches "aspires to a kind of respectful deference (where merited) characterized by an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship".[382] This characterization was picked up in *Doré*, when the Court stated (quoting Liston): "[i]ntegrating *Charter* values into the administrative approach, and recognizing the

[377] Flood & Dolling, *supra* note 23 at 23.
[378] As articulated in *Dunsmuir*, courts "must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures": *Dunsmuir*, *supra* note 10 at para 27.
[379] See Liston, *supra* note 23 at 43–44, 49; Wildeman, *supra* note 23 at 326.
[380] Wildeman, *supra* note 23 at 331. Some judges do, however, take a more formalist vision of the separation of powers: see, for example, *Alberta Teachers' Association*, *supra* note 43 at paras 90–104, Cromwell J.
[381] The approach can be traced back to *C.U.P.E. v N.B. Liquor Corporation*, [1979] 2 SCR 227, which marked a significant turning point in the approach of courts to judicial review, and "transformed the conceptual basis of substantive review through a reformulation of the institutional relationship between courts and the administrative state": see Macklin, *supra* note 3 at 288.
[382] Liston, *supra* note 365 at 100 (references omitted).

expertise of these decisionmakers, opens an 'institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship'".[383]

The institutional dialogue approach views the judicial role in reviewing administrative decisions as part of a public justification project shared among the legislative, judicial and executive/administrative branches of government (rather than as judges patrolling the legal limits of administrative action).[384] As outlined in Section 1.2.1, this model of constitutional ordering requires that all three branches of government participate in working out the legal norms governing the exercise of state power.[385] This conception of the separation of powers suggests that the courts, the legislature, the executive, international actors and parties who challenge administrative decisions all have an important role to play in the determination of the values or principles considered fundamental to the social, political and legal order.[386]

"Institutional dialogue" in administrative law encompasses these ideas in describing the relationship between the legislature, administrative agencies and the courts. A reviewing court concerned about dialogue will therefore demonstrate respect for the legitimacy and expertise of the administrative decision-maker (deference as respect); recognize that more than one reasonable interpretation or decision may exist; uphold the rule of law by ensuring that state action is justified in accordance with the law; and show an awareness of the ability of the other branches of government to take action in response to a judicial decision.

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[383] *Doré*, *supra* note 11 at para 35. Quoting Liston, *supra* note 365 at 100.
[384] Wildeman, *supra* note 23 at 325. See also Liston, *supra* note 160 at 16–17.
[385] Dyzenhaus, *supra* note 46 at 487–489. Further, this model reflects an understanding of administrative decision-makers as able to contribute to the shared work of determining the values and policy objectives of administrative regimes: Wildeman, *supra* note 23 at 331.
[386] Dyzenhaus, *supra* note 46 at 451, 453 and 501. See also Hogg, Thornton & Wright, *supra* note 47 at 30.

3.3.1.2.1 Respect for administrative decision-makers

As outlined in Section 1.2.1, the concept of "deference as respect" recognizes the expertise of the administrative decision-maker.[387] As adopted when applying a reasonableness standard of review, the court avoids second-guessing administrative decision-makers with respect to the weight or priority they assign to competing factors of relevance to their decision.[388] Administrative bodies are therefore viewed as legitimate entities with which to enter into a "dialogue" and contribute to determining the meaning and scope of the fundamental values underlying the *Charter*.[389] The Court has accepted that administrative tribunals should play a primary role in determining *Charter* issues falling within their jurisdiction. As outlined in Chapter 2, there has also been a general trend within administrative law affirming the power of administrative tribunals and respecting their decision-making.[390] Thus, when applying a reasonableness standard, courts have been prepared to defer to agencies' interpretations "rather than assume that the judiciary has a monopoly on the wisdom that is needed to elaborate on the legislature's instructions".[391]

3.3.1.2.2 Rejection of a judicial monopoly on interpretation

Recognition by judges that there may be more than one reasonable decision or interpretation of a statutory provision, rather than the command model of the judiciary imposing the "correct" outcome, is an important aspect of a dialogic relationship.[392] The

[387] See Dyzenhaus, *supra* note 48 at 286. See also David J Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17:1 Can J Admin L & Prac 59 at 93.
[388] See *Suresh*, *supra* note 258 at para 37.
[389] See Wildeman, *supra* note 23 at 331.
[390] See *Doré*, *supra* note 11 at para 48. This trend is seen in *Dunsmuir*, *supra* note 10; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Conway*, *supra* note 319; *Alberta Teachers' Association*, *supra* note 43. See also Bredt & Krajewska, *supra* note 328 at 463.
[391] Van Harten, Mullan & Heckman, *supra* note 161 at 32.
[392] Dialogue theory in the constitutional law domain has been criticized for assuming "a judicial monopoly on correct interpretation," given that "[g]enuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation": Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall LJ 513 at 523–524. See also Rainer Knopff, "How Democratic is the Charter? And Does it Matter?" (2003) 19 Sup Ct L

notion that there may be more than one reasonable interpretation of statutory language, and that there will often be no single right answer or decision is inherent in the notion of reasonableness review.[393] The Court has also recognized the possibility that there may be more than one reasonable interpretation of the *Charter*,[394] and that *some* administrative actors have jurisdiction to interpret the *Charter* and refuse to apply *Charter*-inconsistent legislation.[395] Correctness review, on the other hand, does not allow for deference to the administrative decision maker's reasoning and directs that the court determine the "correct" decision.[396] In conducting a reasonableness review, judges must therefore be careful not to apply a correctness standard by first deciding what they consider to be the answer and then checking to see whether the administrative actor's answer coincides with that answer: the focus is on whether the decision is justified.[397]

3.3.1.2.3 Justification

An important part of a dialogic vision of the rule of law is the idea of justification.[398] As explained by McLachlin J (as she then was), the rule of law should be seen as an essential

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Rev 199 at 212. Hogg et al. respond that they do not assume a judicial monopoly on *correct* interpretation of the *Charter* but do assume is a judicial monopoly on *final* interpretation of the *Charter*. In their view, final authority to interpret the *Charter* rests properly with the judiciary and judicial interpretation of the *Charter* is authoritative: Hogg, Thornton & Wright, *supra* note 47 at 31.

[393] See *C.U.P.E. v N.B. Liquor Corporation*, *supra* note 381 at 230, 237; *Dunsmuir*, *supra* note 10 at para 47; *Law Society of New Brunswick v Ryan*, [2003] 1 SCR 247 at para 51. In *Smith v Alliance Pipeline Ltd*., the Court rejected concerns over the possibility of multiple interpretations flowing from deference. Fish J noted that, even prior to *Dunsmuir*, the standard of reasonableness was based on the idea that multiple valid interpretations of a statutory provision were inevitable, and ought not to be disturbed unless the tribunal's decision was not rationally supported: see *Smith v Alliance Pipeline*, *supra* note 52 at paras 38–39.

[394] See, for example, *R v Mills*, *supra* note 369 at 712–713, 749, McLachlin and Iacobucci JJ; *Khadr*, *supra* note 65 at para 37.

[395] See *Conway*, *supra* note 319 at paras 20, 77.

[396] "When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer": *Dunsmuir*, *supra* note 10 at para 50.

[397] David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev Const Stud 87 at 113.

[398] David Dyzenhaus, "Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?" in C F Forsyth, ed, *Judicial Review and the Constitution* (Oxford; Portland, Or: Hart Pub, 2000) 141 at 171. See also *Dunsmuir*, *supra* note 10 at para 47.

attribute of decision-making in a democratic society, taking as its overarching principle "a certain *ethos of justification*" under which an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness.[399] A key aspect of dialogue theory is therefore the concept of each institution (including the judiciary) justifying its decisions.[400] This conception of the separation of powers envisions all three branches of government having an important role to play in the determination of fundamental values and principles.[401] The possibility of dialogue will be enhanced if the court engages with the decision-maker's reasons and identifies exactly where the court departs from the decision-maker. Such an approach enables the parties, the wider public and the decision-maker itself to evaluate whether the court's conclusion is justifiable.[402]

3.3.1.2.4 Responsive communication

While the rule of law is ultimately maintained because the courts have the last word on the reasonableness of the administrative decision,[403] institutional dialogue is furthered through the ability of the other branches of government to take action in response to a judicial decision. Hogg et al. use dialogue to describe the process whereby a judicial decision is followed by a legislative sequel,[404] which involves a responsive form of communicative action. In the absence of statutory authority, administrative decision-makers are not empowered to act on an interpretation of the *Charter* that conflicts with an interpretation

[399] Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998) 12 Can J Admin L & Prac 171 at 178. The ethos of justification "re-constructs the relationship between the courts and the administrative state, transforming it from a 'policing one' based on mutual suspicion, distrust and antagonism to a more co-operative one based on mutual or reciprocal recognition": Liston, *supra* note 160 at 298.
[400] See Hogg, *supra* note 2 at 36.5; Barak, *supra* note 70 at 465–467; Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23 Sup Ct L Rev 49 at 69. Judges are obliged to see themselves as one of the branches in a democratic legal order together with the executive and the legislature: Dyzenhaus, *supra* note 48 at 305.
[401] Dyzenhaus, *supra* note 46 at 487–489 and 501. See also Wildeman, *supra* note 23 at 325; Hogg, Thornton & Wright, *supra* note 47 at 30.
[402] Wildeman, *supra* note 23 at 341.
[403] *Dunsmuir*, *supra* note 10 at para 30.
[404] Hogg, Thornton & Wright, *supra* note 47 at 40.

provided by the courts. However, although administrative actors are bound to respect judicial decisions, the legislature is able (if it disagrees with the judicial interpretation) to respond through amending the laws governing the administrative body.[405] Furthermore, a judicial ruling on an administrative decision will usually be limited in application to that decision, rather than changing a law of general application. An administrative law approach will therefore generally not constrain the executive's or legislative's options to respond to a judicial decision as much as a constitutional law approach (as the ruling will only apply to a particular factual scenario).

#### 3.3.1.3 Institutional dialogue and *Doré*

In *Doré*, the Court demonstrated a commitment to the legitimate institutional role of administrative bodies and their decisions. The Court in *Doré* suggested that the administrative law approach recognizes this legitimacy that the Court has "given" to administrative decision-making.[406] The Court explained that judicial review "should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state".[407]

The Court recognized that an administrative decision-maker "exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values".[408] This

[405] The legislature may, however, need to utilize s. 33 of the *Charter*: see *Ibid* at 33–34. Hogg et al. point out that if Parliament or the legislature could override a court's interpretation of the *Charter* by simply enacting ordinary legislation reflecting a different interpretation, s. 33 of the *Charter* would be redundant. Note, however, Waldron's critique of the legislature's use of the s. 33 override when it disagrees about the interpretation of a particular *Charter* right: Jeremy Waldron, "Some Models of Dialogue between Judges and Legislators" (2004) 23 Sup Ct L Rev 7 at 7, 34–39.
[406] *Doré*, *supra* note 11 at para 35.
[407] *Ibid* at para 30.
[408] *Ibid* at para 47. The Court referenced Professor Evans, who wrote following *Slaight*: "reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension": Evans, *supra* note 331 at 81.

recognition of the legitimacy of administrative bodies' interpretation of the law reflects a move away from a strict understanding of the separation of powers, as it implies it is legitimate for the executive to exercise judicial-like powers.[409]

### 3.3.2 Discretionary decisions and "law"

In *Doré*, the Court suggested that *Charter* analysis is "poorly suited" to review of discretionary decisions. This section examines the issues the Court sees with applying the *Oakes* test to administrative decisions, including the difficulties arising from placing the burden of justification on administrative bodies and from the s. 1 "prescribed by law" requirement in the context of administrative decisions.

#### 3.3.2.1 Applying the *Oakes* test to discretionary decisions

The Court asserts that difficulties arise with conceptualizing and applying the *Oakes* test to administrative decisions. In particular, the Court suggests that, when a discretionary decision is made under a provision or statutory scheme whose constitutionality is not impugned, "it is conceptually difficult to see what the "pressing and substantial" objective of a decision is, or who would have the burden of defining and defending it".[410]

According to the *Oakes* test, the onus of justifying the limitation of a *Charter* right rests on the party seeking to have that limitation upheld.[411] It would appear that the Court in *Doré* was most concerned about imposing on administrative agencies the burden of defending the objectives of their decisions. The Court suggested that administrative decision-makers, when exercising discretionary powers, are in fact similar to the courts, so the approach the Court

[409] Cartier, *supra* note 162 at 395.
[410] *Doré*, *supra* note 11 at para 38.
[411] *Oakes*, *supra* note 8 at 138.

takes in *Doré* is similar to the approach taken to assess whether the common law is consistent with the *Charter*. As the Court put it:[412]

> This Court has already recognized the difficulty of applying the *Oakes* framework beyond the context of reviewing a law or other rule of general application. This has been the case in applying *Charter* values to the common law …

The common law approach (set out more fully below in Section 3.4.4) requires that, rather than using the *Oakes* test as the vehicle for assessing whether *Charter* values are sufficiently taken into account, the Court merely ensures that the common law is developed in a manner consistent with *Charter* values.

Underlying the approach taken in *Doré* appears to be Abella J's suggestion in *Multani* that administrative bodies "like the courts … cannot be treated as parties with an interest in a dispute".[413] In light of administrative bodies' (supposed) independence from government,[414] she predicted problems with placing the burden of proof onto administrative bodies and requiring an administrative body with quasi-judicial functions to adduce evidence to justify its decision under s. 1.[415] The Court's unease with similar issues when applying the *Charter* to the common law is explored further below (see Section 3.4.4).

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[412] *Doré*, *supra* note 11 at para 39.
[413] *Multani*, *supra* note 7 at para 123.
[414] I say "supposed" independence in light of the concerns that administrative decision-makers lack the independence of the courts and that an administrative body's independence may be undermined on the whim of the legislature: see, e.g., *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 SCR 781. In that case, the Court refused to find a constitutional basis for a guarantee of adjudicative independence for tribunals [in the Preamble to the *Constitution Act, 1867*]. Although the fact that an individual's *Charter* right has been limited by a decision should engage a higher level of procedural fairness, the Court has rejected that there is any constitutional basis for a guarantee of administrative independence. Therefore the degree of independence required of a particular administrative decision-maker is determined by its enabling statute, meaning that the legislature can effectively determine the level of independence the decision-maker has from other parts of government or policy areas. Some tension over the appropriate institutional role of administrative bodies therefore remains, particularly in relation to the issues raised by Lamer CJC in *Cooper*: see *Cooper*, *supra* note 216 at para 13. See further S Ronald Ellis, *Unjust by Design: Canada's Administrative Justice System*, Law and Society (Vancouver: UBC Press, 2013).
[415] *Multani*, *supra* note 7 at para 132.

#### 3.3.2.2 Prescribed by law

Section 1 of the *Charter* requires that government action limiting a protected right or freedom be "prescribed by law" in order to be justified as reasonable in a free and democratic society. If a limitation of rights is not legally authorized, the limit is not prescribed by law (and a *Charter* violation is established, hence the court does not proceed to the *Oakes* test). In previous cases, the Court at times took the approach that a discretionary decision will be prescribed by law for the purpose of s. 1 when the discretionary decision is statutorily authorized.[416] However, in other cases the Court held that discretionary decisions are, by definition, never prescribed by law.[417]

In *Doré*, the Court described the difficulties arising from the "prescribed by law" requirement in the context of administrative decisions:[418]

> The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" [*Vancouver Transit* at para 53].

In *Vancouver Transit*, the Court engaged in an extensive discussion of the case law on the "prescribed by law" requirement, and concluded that the challenge in that case was directed at law rather than at the transit authorities' decisions, the "laws" being the transit authorities' advertising polices.[419] The Court distinguished between policies that are "legislative in nature" (such as municipal by-laws or a law society's rules), and those that are "administrative in nature" (meaning "focussed on 'indoor' management … meant for internal use [and]

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[416] *Slaight*, *supra* note 7; *Ross*, *supra* note 7; *Multani*, *supra* note 7 at para 22.
[417] *Trinity Western*, *supra* note 9; *Chamberlain*, *supra* note 9; *Multani*, *supra* note 7 at paras 112–125, Deschamps and Abella JJ.
[418] *Doré*, *supra* note 11 at para 37.
[419] *Vancouver Transit*, *supra* note 7 at paras 50–73.

express statutory authority is not required to make them").[420] The Court looked to the statutory delegation of power that allowed the transit authority to adopt binding rules, and held that:[421]

> [W]here a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".

Conversely, a policy that is administrative in nature (that is, a policy that is adopted pursuant to the administrator's discretion, without express statutory authority) does not fall within the definition, because it is not intended to be a legal basis for government action.[422]

This distinction between laws and discretionary decisions was a primary reason for Abella and Deschamps JJ's dissent in *Multani*, where they argued that an administrative analysis should be conducted because the Court was assessing an administrative decision rather than a rule or "norm of general application".[423] Abella and Deschamps JJ argued that the expression "law" should not include the decisions of administrative bodies.[424] They suggested that administrative decisions should not be included in the concept of "law" because the expression "law" should be limited to rules of general application.[425] In their view, an administrative decision is not a law or regulation but rather "the result of a process provided for by statute and by the principles of administrative law in a given case" and "[e]stablishing a norm and resolving a dispute are not usually considered equivalent processes".[426]

On this view, discretionary decisions are seen as fundamentally different from "laws" or "norms of general application", such that discretionary decisions are not subject to s. 1 of the *Charter*. Discretionary decisions do not have the necessary degree of general applicability,

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[420] *Ibid* at paras 58–63.
[421] *Ibid* at para 64.
[422] *Ibid* at para 63.
[423] *Multani*, *supra* note 7 at para 103 per Deschamps and Abella JJ.
[424] *Ibid* at para 125.
[425] *Ibid* at para 119.
[426] *Ibid* at para 112.

accessibility and precision to qualify as laws. It seems that this reasoning won the day in *Doré*. However, in his concurring opinion in *Multani*, LeBel J raised concerns about the "norm-decision" duality preferred by Abella and Deschamps JJ, which he suggested underestimates the problems that arise in applying the classifications and "entails a risk of narrowing the scope of constitutional review of compliance with the *Canadian Charter* and its underlying values".[427] Given that the Court in *Doré* did not explicitly adopt Abella and Deschamps JJ's distinction between laws of general application and discretionary decisions, we may speculate that there remains some disquiet on the Court about this distinction, and about the relationship between discretionary decisions and the rule of law concerns underlying the s. 1 "prescribed by law" requirement.

### 3.3.3 Reasonableness standard of review

This section will explore the Court's rationale for a reasonableness standard of review in *Doré*, in particular the reasons for deference to discretionary administrative decisions and the concept of deference in *Charter* and administrative law review.

#### 3.3.3.1 Reasons for deference

In *Dunsmuir*, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state.[428] In *Doré*, the Court suggested that deference to the Disciplinary Council's decision was appropriate, following the pre-*Dunsmuir* decision of *Law Society of New Brunswick v Ryan*:[429]

> Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the

[427] *Ibid* at para 151.
[428] *Dunsmuir*, *supra* note 10 at para 49.
[429] *Law Society of New Brunswick v Ryan*, *supra* note 393 at para 42. See *Doré*, *supra* note 11 at para 44.

> question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the selfregulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions.

The Court concluded that the fact that *Charter* interests are implicated "does not argue for a different standard",[430] and deference is justified on the basis of the decision-maker's expertise and its proximity to the facts of the case.[431]

3.3.3.1.1 Expertise

The Court noted that the starting point is the expertise of the administrative decision-maker in connection with its home statute, which means that it has a "particular familiarity with the competing considerations at play in weighing *Charter* values" when exercising a discretionary power under that home statute by virtue of expertise and specialization.[432] The Court cited David Mullan's explanation that a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime".[433]

3.3.3.1.2 Knowledge of the facts

The Court also pointed to "the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation".[434] The Court once again relied on the distinction

[430] *Doré*, *supra* note 11 at para 45.
[431] *Ibid* at para 54.
[432] *Ibid* at paras 46–47.
[433] Mullan, *supra* note 387 at 93. For further exploration of the rationale for deferring to the expertise of administrative decision-makers, see above, Section 1.2.1.
[434] *Doré*, *supra* note 11 at para 48. Referring to *Mooring*, *supra* note 214 at para 64, Major J, dissenting; *Conway*, *supra* note 319 at paras 79–80.

between norms of general application and discretionary decisions as a reason for an approach that differs from the *Charter* approach:[435]

> When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference ...

Therefore, even where *Charter* values are involved, the administrative decision-maker "will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case".[436]

The rationale for the idea that deference is appropriate when *Charter* values are applied in relation to a particular set of facts is a recognition that the initial decision-maker will generally have a greater appreciation of the facts of the individual case, given that he or she will have examined the evidence firsthand and observed any witness testimony.[437] Appeal courts take a similar approach to review judicial decisions of first instance on factual issues, which will only be interfered with where the appellate court can identify a "palpable and overriding error" or where the finding was "clearly wrong".[438]

#### 3.3.3.2 Deference when assessing reasonableness and proportionality

In *Doré*, the Abella J (for the Court) asserts:[439]

> I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

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[435] *Doré*, *supra* note 11 at para 36. Citing *Dunsmuir*, *supra* note 10 at para 53; *Suresh*, *supra* note 258 at para 39.
[436] *Doré*, *supra* note 11 at para 54.
[437] *Baker*, *supra* note 9 at para 61; *Suresh*, *supra* note 258 at para 31; *Dr. Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras 19, 33–34.
[438] *Stein et al. v "Kathy K" et al. (The Ship)*, [1976] 2 SCR 802 at 806 and 808. See also *H.L. v Canada (Attorney General)*, 2005 SCC 25 at paras 55–57.
[439] *Doré*, *supra* note 11 at para 5.

This statement implies that the nature of the deference operating when courts review rights-infringing administrative decisions within an administrative law framework should not differ significantly from the *Charter* approach. The following sections explore the nature of deference in conducting proportionality analysis under the *Oakes* test and in conducting reasonableness review, to better understand the Court's proposition that there is "conceptual harmony" between the *Oakes* framework and reasonableness review, "since both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives".[440]

3.3.3.2.1 Deference in applying the *Oakes* test

Judicial review under the *Charter* requires judges to determine the legal validity of actions by the other branches of the state. Given that the judiciary is not democratically accountable,[441] the legitimacy of the courts second-guessing the value judgments of democratic institutions has been called into question.[442] The Court has responded to this legitimacy dilemma by adopting a deferential approach in some cases, emphasizing that their role to "is not to second-guess the wisdom of policy choices made by our legislators".[443] Reasons for this deference by courts include the view that political forms of accountability are more appropriate, that courts are not institutionally competent to review policy choices and/or lack subject area expertise or access to relevant data, and that the judicial review procedure is ill-suited to an appropriate evaluation of the competing considerations that bear upon

[440] *Ibid* at para 57.
[441] Robert Alexy, "Balancing, Constitutional Review, and Representation" (2005) 3 Int'l J Const L 572 at 578.
[442] Weinrib points out, however, that although rights protection is clearly anti-majoritarian in some respects, it should not be labelled anti-democratic: Lorraine E Weinrib, "This New Democracy...: Justice Iacobucci and Canada's Rights Revolution" (2007) 57 UTLJ 399 at 413. Judicial review can be seen as intensifying accountability and broadening representation, and thus legitimating the democratic, majoritarian process: Weinrib, *supra* note 98 at 174. Judicial review may also be viewed as enhancing citizen self-government: Stephen Gardbaum, "Limiting Constitutional Rights" (2006) 54 UCLA L Rev 789 at 817.
[443] *Prostitution Reference*, *supra* note 192 at 1119, Lamer J (as he then was).

discretionary choices.[444] The Court has also expressed concern that a non-deferential approach may result in legislative measures protecting vulnerable groups being struck down.[445]

The Court has held that deference to the legislature's judgment about the need for, or effectiveness of, a particular limit on a *Charter* right is more appropriate in some contexts than in others.[446] Thus greater deference is accorded where the law is concerned with the competing rights between different sectors of society than if it is "a contest between the individual and the state".[447] The courts also accord greater deference to legislative choice where the measure is designed to protect a vulnerable group,[448] concerns a complex social issue,[449] deals with the allocation of scarce resources,[450] or seeks to balance the interests of competing groups.[451] In these cases, the Court has stated that the *Oakes* test should be applied flexibly, and "not formally or mechanistically".[452] Hence, a complex regulatory response to a social problem will be assessed differently than criminal legislation that directly threatens a person's liberty (with the courts showing little or no deference in criminal justice cases).[453]

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[444] David J Mullan, "Proportionality – A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?" (2010) NZL Rev 233 at 238.
[445] *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713; *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 772–774.
[446] *R v St-Onge Lamoureux*, 2012 SCC 57 at para 39. See also Constitutional Law Group, *supra* note 114 at 781. See also *Irwin Toy*, *supra* note 189 at 994; Constitutional Law Group, *supra* note 114 at 781–785; Choudhry, *supra* note 106; Hogg, *supra* note 2 at 38.11; Weinrib, *supra* note 85 at 91.
[447] *RJR-MacDonald*, *supra* note 77 at 331.
[448] *Irwin Toy*, *supra* note 189 at 993–994. See also *Thomson Newspapers Co. v Canada (Attorney General)*, [1998] 1 SCR 877 at 942–943; *R v Sharpe*, [2001] 1 SCR 45 at para 133, L'Heureux–Dubé, Gonthier and Bastarache JJ.
[449] *Hutterian Brethren*, *supra* note 8 at para 53; *JTI-Macdonald*, *supra* note 372 at para 43.
[450] *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381. Governments "must be afforded wide latitude to determine the proper distribution of resources in society": *Egan v Canada*, [1995] 2 SCR 513 at para 104. Further, "financial considerations are relevant to determining the standard of deference for the test of minimal impairment when reviewing legislation which is enacted for a purpose which is not financial": *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.* [*Ref re Remuneration of Judges*], [1997] 3 SCR 3 at para 283.
[451] *Irwin Toy*, *supra* note 189 at 993–994. In the words of Lon Fuller, these types of cases deal with classic "polycentric" matters which are ill-suited to resolution in the bipolar adjudicative arena: see Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.
[452] *Eldridge*, *supra* note 7 at para 85; *Keegstra*, *supra* note 135 at 737; *Irwin Toy*, *supra* note 189 at 999–1000; *RJR-MacDonald*, *supra* note 77 at para 63, La Forest J; and at paras 127–138, McLachlin J (as she then was).
[453] *Hutterian Brethren*, *supra* note 8 at paras 35, 37.

However, there is significant disagreement among members of the Court about when the judiciary should defer to legislative judgment.[454]

The concept of deference generally arises within the margin of appreciation that the *Oakes* framework acknowledges, particularly in the Court's discussion of the minimal impairment limb of the *Oakes* test.[455] However, the Court has applied the notion of deference at almost every stage of the *Oakes* test.[456] The Court has held that deference may be appropriate in assessing whether the requirement of rational connection is made out,[457] whether there are less harmful means of achieving the legislative goal,[458] and whether the measure has a disproportionate effect.[459] While the Court has generally discussed deference when considering the minimal impairment step, some members of the Court have debated whether deference is appropriate in the earlier steps of the *Oakes* test.[460]

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[454] Constitutional Law Group, *supra* note 114 at 780. For example, some members of the Court have pointed out that the "fact that the matter is complex, contentious or laden with social values" does not mean that the judiciary can abdicate the responsibility vested in them by the Constitution to review legislation for *Charter* compliance": *Chaoulli*, *supra* note 100 at para 107, McLachlin CJC and Major J.

[455] *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 81; Hogg, *supra* note 2 at 38.11.

[456] Bredt, *supra* note 87 at 63. Deference does not play a role in determining whether the objective of the measure implemented by the legislature is sufficiently important: this is an important step for ensuring the constitutional status of the right is respected and, as shown above, deficiencies in the legislative objective will impact upon the later *Oakes* test steps: see further Barak, *supra* note 70 at 403–405.

[457] *JTI-Macdonald*, *supra* note 372 at para 41. The Court held that, in cases dealing with complex social problems such as tobacco consumption, and where there is room for debate about what will work or the outcome is not be scientifically measurable, Parliament's decision as to what means to adopt should be accorded considerable deference.

[458] *Hutterian Brethren*, *supra* note 8 at para 53; *JTI-Macdonald*, *supra* note 372 at para 43.

[459] *Hutterian Brethren*, *supra* note 8 at para 85.

[460] For example, McLachlin CJC has argued that the obligation of the government to demonstrate a pressing and substantial objective, rational connection, and minimal impairment should not be influenced by the court's view that the restricted expression is of little value, and only at the final stage of the *Oakes* proportionality analysis is the value of the restricted expression relevant: *R v Lucas*, [1998] 1 SCR 439 at para 116–119, McLachlin J (as she then was), dissenting. See also *Hutterian Brethren*, *supra* note 8 at para 85.

*3.3.3.2.1.1 Importance of context*

Soon after the *Oakes* decision, the Court called for a more contextually sensitive balancing of competing interests under s. 1.[461] Thus the Court has held that a particular right or freedom may have a different value depending on the context:[462]

> The contextual approach attempts to bring into sharp relief the aspect of the right or freedom that is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

The Court has indicated in a number of cases that the application of the *Oakes* test requires close attention to the context in which the impugned legislation operates.[463] Thus, a less-significant competing interest may support restriction of a less-valuable form of the protected right or freedom.[464] The Court has stated that context is "the indispensable handmaiden" to the proper characterization of each step of the *Oakes* test.[465]

Sujit Choudhry identifies the collapse of the Court's approach of drawing categorical distinctions to identify cases in which it should defer to the legislature under s. 1 of the *Charter*, and the Court's tailoring of the analysis to the unique context of each case, as the

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[461] *Edmonton Journal*, *supra* note 445; *Irwin Toy*, *supra* note 189. See also Constitutional Law Group, *supra* note 114 at 780.
[462] *Edmonton Journal*, *supra* note 445 at 1355–1356, Wilson J.
[463] *Ross*, *supra* note 7 at para 78; *Thomson Newspapers*, *supra* note 448 at 939, Bastarache J.
[464] *Thomson Newspapers*, *supra* note 448. The Court has held the level of protection to which expression may be entitled will vary with the nature of the expression: the further that expression is from the core values of the right the greater will be the ability to justify the state's restrictive action: *R v Lucas*, *supra* note 460 at 459. Thus pornography, commercial expression, hate promotion, soliciting for the purposes of prostitution, and defamation are held to be less directly connected to the values underlying the freedom than political or artistic expression, and are therefore subject to a less demanding standard of justification under the *Oakes* test: see Moon, *supra* note 97 at 347.
[465] *Thomson Newspapers*, *supra* note 448 at 939. Bastarache J held that since the context of the impugned provision is also important in determining the type of proof which a court can demand of the legislator to justify its measures under s. 1, contextual factors, including the relative value of the restricted expression, affects the entirety of the s. 1 analysis: *Ibid* at 939–943. The Court has also held that "the contextual approach requires that regulatory and criminal offences be treated differently for the purposes of *Charter* review", such that regulatory offences are subject to a more deferential review: see *R v Wholesale Travel Group Ltd.*, [1991] 3 SCR 154 at 227. See also *Ontario v Canadian Pacific Ltd.*, [1995] 2 SCR 1031 at para 58.

"dominant legacy" of *Oakes*.[466] Choudhry posits that recent cases (since 1998) highlighted that these categorical distinctions were untenable, which has resulted in "the death of the categorical approach to section 1" and the rise of "a highly context-driven inquiry".[467]

While a contextual approach does not necessarily involve judicial deference to legislative judgment,[468] the flexibility accorded when the Court takes a contextual approach will often lead to deference. The Court recently clarified that the contextual factors should be directed at determining to what extent the case is one "where the evidence will rightly consist of 'approximations and extrapolations' as opposed to more traditional forms of social science proof, and therefore to what extent arguments based on logic and reason will be accepted as a foundational part of the case."[469] Thus the context is also relevant in considering the evidence required to prove the elements of the *Oakes* test.

*3.3.3.2.1.2 Standard of justification*

With many rights-limiting measures, there is some uncertainty about the likelihood of the measure actually achieving the specified objective, or whether the measure chosen will fulfill the objective better than other possible measures. In *Oakes*, the Court held that "cogent and persuasive" evidence was required to prove the elements of the s. 1 inquiry.[470] However, the Court has recognized in subsequent cases that this standard of proof is unworkable in many cases, and that government policies must often be established based on imperfect or inconclusive evidence.[471] In cases in which there is conflicting or inconclusive evidence, the

[466] Choudhry, *supra* note 106 at 503, 520–521.
[467] *Ibid* at 521.
[468] Moon, *supra* note 97 at 359.
[469] *R v Bryan*, [2007] 1 SCR 527 at para 29. Citing Choudhry, *supra* note 106 at 524.
[470] *Oakes*, *supra* note 8 at 138.
[471] In *Hutterian*, McLachlin CJC stated that if "legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer": *Hutterian Brethren*, *supra* note 8 at para 85, McLachlin CJC.

question therefore becomes whether the government has a "reasonable basis" for concluding that each element of the *Oakes* test is met.[472]

This standard is understood as expecting something less of governments than definitive, scientific proof.[473] However, an absolute lack of evidence is unacceptable; there must be some factual basis for the rights-limiting measure.[474] For example, in *Canada v PHS*, the Court held that the Minister's decision was not justifiable because he had not taken into account the evidence supporting a finding that the safe injection site did more good than harm, so in fact furthered the statutory objectives.[475] In some cases, where the evidence is ambiguous, the Court has accepted "experience and common sense"[476] or "reason or logic"[477] to bridge the evidential gap. The Court recently explained that this approach recognizes that traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case and that to require such evidence in those circumstances would be inappropriate.[478] The Court therefore lowers the standard of justification required under the *Oakes* test in some cases, in a manner that looks a lot like judicial deference.[479]

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[472] *Irwin Toy*, *supra* note 189 at 994. In *Irwin Toy*, the social science evidence was inconclusive but Court deferred to legislative judgment of the evidence.
[473] As La Forest J wrote in his dissenting judgment in *RJR-MacDonald*, to require governments to bear the risk of empirical uncertainty "could have the effect of virtually paralyzing the operation of government": *RJR-MacDonald*, *supra* note 77 at para 67.
[474] Choudhry, *supra* note 106 at 525.
[475] See *Canada v PHS*, *supra* note 105 at para 131.
[476] *R v Sharpe*, *supra* note 448 at para 94; *R v Butler*, [1992] 1 SCR 452.
[477] *RJR-MacDonald*, *supra* note 77 at para 154; *Harper v Canada (Attorney General)*, [2004] 1 SCR 827. In *Harper*, the majority acknowledged that both the alleged harm (to freedom of expression caused by legislative limits on third□party spending on advertising in the course of a federal election campaign) and the efficacy of legislative responses to the harm were "difficult, if not impossible, to measure scientifically" but reasoned that the harm nonetheless existed and the cure was effective: *Ibid* at para 79. In dissent, McLachlin CJC, Major J and Binnie J argued that, in the absence of evidence, the alleged dangers were entirely hypothetical, "unproven and speculative", and that the legislation was "an overreaction to a non-existent problem": *Ibid* at paras 34, 41.
[478] *Bryan*, *supra* note 469 at para 29. This approach may be contrasted with the approach in Germany, where the courts have developed a scale of scrutiny that ranges from whether the legislature's prognostications are evidently wrong to a reasonableness test to strict scrutiny, depending on the nature of the policy area, the possibility of basing the decision on reliable facts, and the importance of the constitutionally protected goods or interests at stake: see Grimm, *supra* note 137 at 391.
[479] Constitutional Law Group, *supra* note 114 at 786. Choudhry suggests that the *Oakes* approach to interpreting s. 1 has "unwittingly created a major institutional dilemma for the Court, given the practical reality that public policy is often made on the basis of incomplete knowledge": Choudhry, *supra* note 106 at 524.

#### 3.3.3.2.2 Deference in administrative law

##### *3.3.3.2.2.1 Reasonableness review*

The Court has recognized that, when conducting a review for reasonableness, courts should be concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[480] As the Court said in *Dunsmuir*, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process".[481] Administrative decision-makers are accorded "a margin of appreciation within the range of acceptable and rational solutions".[482] In applying the reasonableness standard, the reviewing court therefore pays attention to the administrative decision-maker's justification and reasoning, and the decision will stand unless it cannot be rationally supported by the relevant legislation or the evidence.[483]

##### *3.3.3.2.2.2 Importance of context*

The notion of "reasonableness" has many forms in different contexts, even within administrative law.[484] Reasonableness "is a single standard that takes its colour from the context".[485] As McLachlin CJC noted in *Catalyst Paper*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry".[486] The relevant contextual factors can include the subject matter of the decision, the nature of the decision maker (which may include labour arbitrator, Minister, school board, immigration officer, or police board), the type of body (including

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[480] *Dunsmuir*, *supra* note 10 at para 47.
[481] *Ibid*.
[482] *Ibid*.
[483] See *Ibid* at para 35. See also David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2d ed (Oxford; New York: University of Oxford, 2010).
[484] See Barak, *supra* note 70 at 374; Michal Bobek, "Reasonableness in Administrative Law: A Comparative Reflection on Functional Equivalence" in *Reasonableness and Law* (New York: Springer, 2009) 294.
[485] *Khosa*, *supra* note 390 at para 59.
[486] *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 at para 18.

tribunals, inquiries, municipal councils, licensing agencies, disciplinary bodies), the statutory framework (including the breadth of any grant of discretion), the similarity to courts (as an institution or in mode of decision-making) or proximity to the legislature, and the type of person affected (whether individual or corporate body, vulnerable or powerful). For example, in *Catalyst Paper*, the Court took into account the fact that a municipality passing bylaws involves "an array of social, economic, political and other non-legal considerations", that the nature of decision-making is legislative rather than adjudicative or quasi-judicial in nature, and that municipalities are democratic institutions.[487] Taking into account these contextual factors, the Court concluded that "reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable", and a deferential approach was therefore appropriate.

*3.3.3.2.2.3 Justification through reasons*

Historically, there was no duty for administrative decision-makers to provide reasons.[488] However, in *Baker*, the Court held that the reasons for a decision are required to be provided in certain circumstances, including if a particular decision has "important significance for the individual".[489] The purpose of providing reasons is to allow the individual to understand why the decision was made and to allow the reviewing court to assess the validity of the decision.[490] Judicial attention to reasons also demonstrates respectful deference and constrains

[487] *Ibid* at para 19.
[488] Grant Huscroft, "From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review" in Lorne Sossin & Colleen M Flood, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 147 at 177.
[489] See *Baker*, *supra* note 9 at para 43. While the requirement was framed as a procedural fairness requirement, the Court has clarified that procedural fairness is fulfilled by the provision of any reasons whereas analysis of the adequacy of the reasons should be made within the reasonableness analysis: *Newfoundland Nurses*, *supra* note 49 at paras 21–22. Reasons are still not required in all cases: see, for example, *Canada (Attorney General) v Mavi*, 2011 SCC 30.
[490] *Lake*, *supra* note 9 at para 46.

the ability to re-weigh the factors leading to the decision.[491] As the Court stated in *Alberta Teachers*,[492]

> [D]eference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided.

Reason-giving by the administrative decision-maker thus acts as a rule of law constraint on administrative discretion and complements a democratic, justificatory culture.[493]

While a failure to provide any reasons will constitute a breach of the duty of fairness, the reviewing court does not assess the adequacy of the decision-maker's reasons separately from the reasonableness of its ultimate decision.[494] While reasons may vary in length and comprehensiveness (reflecting the reality of administrative decision-making), gaps in reasoning may be evidence of failure to consider a factor of mandatory relevance.[495] There must be a "line of analysis" within the reasons that could reasonably lead the decision-maker from the evidence before it to the conclusion at which it arrived.[496] In spite of this, the courts may look beyond the reasons offered to those that could be offered in support of the decision,[497] but not to such an extent as to reformulate the initial decision-maker's reasons in order to find the decision reasonable.[498]

Reasons are not, however, always required. For example, formal reasons are not required of democratic institutions engaging in a democratic process (such as municipal

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[491] Liston, *supra* note 23 at 76.
[492] *Alberta Teachers' Association*, *supra* note 43 at para 54.
[493] Liston, *supra* note 160 at 242. Deference as respect involves of a model of review in which well-justified reasons will compel respect from the courts: *Ibid* at 298.
[494] *Newfoundland Nurses*, *supra* note 49 at paras 14–15.
[495] Wildeman, *supra* note 23 at 356.
[496] *Law Society of New Brunswick v Ryan*, *supra* note 393 at para 55; *Dunsmuir*, *supra* note 10 at para 47.
[497] *Newfoundland Nurses*, *supra* note 49 at para 12; *Alberta Teachers' Association*, *supra* note 43 at paras 22–28, 54.
[498] *Alberta Teachers' Association*, *supra* note 43 at para 54.

councils passing bylaws) but reasons can be deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.[499]

3.3.3.2.3 Differences in the nature of deference

The primary potential difference between a traditional administrative/ 'reasonableness' law approach and a *Charter*/*Oakes* test approach therefore appears to be the level of justification required by the rights-infringer or, in other words, the level of scrutiny to which the court subjects the reasons for the decision. Neither approach means that the reviewing court steps into the shoes of the initial decision-maker. In the case of proportionality review under the *Charter*, however, the level of deference shown by the court varies according to the subject matter or nature of the legislation in issue, and is generally considered when assessing the minimal impairment and ultimate balancing steps. In some cases, very little or no deference will be shown and the court will engage in its own assessment of the evidence and arguments.[500] Deference when undertaking a reasonableness review, on the other hand, is characterized by a respectful treatment of the initial decision-maker's reasoning and is accorded when the decision demonstrates justification, transparency, and intelligibility. The level of justification required by the court when conducting a review for reasonableness, however, will depend on whether justificatory reasons are required of the administrative decision-maker and the level of scrutiny this justification is subjected to. As explored below, the level of scrutiny required under the *Doré* approach is ambiguous.

### 3.3.4 Revised relationship between administrative law and the *Charter*

As noted above, the Court in *Doré* states "we see a completely revised relationship between the *Charter*, the courts, and administrative law than the one first encountered in

[499] *Catalyst Paper*, *supra* note 486 at paras 29–33. See also *Canada (Attorney General) v Mavi*, *supra* note 489.
[500] See, for example, *Multani*, *supra* note 7 at paras 50–51. See also the discussion in *Irwin Toy* regarding the differences between criminal justice and social/economic policy cases: *Irwin Toy*, *supra* note 189 at 994.

*Slaight*".[501] So what has changed in this relationship since *Slaight?* The Court does not explain how this relationship has changed. However, a review of recent cases dealing with administrative bodies and the *Charter*, as well as the reasons for preferring the *Doré* approach as outlined in the previous sections, does shed some light on how the Court conceives of this "revised relationship" between administrative law and the *Charter*.

Firstly, and importantly, there has been a general shift within administrative law toward affirming the power of administrative agencies and respecting their decision-making. Since the 2008 case of *Dunsmuir*, the Court has applied a presumption of reasonableness review where administrative bodies are interpreting their enabling statutes, except in certain defined cases. The Court also recognizes that the administrative body will generally be in the best position to consider the application of the law to the specific facts of the case. The Court emphasized in *Doré* that administrative decisions are entitled to a measure of deference so long as the decision falls within a range of possible, acceptable outcomes.[502] This recognition of the legitimacy of administrative bodies' interpretation and application of the law reflects a move away from a strict understanding of the separation of powers, as it suggests that it is legitimate for the executive to exercise judicial-like powers of statutory interpretation and application.

Secondly, the Court views discretionary decisions as fundamentally different from "laws" or "norms of general application" such that discretionary decisions, like the common law, are not subject to s. 1 of the *Charter*. The Court suggests that the nature of discretionary decision-making makes it more suited to administrative law review and that some aspects of

[501] *Doré*, *supra* note 11 at para 30.
[502] *Ibid* at paras 55–56. This can be contrasted with administrative bodies' decisions on the constitutionality of statutory provisions (under s. 52) and to grant remedies under s. 24, which are subject to judicial review on a correctness standard: see *Martin*, *supra* note 231 at para 31; *Dunsmuir*, *supra* note 10 at para 58; *Doré*, *supra* note 11 at para 43.

the *Oakes* test are poorly suited to the review of discretionary decisions.[503] Further, a conception of administrative bodies as judicial-like is evident in the *Doré* decision.[504] The Court suggests that administrative decision-makers, when exercising discretionary powers, are in fact similar to the courts, so the approach the Court takes in *Dore* is similar to the approach taken to assess whether the common law is consistent with the *Charter*.[505]

Thirdly, the Court recognizes that there is not necessarily only one correct conclusion to the question of how a *Charter* right is justifiably limited. As the notion that there may be more than one reasonable answer or decision is inherent in the concept of reasonableness review,[506] the *Doré* approach reflects a recognition that there may be more than one decision that is *Charter*-compliant. In this way, reasonableness review may be seen as rejecting a "judicial monopoly" on the interpretation of the *Charter* and encouraging a more democratic process of interpretation.[507] Similarly, the Court raises concerns about the courts becoming de novo appellate bodies from all administrative decision-makers that make decisions impacting on *Charter* rights and freedoms,[508] as a reason for rejecting a correctness standard of review.

In spite of these developments, the tension between the *Charter* as fundamental and supreme law and the policy within administrative law of judicial restraint towards administrative tribunals remains. In particular, administrative law review on a reasonableness

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[503] *Doré*, *supra* note 11 at para 37.
[504] See *Ibid* at paras 37–42. Compare with Lamer CJC's conception in *Slaight* and *Cooper* of administrative bodies as servants to legislature and "just" part of the executive (see above, Section 2.2.1 and 2.3.1). The Court's conception of administrative bodies as similar to courts is discussed further below at Section 5.1.
[505] See, for example, *Dolphin Delivery*, where the Court held that the *Charter* does apply to the common law, and the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution: *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at para 39.

[506] See *C.U.P.E. v N.B. Liquor Corporation*, *supra* note 381 at 230, 237; *Chamberlain*, *supra* note 9 at para 156, Gonthier J, dissenting; *Law Society of New Brunswick v Ryan*, *supra* note 393 at para 51; *Dunsmuir*, *supra* note 10 at para 47.
[507] See Cartier, Geneviève, *supra* note 25 at 84. Cartier suggests that, on a *Baker*-type approach, administrative law and the *Charter* can be seen to be working in tandem toward articulating, enforcing, and modifying fundamental values, rather than administrative law being subordinated to the *Charter*. Each branch of government, as well as the citizen, participates in the development and articulation of fundamental values.
[508] *Doré*, *supra* note 11 at para 51. Citing Mullan, *supra* note 331 at 145.

standard is premised on the basis that courts do not conduct a review of the merits of an administrative decision but rather ensure that the decision is within the bounds of the law.[509] Proportionality review according to the *Charter* approach, while not a full merits review, does engage in a weighing of the factors put forward as justifying the rights-limiting measure. The key tensions inherent in the relationship between administrative law and the *Charter* thus remain and will continue to play out in subsequent cases.[510] As the next section examines, the precise nature of the approach to judicial review of rights-infringing administrative decisions required by *Doré* is somewhat unclear.

### 3.4 The *Doré* approach: a new proportionality test?

In this section, I outline the Court's guidance to administrative decision-makers on making a decision that accords with *Charter* guarantees, and the approach to be taken on judicial review. I then analyze existing methodological approaches the Court takes to reviewing compliance with the *Charter* in an attempt to determine whether the *Doré* approach requires a new proportionality test and what may be required by this test.

#### 3.4.1 Approach to exercising discretion and judicial review

In *Doré*, the Court explained that administrative decision-makers making decisions that impact on *Charter* guarantees must balance the *Charter* value(s) with statutory objectives, and make a decision that is within a range of possible "acceptable" or "reasonable" outcomes.[511] The decision-maker should ask how the *Charter* value at issue will best be protected in light of the statutory objectives, and balance the severity of the interference of the *Charter* protection

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[509] While the courts may ensure that relevant considerations were taken into account by the decision-maker, they must not inquire into the relative weight assigned to the various factors or how those factors were balanced: see *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 at 7–8; *Suresh*, *supra* note 258 at para 37. See also Cartier, *supra* note 162 at 395.

[510] The interrelationship between *Charter* rights and administrative law has recently been described as "a deeply complex one that courts still struggle with": Flood & Dolling, *supra* note 23 at 5.

[511] *Doré*, *supra* note 11 at paras 55–56. Citing *Dunsmuir*, *supra* note 10 at para 47; *RJR-MacDonald*, *supra* note 77 at para 160.

with those objectives.[512] The Court states that this balancing exercise is "at the core of the proportionality exercise".[513]

As noted above, on judicial review, the fact that *Charter* interests are implicated does not result in a different standard of review than would otherwise apply, and the principles set out in the *Dunsmuir* case should be applied to determine the appropriate standard of review.[514] On this basis, the Court concluded that reasonableness remains the applicable review standard for disciplinary decisions. However, the Court explained:[515]

> In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

The question to be asked on judicial review is whether the decision reflects a "proportionate balancing" of the *Charter* rights and values at play.[516] If the decision-maker has "properly" balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.[517]

Applying the new approach, the Court said its role was to determine whether the Council's decision that a reprimand was warranted reflected a proportionate balancing of Mr. Doré's expressive rights with its statutory mandate to ensure that lawyers behave with "objectivity, moderation and dignity" in accordance with article 2.03 of the *Code of Ethics*.[518]

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[512] *Doré*, *supra* note 11 at para 56.
[513] *Ibid*.
[514] *Ibid* at para 57. See *Dunsmuir*, *supra* note 10 at paras 32–34, 43–45.
[515] *Doré*, *supra* note 11 at para 7.
[516] *Ibid* at para 57.
[517] *Ibid* at para 58.
[518] Article 2.03 of the *Code of Ethics* was created pursuant to s. 87 of the *Professional Code*, RSQ, c C-26 [*Professional Code*]. Section 87 provides [emphasis added]:

> The board of directors must make, by regulation, a code of ethics governing the general and special duties of the professional towards the public, his clients and his profession, particularly the duty to discharge his professional obligations with integrity. Such code must contain, *inter alia*:
>
> (1) provisions to prevent conflict of interest situations;
>
> (2) provisions defining, if applicable, the professions, trades, industries, businesses, offices or duties incompatible with the dignity or practice of the profession;

The only issue before the Supreme Court in *Doré* was whether the Council's decision to reprimand Mr. Doré violated the *Charter* (as Mr. Doré had dropped his challenge to his 21-day suspension).[519] The Court noted that the Council's decision involved the "fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession" and, while lawyers should not be expected to behave like "verbal eunuchs", they are required "behave with transcendent civility".[520] Criticism may be robust, but must not exceed "the public's reasonable expectations of a lawyer's professionalism".[521] In deciding to reprimand Mr. Doré, the Disciplinary Council had been "conscious" of the fact that article 2.03 may constitute a restriction on a lawyer's expressive rights. The Court concluded that, in light of "the excessive degree of vituperation in the letter's context and tone",[522] the Council's decision to reprimand Mr. Doré reflected "a proportionate balancing of its public mandate to ensure that lawyers behave with 'objectivity, moderation and dignity' with the lawyer's expressive rights".[523] The Council's decision therefore did not represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives.[524] Accordingly, the decision was reasonable.

The Court's explanation and application of this approach to judicial review raises many questions. How exactly should courts determine whether the decision reflects a "proper" or "proportionate" balance while applying a reasonableness standard of review? Will the courts inquire into the appropriate weighting of the *Charter* interest against other interests, and

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…

(6) provisions identifying offences, if any, for the purposes of subparagraphs 5 and 6 of the first paragraph of section 45 or of the first paragraph of section 55.1.

[519] See *Doré*, *supra* note 11 at para 67.
[520] *Ibid* at para 68.
[521] *Ibid* at para 69.
[522] *Ibid* at para 71.
[523] *Ibid* at para 8.
[524] *Ibid* at para 71.

against the "statutory objectives"?[525] Should courts engage in a formal analysis of the rights-infringement based on the *Charter* jurisprudence?[526] How does the "nature of the decision"[527] influence the analysis? Does the *Doré* approach of "proportionate balancing" entail a new proportionality analysis test or is the test just a rephrasing an existing doctrine? To attempt to answer these questions, in the following sections I analyze existing doctrine as illustrated in the following approaches, which may be seen as variations of a proportionality analysis:

- The *Oakes* test approach, used as the method of analysis when evaluating the legislative limitation of *Charter* rights.
- The "principles of fundamental justice" approach, as conducted when interpreting and applying s. 7 of the *Charter*.
- The "balancing *Charter* values" approach, used to review a common law rule for consistency with the *Charter*.

I explore the forms proportionality analysis takes in these cases, which I then draw on to assess the nature of the proportionality analysis in *Doré* more fully. While ultimately concluding that the exact nature of the proportionality test required by the *Doré* approach is unclear, I suggest some possible interpretations of the *Doré* approach to proportionality analysis based on prior jurisprudence and academic literature.

### 3.4.2 Proportionality analysis under the *Charter*: the *Oakes* test

As noted in Chapter 1, when reviewing legislation that limits an individual's *Charter* rights, the Court engages in a two-stage analysis: a court first determines whether the challenged measure infringes upon a *Charter* right and, if it does, the review moves to consider whether the measure is justified under s. 1 of the *Charter*.[528] The onus of justifying

[525] Macklin, *supra* note 3 at 318.
[526] Wildeman, *supra* note 23 at 377.
[527] *Doré*, *supra* note 11 at para 57.
[528] Hogg, *supra* note 2 at 36.4(c).

the limitation of a *Charter* right rests on the party seeking to have that limitation upheld.[529] In *R v Oakes*, the Court adopted the concept of proportionality as the method of analysis used to determine whether a limit on a *Charter* right is "reasonable" and "demonstrably justified" under s. 1.[530] First, the objective of the limiting measure must be sufficiently important to warrant overriding a constitutionally protected right or freedom. Once a sufficiently significant objective is recognized, the party invoking s. 1 must satisfy a proportionality analysis with reference to this objective by showing that the means chosen are reasonable and demonstrably justified.[531] Thus the next three steps of the *Oakes* test require that: the measures adopted are rationally connected to the objective in question; the measures impair the right as minimally as possible; and there is proportionality between the objective and the effects of the measures (including between the deleterious and the salutary effects). The following sections explore each of these criteria, with reference to the Court's jurisprudence.

3.4.2.1.1 Sufficiently important objective

In *Oakes*, the Court held:[532]

> [T]he objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Not every government interest or policy objective is entitled to s. 1 consideration: the Court is "guided by the values and principles essential to a free and democratic society", which include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity,

[529] *Oakes*, *supra* note 8 at 138. See also Hogg, *supra* note 2 at 38.5.
[530] *Oakes*, *supra* note 8 at 138–139.
[531] *Ibid* at 139.
[532] *Ibid* at 138.

and faith in social and political institutions which enhance the participation of individuals and groups in society".[533]

However, the courts have not applied the important objective requirement stringently, perhaps even accepting almost any purpose.[534] A review of the cases reveals that sufficiently important objectives include: protection of competing rights;[535] protection of public safety, order, health, or morals;[536] national security;[537] the administration of justice;[538] protection of children from advertising;[539] and suppression of the willful promotion of hatred against identifiable groups.[540] However, the objective will not be constitutionally valid if it amounts to a direct denial or contradiction of the right,[541] or a "simple majoritarian political preference for abolishing a right altogether".[542] A measure whose sole purpose is financial will generally not qualify as a pressing and substantial objective,[543] although the Court has found that certain financial objectives, such as controlling health care expenditure or managing a financial crisis, may amount to a sufficiently important objective.[544] Administrative convenience is also not an adequate reason for infringing on *Charter* rights.[545]

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[533] *Ibid* at 136. Lorraine Weinrib argues that the concept of a free and democratic society is the genesis of both the *Charter* rights and freedoms and the standard against which limits of those rights and freedoms are justified: Lorraine Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988) 10 Sup Ct L Rev 469 at 471. Accordingly, s. 1 merely gives legal expression to the common body of principles underlying the guarantees: Weinrib, *supra* note 98 at 122.
[534] Constitutional Law Group, *supra* note 114 at 777.
[535] *Sauvé*, *supra* note 369 at para 20; *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 294–296.
[536] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 98; *RJR-MacDonald*, *supra* note 77 at 146; *Butler*, *supra* note 476 at 493.
[537] *Suresh*, *supra* note 258 at para 85.
[538] *Ref re Remuneration of Judges*, *supra* note 450 at paras 281–285.
[539] *Irwin Toy*, *supra* note 189 at 987.
[540] *Keegstra*, *supra* note 135.
[541] *Vriend*, *supra* note 140 at para 116; *R v Big M Drug Mart Ltd.*, *supra* note 536 at 351–353.
[542] *Sauvé*, *supra* note 369 at para 20.
[543] *Ref re Remuneration of Judges*, *supra* note 450 at paras 281–285; *Martin*, *supra* note 231 at paras 109–110.
[544] *Eldridge*, *supra* note 7 at para 84; *Newfoundland (Treasury Board) v N.A.P.E.*, *supra* note 450 at paras 72–76. See also *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912 at para 66.
[545] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 218–219; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 at 554–555.

It is the legislation's original purpose when enacted that is examined for this step of the test,[546] although objectives may change over time and a "shift in emphasis" to reflect changing community values may be permissible.[547] At this stage, the government does not need to show that the objective is furthered by the measure chosen: all that is required is the assertion of a sufficiently important objective.[548] However, the characterization of the objective can have a significant influence on the next three steps of the *Oakes* test. If the objective is defined at a high level of generality (for example, as protection of the public), justifying the limit under the minimal impairment limb will be difficult because it will be easy to formulate alternative ways to achieve the wide objective.[549] However, if the level of generality is too low (for example, the protection of children from advertising) the proportionality analysis becomes tautological and the next three steps will have little work to do. For this reason, the definition of the measure's objective plays an integral role in the proportionality analysis.[550]

3.4.2.1.2 Rational connection

The second step of the *Oakes* test is to determine whether the limit on a *Charter* right is "rationally connected" to the objective determined in the first step. The Court in *Oakes* explained: "the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective."[551] The Court has subsequently held that the rational connection requirement merely entails showing that the objective is "logically

[546] *R v Big M Drug Mart Ltd.*, *supra* note 536 at 335.
[547] *Butler*, *supra* note 476 at 496.
[548] *Harper*, *supra* note 477 at paras 25–26; *Bryan*, *supra* note 469 at paras 32–34.
[549] Hogg, *supra* note 2 at 38.9(a).
[550] Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 UTLJ 370 at 371–372. For example, had the legislature's objective in *Oakes* been defined as to alleviate the Crown's difficulty in gathering evidence to prove an intent to traffic beyond a reasonable doubt, rather than to protect society from drug trafficking, the case would have likely have passed the rational connection test: Slattery, *supra* note 113 at 27.
[551] *Oakes*, *supra* note 8 at 139. I note, however, that arbitrary or unfair measures will not necessarily fail at this step: see Barak, *supra* note 70 at 307.

furthered by the means government has chosen to adopt",[552] and "reason or logic may establish the requisite causal link".[553] Thus direct proof of a causal relationship between the objective of the limit and the measures enacted by the impugned provision is not required.[554]

The legislative provision in issue in *Oakes* was held to fail at this step because the limit on the right (that is, the infringement of s. 11(d) of the *Charter* caused by placing on a defendant found to be in possession of a prohibited drug the burden of proving he or she was not trafficking) was not rationally connected to the objective of the limit (protecting society from drug trafficking).[555] However, very few cases since have failed at the rational connection step,[556] and those cases that have arguably could have turned on the minimal impairment requirement.[557] The Court has yet to examine the scope of the "rational connection" limb in any depth,[558] and this step has only become significant in cases where there is clearly no connection between the means and the purpose.[559]

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[552] *Lavigne v Ontario Public Service Employees Union*, *supra* note 535 at 219. See also *Harper*, *supra* note 477 at paras 25–26; *Bryan*, *supra* note 469 at paras 32–34.
[553] *Harper*, *supra* note 477 at para 28.
[554] *Butler*, *supra* note 476; *Keegstra*, *supra* note 135. See further Hogg, *supra* note 2 at 38.10(b).
[555] *Oakes*, *supra* note 8 at 141–142. The Court's reliance on this step of the test has been criticized for being a weak ground for the decision compared to the possible rationale under the minimal impairment step: see Hogg, *supra* note 2 at 38.10(a); Slattery, *supra* note 113 at 27. Slattery suggests that the focus in *Oakes* on rational connection resulted in the Court "squeezing" considerations of justice under the rubric of rational connection (concluding that possession of a small quantity of drugs does not support the inference of an intent to traffic). However, this does not relate to the legislature's actual objective, which was to alleviate the Crown's difficulty in gathering evidence to prove an intent to traffic beyond a reasonable doubt: *Ibid* at 27.
[556] *JTI-Macdonald*, *supra* note 372 at para 40. For a recent example of a measure failing the rational connection step, see *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 99. In that case, the Court found that certain words in s. 14(1)(b) of the Saskatchewan Human Rights Code ("ridicules, belittles or otherwise affronts the dignity of") were not rationally connected to the objectives of eliminating discrimination and the other wrongful effects of hatred, and therefore unjustifiably infringed s. 2(b) of the *Charter*.
[557] Hogg, *supra* note 2 at 38.10(a). For example, see *Vancouver Transit*, *supra* note 7. In that case, the Court held that the transit authority's policy prohibiting placing political messages on the sides of buses limited the respondents' right to freedom of expression under s. 2(b). The objective of "a safe, welcoming public transit system" was held to be a sufficiently important objective to warrant placing a limit on freedom of expression but the Court was not convinced that the limits on political content imposed by the policy were rationally connected to this objective (at para 76). However the Court went on to consider whether the limit constituted a minimal impairment on the right to freedom of expression, concluding that the means chosen to implement the objective was neither reasonable nor proportionate to the impairment of political speech (paras 77-80).
[558] Barak, *supra* note 550 at 373.
[559] Grimm, *supra* note 137 at 389; Barak, *supra* note 70 at 316.

3.4.2.1.3 Minimal impairment

The third step in the *Oakes* test requires that the limit impair the right or freedom in question as little as possible.[560] However the Court subsequently clarified that the legislator is allowed some leeway[561] or "margin of appreciation",[562] so that the impugned measure need not be the *least* impairing option.[563] The question is whether the measure "falls within a range of reasonable alternatives".[564] If the Court finds that other measures were available to the Government that would achieve the desired objective but would impair the *Charter* right less than the impugned measure, the measure is not justified under s. 1.

Nearly all of the s. 1 cases have turned on the minimal impairment requirement.[565] Prior to *Alberta v Hutterian Brethren of Wilson Colony* [*Hutterian*],[566] the Court would hold that the measure failed the minimal impairment test if a small or debatable decrease in the measure's effectiveness in achieving its objective would significantly reduce its interference with the protected right.[567] The Court therefore often balanced alternative approaches that would further a similar objective in the minimal impairment step, resulting in the final step of the *Oakes* test (proportionate effect) not playing a large role.[568]

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[560] *Oakes*, *supra* note 8 at 139.
[561] *RJR-MacDonald*, *supra* note 77 at para 160.: "The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement."
[562] *Irwin Toy*, *supra* note 189 at 990; *R v Sharpe*, *supra* note 448 at para 160; *Newfoundland (Treasury Board) v N.A.P.E.*, *supra* note 450 at 84; *Fraser*, *supra* note 455 at para 81.
[563] *Harper*, *supra* note 477 at para 110; *Keegstra*, *supra* note 135 at 776; *R v Sharpe*, *supra* note 448 at para 97; *Butler*, *supra* note 476 at 504. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive: *Committee for the Commonwealth of Canada v Canada*, *supra* note 191 at 248.
[564] *RJR-MacDonald*, *supra* note 77 at para 160; *Multani*, *supra* note 7 at paras 50–53; *Hutterian Brethren*, *supra* note 8 at para 37.
[565] *Hutterian Brethren*, *supra* note 8 at para 75; Constitutional Law Group, *supra* note 114 at 777–779; Attaran, *supra* note 81 at 265; Hogg, *supra* note 2 at 38.8(b).
[566] *Hutterian Brethren*, *supra* note 8.
[567] Constitutional Law Group, *supra* note 114 at 778.
[568] *Ibid*.

However, in *Hutterian*, McLachlin CJC emphasized that the government's pressing and substantial objective should not be altered when conducting a minimal impairment analysis.[569] The minimum impairment test: "requires only that the government choose the least drastic means *of achieving its objective*. Less drastic means which do not actually achieve the government's objective are not considered at this stage."[570] So a proposed alternative that is less impairing but that does not give "sufficient protection" to the government's goal is not a valid minimally impairing alternative.[571] If a proposed less-impairing alternative involves limiting or qualifying the government's pressing and substantial objective, "[r]ather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*."[572]

The *Hutterian* decision reinforces the importance of the characterization of the objective to the likelihood that a rights-impairing measure will be found to be minimally impairing. It is rare that a less-impairing alternative measure will advance the measure's objective as completely or as effectively.[573] So if the objective is characterized narrowly, the "fit" between the objective and the measures will inevitably be minimally impairing.[574] The final stage of the *Oakes* test therefore becomes determinative.

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[569] Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of Alberta v. Hutterian Brethren of Wilson Colony" (2010) 51 Sup Ct L Rev, online: <https://pi.library.yorku.ca/ojs/index.php/sclr/article/view/34801> at 32.
[570] *Hutterian Brethren*, *supra* note 8 at para 54.
[571] *Ibid* at para 55. The question to be asked at the minimal impairment stage is "whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner". Thus "the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure" (at para 55).
[572] *Ibid* at para 76.
[573] Constitutional Law Group, *supra* note 114 at 778.
[574] Attaran, *supra* note 81 at 266.

3.4.2.1.4 Proportionate effect

The final step of the *Oakes* test requires that there be "a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'".[575] The measure may fail to be justified because of the severity of the deleterious effects on individuals or groups.[576] In *Dagenais*, the Court rephrased this step, requiring that courts consider not only the objective of the impugned measure but also its beneficial effects: "there must be a proportionality between the deleterious and the salutary effects of the measures".[577] In the final stage of the *Oakes* test the Court therefore compares or balances the limiting measure's benefit or value (in terms of "the collective good sought to be achieved") with its "costs". The judge "balance[s] the interests of society with those of individuals and groups".[578]

Canadian constitutional scholar Peter Hogg suggests that the proportionality limb of the test is actually redundant, as it is just a restatement of the first three steps, so that an affirmative answer to the (appropriately defined) first step/sufficiently important objective will always lead to an affirmative answer to the fourth step/proportionate effect.[579] He notes, however, that the Court has not accepted this argument and nor has Aharon Barak, who according to Hogg is "perhaps the foremost scholar of proportionality".[580] Barak argues that the minimal impairment step has no power to protect human rights if there are no less-drastic means available, even if the limitation of the right is severe.[581] Thus, the "proportionate effect" limb is necessary because, even if the objective chosen by the legislature is proper, the means

[575] *Oakes*, *supra* note 8 at 139.
[576] *Ibid* at 140.
[577] *Dagenais*, *supra* note 279 at 889.
[578] *Oakes*, *supra* note 8 at 139.
[579] Hogg, *supra* note 2 at 38.12.
[580] *Ibid*. See Barak, *supra* note 550 at 381. Barak is also a former Chief Justice of the Israeli Supreme Court.
[581] Barak, *supra* note 550 at 373. See also Grimm, *supra* note 137 at 396. Grimm argues that the proportionality step is essential because the two previous steps can only reveal the failure of a law to reach its objective; they cannot evaluate the relative weight of the objective compared to the fundamental right in the context of the measure under review.

are rational and are no more drastic than necessary, the resulting limitation on human rights may be so severe that it cannot be justified in a free and democratic society.[582]

In *Hutterian*, McLachlin CJC explicitly rejected Hogg's argument,[583] and accepted Barak's argument that if the analysis were to end with the rational connection and minimal impairment steps being met, the result might be to uphold a severe impairment on a right in the face of a less important objective.[584] Resolving matters at the final stage is therefore to be preferred because this overall balancing "allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation".[585] Only the proportionate effect step takes full account of the severity of the deleterious effects of a measure on individuals or groups.[586] In *Hutterian*, however, the salutary effects of the legislation (in terms of minimizing the risk of misuse of driver's licences for identity theft) were held to outweigh the deleterious impacts on the religious freedom of the community.[587]

The Court's recent emphasis on the "proportionate effect" step of the *Oakes* test may indicate that this step has a new prominence. However, while the Court's recent decisions do

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[582] Barak, *supra* note 550 at 381.
[583] *Hutterian Brethren*, *supra* note 8 at paras 75–77.
[584] The Court had previously emphasized the importance of the final step of the *Oakes* test, stating: "If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective": *JTI-Macdonald*, *supra* note 372 at para 46. See also *R v Sharpe*, *supra* note 448. Justice McLachlin (as she then was) had also argued that the balancing of competing interests should be left to the final step of the *Oakes* test: *R v Lucas*, *supra* note 460 at paras 116–119, McLachlin J, dissenting.
[585] *Hutterian Brethren*, *supra* note 8 at para 77.
[586] *Ibid* at para 76. Thus the majority of the Court in *Hutterian Brethren* found that the government's legislative goal ("to maintain an effective driver's licence scheme that minimizes the risk of fraud to citizens as a whole") was weighty whereas the deleterious effects of the legislation "fall at the less serious end of the scale" (at paras 101-102). The question "is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices" (at para 88). In this case, the costs on the religious practitioner ("in terms of money, tradition or inconvenience": at para 95) were not so severe as to "negate the choice that lies at the heart of freedom of religion" (at para 99).
[587] The Court was not in agreement on this point, however: see LeBel J's suggestion that an "alternative measure might be legitimate even if the objective could no longer be obtained in its complete integrity": *Ibid* at para 197. Abella J's conclusion was that "[t]o suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, fails to appreciate the significance of their self sufficiency to the autonomous integrity of their religious community": *Ibid* at para 167.

not yet reveal such a prominence,[588] it may be that leaving the balancing of interests, and alternative measures that achieve the government's goal to a lesser extent, to be considered in the final stage of the analysis could lead to a more transparent and honest mode of reasoning,[589] and improve the quality of the engagement.[590]

#### 3.4.2.2 ***Oakes* test in administrative law**

Despite the Court in *Doré* suggesting that there are difficulties applying the *Oakes* test to an administrative decision, the Court has undertaken an *Oakes* test analysis of administrative decisions.[591] For example, in *Slaight*, Lamer J held that the objective of the adjudicator's order was "to counteract, or at least to remedy, the consequences of the dismissal found by the adjudicator to be unjust", which in his opinion is sufficiently important to warrant a limitation on a *Charter* right or freedom.[592] The majority adopted this characterization of the objective, pointing out that "in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof".[593] The majority further held that orders were rationally linked to this objective,[594] and that there was "no less intrusive measure that the adjudicator could have taken and still

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[588] For example, in *A.C. v Manitoba*, although the majority held that there was no breach of a *Charter* right, Justice Binnie (dissenting) would have found that the impugned provisions breached the claimant's rights, and could not be justified under s. 1 because the claimant "has demonstrated that the deleterious effects are dominant": *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 237. In *Nguyen v Quebec*, the objectives of the measures adopted by the legislature (to protect and promote the French language and resolve the problem of expansion of the categories of rights holders resulting from the enrolment of students in bridging schools) were held to be sufficiently important and legitimate to justify the limit on the claimants' s. 23(2) rights but the means chosen by the legislature were "excessive" and "overly drastic", and therefore "do not meet the standard of minimal impairment": *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47 at para 37–42. The Court also held that part of the legislative provision under consideration in *R v Tse* was not justified, concluding (in one paragraph) that the measure failed "the proportionality analysis" because there was a less-impairing alternative available: *R v Tse*, 2012 SCC 16 at para 98.
[589] Berger, *supra* note 569 at 46.
[590] *Ibid* at 39.
[591] See *Slaight*, *supra* note 7; *Little Sisters*, *supra* note 262; *Multani*, *supra* note 7; *Lake*, *supra* note 9; *Vancouver Transit*, *supra* note 7; *Canada v PHS*, *supra* note 105.
[592] *Slaight*, *supra* note 7 at 1082, Lamer J.
[593] *Ibid* at 1051.
[594] *Ibid* at 1053.

have achieved the objective with any likelihood".[595] In terms of proportionate effect, the majority concluded that the objective of the orders was "a very important one", and the effects of the orders were not so deleterious as to outweigh this objective.[596]

In *Multani*, the majority explicitly applied the *Oakes* test to the council of commissioners' decision prohibiting a student from wearing his kirpan to school. The majority held that the objective of ensuring reasonable safety in schools was sufficiently important to warrant overriding a constitutionally protected right or freedom.[597] The council of commissioners' decision had a rational connection with the objective of ensuring a reasonable level of safety in schools (given that the kirpan does have the characteristics of a bladed weapon and could therefore cause injury).[598] However, the respondents were held to have "failed to demonstrate that it would be reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs [the student's] rights",[599] and the majority also concluded that the deleterious effects of a total prohibition outweighed its salutary effects.[600]

In *Vancouver Transit*, while the Court distinguished the case as one involving a challenge to a policy rather than an individual decision, the case could equally be characterized as a review of an administrative decision. While the decision was made pursuant to the transit authority's policy (and it was appropriate that the policy be declared of no force or effect to the extent of its inconsistency with the *Charter*), the Court's s. 1 analysis

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[595] *Ibid*.
[596] *Ibid* at 1056–1057.
[597] *Multani*, *supra* note 7 at para 77.
[598] *Ibid* at para 49.
[599] *Ibid* at para 77. Charron J for the majority noted: "it must be determined whether the decision to establish an absolute prohibition against wearing a kirpan "falls within a range of reasonable alternatives" (at para 51).
[600] *Ibid* at para 79.

> A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.

could equally have been applied to the individual administrative decisions challenged by the Canadian Federation of Students.

*Canada v PHS* is another case in which the Court carried out a proportionality analysis of an administrative decision. However, because this case raised issues under s. 7 of the *Charter*, the proportionality of the Minister's decision was considered within the "principles of fundamental justice" analysis.

### 3.4.3 "Principles of fundamental justice" analysis

Section 7 of the *Charter* provides as follows:[601]

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Deprivations of life, liberty and security of the person must thus respect the principles of fundamental justice in order to be consistent with the *Charter*. In this way, s. 7 provides the rights-infringer an opportunity to justify a limitation of rights before reaching the s. 1 justification (*Oakes* test) stage.

The "principles of fundamental justice", as defined by the Court, are the core values within the justice system that must prevail over these rights for the greater good of society, and accordingly the principles of fundamental justice "are to be found in the basic tenets of the legal system".[602] For a rule or principle to constitute a principle of fundamental justice,[603]

> it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

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[601] *Charter*, *supra* note 1, s 7.
[602] *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486 at 503.
[603] *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 113, Gonthier and Binnie JJ.

Fundamental justice therefore performs a function similar to s. 1 of the *Charter*, that is, of guaranteeing basic human rights within limits considered reasonable in Canadian society.[604] The principles of fundamental justice are not restricted to procedure, and include the concepts of vagueness, arbitrariness, overbreadth, and gross disproportionality. In each of these principles, parallels can be drawn with the components of the *Oakes* test.

#### 3.4.3.1 Vagueness

It is a principle of fundamental justice that laws not be too vague. A law is unconstitutionally vague if it "so lacks in precision as not to give sufficient guidance for legal debate".[605] This requirement of legal precision is founded on two rationales: the need to provide fair notice to citizens of prohibited conduct, and the need to constrain enforcement discretion.[606] A law will only be declared unconstitutionally vague after the court has considered the possible legislative interpretations (including an analysis of considerations such as the purpose, subject matter, nature, prior judicial interpretation, societal values, and related provisions), and concluded that interpretation is not possible.[607] The Court has held that a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, to avoid hindering the state's ability to pursue those objectives.[608] The requirement that laws be sufficiently precise aims to protect fundamental rule of law values, such as accessibility and certainty in law, and is thus akin to the "prescribed by law" requirement in s. 1 of the *Charter*.

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[604] See Denis W Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1996) 22 Queen's LJ 229 at 278–279.
[605] *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 643. An unintelligible provision gives insufficient guidance for legal debate: *Ibid* at 638.
[606] *Ontario v Canadian Pacific Ltd.*, *supra* note 465 at para 46.
[607] *Ibid* at para 47.
[608] *R v Nova Scotia Pharmaceutical Society*, *supra* note 605 at 642; *Ontario v Canadian Pacific Ltd.*, *supra* note 465 at para 49.

#### 3.4.3.2 Arbitrariness

Another principle of fundamental justice is that laws should not be arbitrary,[609] meaning that the state cannot limit an individual's rights where the limit "bears no relation to, or is inconsistent with, the objective that lies behind the legislation".[610] A law is arbitrary if it "lacks a real connection on the facts to the purpose the [law] is said to serve".[611] The similarity of the arbitrariness principle to the rational connection limb of the *Oakes* test is obvious. However, the Court has not agreed on a definition of arbitrariness, and has expressed differences of opinion regarding whether arbitrariness is separate from disproportionality,[612] and about the level of connection required between the objective and the limit in question.[613]

#### 3.4.3.3 Overbreadth

Related to the concept of vagueness, the "principles of fundamental justice" also include a requirement that the law not be overbroad, that is that the *means* used to achieve an objective must be "reasonably tailored",[614] and not "too sweeping",[615] in relation to the objective.[616] If the means used are broader than is necessary to accomplish that objective, "the principles of fundamental justice will be violated because the individual's rights will have been limited for

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[609] *R v Morgentaler*, *supra* note 132; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519; *Malmo-Levine*, *supra* note 603; *Canada v PHS*, *supra* note 105.
[610] *Rodriguez*, *supra* note 609 at 619–620, McLachlin J (as she then was).
[611] *Chaoulli*, *supra* note 100 at para 134, McLachlin CJC and Major J. In *Canada v PHS*, the Court held that the Minister's decision was arbitrary as it undermined the very purposes of the enabling legislation: *Canada v PHS*, *supra* note 105 at para 136.
[612] In *Malmo-Levine*, the majority opinion treated the two principles separately: *Malmo-Levine*, *supra* note 603 at paras 135–183, Gonthier and Binnie JJ. However the dissenting judgments treated disproportionality as the test of arbitrariness: see *Ibid* at paras 277–280, LeBel J; paras 289–302, Deschamps J. In *Canada v PHS*, McLachlin CJC for the Court treated the two doctrines separately but held that both were applicable in that case, and acknowledged that "the jurisprudence on arbitrariness is not entirely settled": *Canada v PHS*, *supra* note 105 at paras 129–133.
[613] In *Chaoulli*, three justices stated that a limit must be "necessary" to further the state objective *Chaoulli*, *supra* note 100 at paras 131–132, McLachlin CJC and Major J. Binnie and LeBel JJ, on the other hand, approved of the prior definition of arbitrariness as the deprivation of a right . that "bears no relation to, or is inconsistent with, the state interest that lies behind the legislation": *Ibid* at para 232, Binnie and LeBel JJ.
[614] *R v Heywood*, [1994] 3 SCR 761 at 794.
[615] *Ibid* at 792.
[616] See *Heywood*, *supra* note 614; *R v Demers*, 2004 SCC 46.

no reason".[617] The doctrine of overbreadth thus allows the courts to undertake a review of the efficacy of the means enacted to achieve a legislative objective,[618] in a similar manner to the minimal impairment stage in the *Oakes* test.[619] As with the minimal impairment stage, the courts must pay "a measure of deference … to the means selected by the legislature", such that a court "should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator".[620]

#### 3.4.3.4 Gross Disproportionality

In the 2003 case of *Malmo-Levine*, the Court established that "gross disproportionality" also amounts to a breach of the principles of fundamental justice. Gross disproportionality describes state actions or legislative measures that are so extreme as to be disproportionate to any legitimate government objective.[621] The doctrine of disproportionality requires the Court to determine whether the law pursues a "legitimate state interest" and, if it does, whether the harmful effects of the legislative measure are grossly disproportionate to the state interest.[622] For example, in *Canada v PHS*, the Court held that the effect of the Minister's decision to deny the exemption was "grossly disproportionate" to any state interest in maintaining an absolute prohibition of possession of illegal drugs on Insite's premises, as it disregarded the evidence that Insite saved lives and prevented injury and disease without any countervailing adverse effects on public safety.[623] The doctrine of gross disproportionality thus fulfils a similar function to the final step of the *Oakes* test, which requires that there be proportionality between the effects of the rights-limiting measure and the legislative objective.

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[617] *Heywood*, *supra* note 614 at 792–793.
[618] Peter W Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 Sup Ct L Rev, online: <http://pi.library.yorku.ca/ojs/index.php/sclr/article/view/36530> at 204.
[619] As the Court stated in *R v Heywood*, "[o]verbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis": *Heywood*, *supra* note 614 at 802–803.
[620] *Ibid* at 793.
[621] *Malmo-Levine*, *supra* note 603 at para 143.
[622] *Ibid*.
[623] *Canada v PHS*, *supra* note 105 at para 136.

Thus the Court has essentially imported the s. 1 *Oakes* test into the 'principles of fundamental justice' analysis. However, the definitions of these principles of fundamental justice have been criticized for the ease with which a judge who disapproves of a law can find that that law is arbitrary, overbroad, or disproportionate.[624] On the other hand, the Court's application of these doctrines has also been criticized for being "very deferential".[625]

### 3.4.4 Balancing *Charter* values: the common law approach

This section examines cases in which a common law rule impacted upon *Charter* values but the Court undertook a balancing exercise rather than applying the *Oakes* test to assess whether the common law had to be altered as a result. In *Doré*, the Court pointed out that although each of these cases engaged *Charter* values, "the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account".[626] In the Court's view, the same is true in the administrative law context, where decision-makers must exercise their statutory discretion in accordance with *Charter* protections.[627]

The Supreme Court of Canada first addressed the *Charter's* application to the common law in *RWDSU v Dolphin Delivery* [*Dolphin Delivery*].[628] In that case, the Court held that the *Charter* applies to the common law only "insofar as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom".[629] The Court thus interpreted the concept of governmental action for the purpose of the *Charter* as excluding judicial enforcement of common law rules. However, the Court held that, where no

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[624] Hogg, *supra* note 618 at 203.
[625] See Choudhry, *supra* note 106 at 531.
[626] *Doré*, *supra* note 11 at para 42.
[627] *Ibid*.
[628] *Dolphin Delivery*, *supra* note 505. In *Dolphin Delivery*, a private company obtained an injunction against a trade union, which was granted under the common law prohibiting secondary picketing. The union claimed that the picketing was protected by the freedom of expression guarantee of s. 2(b) of the *Charter* and that the common law principles that permit the injunction infringed on such a right.
[629] *Ibid* at 599. The judiciary is not expressly referred to in s. 32 as a branch of government to which the *Charter* applies, leaving open the possibility of different treatment of the judicial versus the legislative and executive/administrative branches of government. For a critique of the Court's reasoning in *Dolphin Delivery* and subsequent cases, see Section 5.1)

act of government is relied upon to support the action, "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution".[630] In reaching the conclusion that the *Charter* does not apply directly to the common law, the Court was concerned that a definition of governmental action that included the common law (or court orders based on common law) would widen the scope of *Charter* application to include virtually all private litigation, and thus all private action.[631] The Court also noted that the courts' involvement in private litigation is not as a "contending" party, but a neutral arbiter.[632]

The *Dolphin Delivery* decision was widely criticized, particularly for its differential treatment of common law and statute law.[633] There was some suggestion in subsequent cases that the Court may revise the direction given in *Dolphin Delivery*. For example, in *Dagenais v Canadian Broadcasting Corp*. [*Dagenais*],[634] the Court applied a proportionality analysis to a judge's common law-based discretionary publication ban order. All justices agreed that the

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[630] *Ibid* at 603.

[631] *Ibid* at 600. The Court explained (at 600):

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.

[632] *Ibid*.

[633] See June Ross, "The Common Law of Defamation Fails to Enter the Age of the Charter" (1996) 35 Alta L Rev 117 at 126; Boivin, *supra* note 604 at 272–280; Brian Slattery, "The Charter's Relevance to Private Litigation: Does Dolphin Deliver?" (1986) 32 McGill LJ 905; Peter W Hogg, "The Dolphin Delivery Case: The Application of the Charter to Private Action" (1986) 51 Sask L Rev 273 at 275; Robin Elliot, "Scope of the Charter's Application" (1993) 15 Advoc Q 204 at 210–211, 214. See also *R v Swain*, [1991] 1 SCR 933. In *R v Swain*, the majority interpreted *Dolphin Delivery* as holding that the *Charter* applies to common law rules in cases where the *Charter* is generally applicable to the litigation in question (within the meaning of s. 32) and, "if a common law rule is inconsistent with the provisions of the Constitution, it is, to the extent of the inconsistency, of no force or effect (s. 52(1))": *Ibid* at 968. The Court found that the challenged common law rule (permitting the Crown to adduce evidence of an accused's insanity) violated s. 7 of the *Charter*. While the Court undertook a s. 1 *Oakes* test analysis, it observed that the *Oakes* test may not always provide the appropriate framework by which to evaluate the justifications for maintaining a common law rule. Rather, it may be appropriate to consider whether an alternative common law rule could be fashioned which would not be contrary to the principles of fundamental justice (at 978-979). In particular,"[g]iven that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue" (at 978).

[634] *Dagenais*, *supra* note 279.

*Charter* should apply, although for different reasons.[635] Lamer CJC (for the majority on this issue) held that a judge's discretion to order a publication ban was subject to the *Slaight* principle, and must be "exercised within the boundaries set by the principles of the *Charter*".[636] If the common law rule conflicted unduly with *Charter* values, the common law rule must be varied. The majority did not adopt a formal s. 1 analysis, but held that the approach taken "clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*",[637] and considered both the objective of the common law rule of a publication ban and the proportionality of the ban's effect on protected *Charter* rights.

However, in *Hill v Church of Scientology* [*Hill*],[638] the Court reconfirmed the rule laid down in *Dolphin Delivery* and rejected the use of the s. 1 *Oakes* framework in developing the common law.[639] The Court held that, in private litigation, a different approach is called for and "[i]t is important not to import into private litigation the analysis which applies in cases involving government action".[640] This approach, the "constitutional values" test, requires the

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[635] McLachlin J, in a concurring judgment, criticized the majority approach to the application of the *Charter* for implicitly overruling *Dolphin Delivery*. She agreed that the *Charter* should apply, but limited its application to the criminal context: *Ibid* at 944. La Forest J (dissenting on other grounds) that the case was distinguishable from *Dolphin Delivery* and the order reviewable under the *Charter* because it was "exercised pursuant to a discretionary power directed at a governmental purpose, i.e., ensuring a fair trial": *Ibid* at 893. Likewise, Gonthier J (dissenting on other grounds) concluded that the order was subject to the *Charter* because it dealt with the determination of the rights of accused persons in criminal matters: *Ibid* at 918. L'Heureux-Dubé J (dissenting) concluded that, while this was not a case in which the *Charter* should be applied to the court order, "the common law governing its issuance is subject to *Charter* scrutiny": *Ibid* at 912.

[636] The case involved a challenge to a publication ban, granted in an effort to protect the right to a fair trial of criminal charges.

[637] *Dagenais*, *supra* note 279 at 878.

[638] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130.

[639] The Court explained that "[t]his obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values": *Ibid* at para 91. The Court rejected the defendants' argument that the common law of defamation unreasonably restricted their right to free expression, and stated (at para 95):

> The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action or by subjecting all court orders to *Charter* scrutiny.

[640] *Ibid* at para 93.

court to determine whether the common law "strikes an appropriate balance" between the relevant values (in libel cases, the values of reputation and freedom of expression).[641]

The Court elaborated on the distinction between application of the *Charter* to governmental action and development of the common law in accordance with *Charter* values, identifying three ways in which the process of considering "*Charter* values" differs from applying "*Charter* rights".[642] Firstly, the courts are cautious when amending the common law generally, "[f]ar-reaching changes to the common law must be left to the legislature", and courts "must not go further than is necessary when taking *Charter* values into account".[643] Secondly, the balancing approach must be more flexible than under a traditional s. 1 analysis because "the *Charter* 'challenge' in a case involving private litigants does not allege the violation of a *Charter* right".[644] Instead, the challenge "addresses a conflict between principles", so *Charter* values "should be weighed against the principles which underlie the common law".[645] Thirdly, the Court noted that "the division of onus which normally operates in a *Charter* challenge" was not appropriate for private litigation under the common law, as the party seeking to change the common law should not be allowed to benefit from a reverse onus.[646] The party challenging the common law must therefore bear the burden of proving

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[641] *Ibid* at para 100. The Court's analysis considered that, although the law of defamation has an impact on freedom of expression, defamatory speech is "very tenuously related", if not detrimental, to the core values which underlie s. 2(b) of the *Charter: Ibid* at para 106. On the other hand, "[a]lthough it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights", and thus "the protection of the good reputation of an individual is of fundamental importance to our democratic society": *Ibid* at para 120. The Court concluded that the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it: *Ibid* at para 141.

[642] See Ross, *supra* note 633 at 128–129.

[643] *Hill v Church of Scientology of Toronto*, *supra* note 638 at para 96.

[644] The Court stated that the party challenging the common law "cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values.": *Ibid* at para 95.

[645] *Ibid* at para 97.

[646] *Ibid* at para 98. The Court explained that, where two private parties are involved in a civil suit, one party "will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of

both that the common law is inconsistent with *Charter* values and that its provisions cannot be justified.[647]

Despite the Court's rejection of the direct application of the *Charter* to the common law, and rejection of the *Oakes* test in favour of a "balancing" approach, this approach does bear some resemblance to the *Oakes* proportionality analysis. For example, in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*., the Court said the appropriate question was "which approach [to regulating secondary picketing] best balances the interests at stake in a way that conforms to the fundamental values reflected in the *Charter*?"[648] The Court held that, while s. 2 (b) of the *Charter* was not directly implicated in that case, the right to free expression that it enshrines is a fundamental Canadian value and the development of the common law must therefore reflect this value, including that freedom of expression must be protected unless its curtailment is justified.[649] Limitations on freedom of expression are permitted "only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society".[650] The Court went on to consider whether the limit on freedom of expression was justified in that case, concluding that the preferred common law rule "offers a rational test … not an arbitrary one",[651] and that no more restrictive a rule was necessary.[652]

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having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified."

[647] *Ibid*.

[648] *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCR 8 at para 65.

[649] *Ibid* at paras 36–37, 67. The Court noted that freedom of expression is not absolute, so when the harm of expression outweighs its benefit, the expression may legitimately be curtailed. Thus, s. 2(b) of the *Charter* is subject to justificative limits under s. 1 (see para 36). The same applies in interpreting the common law to reflect the *Charter*: the Court noted that "if we are to be true to the values expressed in the *Charter* our statement of the common law must start with the proposition that free expression is protected unless its curtailment is justified" (at para 67).

[650] *Ibid* at para 37.

[651] *Ibid* at para 76.

[652] *Ibid* at para 92. In summary, a wrongful action approach to picketing allows for a proper balance between traditional common law rights and *Charter* values (at para 74).

In *Grant v Torstar Corp.*,[653] the Court concluded that the common law defences to the offence of defamation did not give adequate weight to the constitutional value of free expression and, "[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences".[654] The Court outlined relevant factors that may aid in determining whether a defamatory communication on a matter of public interest was responsibly made, some of which echo the *Oakes* test. The Court held that the "logic of proportionality dictates that the degree of diligence required in verifying the allegation should increase in proportion to the seriousness of its potential effects on the person defamed",[655] as it also should where the public importance of a subject matter is especially high.[656]

#### 3.4.4.1 The "constitutional values" test

As the jurisprudence above illustrates, the "constitutional values" test requires the court to determine whether the common law strikes "an appropriate balance" between the relevant *Charter* values.[657] This approach reflects a concern about the institutional role of the courts in relation to the legislature, in particular that it is the legislature's role to make major

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[653] *Grant v Torstar Corp.*, 2009 SCC 61. In this case, the Court relied on *Charter* values in introducing a new defence of responsible communication on matters of public interest to the law of defamation.
[654] *Ibid* at para 65. Abella J dissented on the question of whether the defence should be left to the jury. In her view, weighing often competing constitutional interests is a legal determination so is a determination that the judge should undertake (at para 143).
[655] *Ibid* at para 111.
[656] *Ibid* at para 112. See also *R v National Post*, 2010 SCC 16, in which National Post asked that the Court quash a general warrant and assistance order issued against them because it infringed their freedom of expression under s. 2(b) of the *Charter*. The Court held that a judicial order to compel disclosure of a secret source would not in general violate s. 2(b) (at para 41) but a privilege could be found, on a case-by-case basis, where several criteria (known generally as the Wigmore criteria) were met. Underlying the fourth Wigmore criterion analysis "is the need to achieve proportionality in striking a balance among the competing interests" (at paras 58-59).
[657] *Hill v Church of Scientology of Toronto*, *supra* note 638 at para 100. The Court's analysis considered that, although the law of defamation has an impact on freedom of expression, defamatory speech is "very tenuously related", if not detrimental, to the core values which underlie s. 2(b) of the *Charter: Ibid* at para 106. On the other hand, "[a]lthough it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights", and thus "the protection of the good reputation of an individual is of fundamental importance to our democratic society" (at para 120). The Court concluded that the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it (at para 141).

amendments to the common law.[658] It takes a more flexible balancing approach to weighing *Charter* values than the s. 1 *Oakes* test, and rejects an approach that would place the burden of justifying the common law on either the opposing party or the courts. In undertaking the "constitutional values" test, the Court has at times considered the rationality of the common law rule, and whether the rule is no more restrictive than necessary.[659] However, the test lacks the structured nature of the *Oakes* framework, and the courts take varying approaches to determine whether the common law strikes the "appropriate balance".[660]

### 3.4.5 Similarities and differences to previous approaches

In *Doré*, the Court indicates that "[t]he notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis".[661] Further:[662]

> In assessing whether a law violates the Charter, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the Charter right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the Charter, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a Charter right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

In this paragraph, the Court appears to suggest that the *Doré* "proportionate balancing" approach is similar to the s. 1 *Oakes* test. Nonetheless, the Court explicitly rejects the *Oakes* test as the methodological approach for review of rights-limiting administrative decisions and implies that an approach akin to the common law "balancing *Charter* values" approach is to

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[658] *Hill v Church of Scientology of Toronto*, *supra* note 638 at para 96.
[659] *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, *supra* note 648 at paras 76, 92.
[660] Ross, *supra* note 633 at 132.
[661] *Doré*, *supra* note 11 at para 5.
[662] *Ibid* at para 6.

be adopted.[663] The following subsections explore the differences (and similarities) in the approach taken in *Doré*, the *Oakes* test, and the common law balancing approach.

#### 3.4.5.1 Nature of the proportionality analysis

There is a distinction between proportionality as a standard for decisions (that is, as a requirement placed on the original decision-maker) and proportionality as a standard of review (that is, as a methodology used by the reviewing court).[664] The *Doré* approach, while rejecting the *Oakes* test as a requirement for either standard, seems to conflate these two standards and refers to proportionality as both a standard of review and standard for decisions. Some members of the Court had previously expressed concern that the *Oakes* test should not be used as a standard for discretionary decisions, suggesting that such a test would make decision-making unduly formalistic.[665] However, in *Doré*, decision-makers are directed to undertake a "proportionality exercise" and "balance the severity of the interference of the *Charter* protection with the statutory objectives" (rather than apply an *Oakes* test analysis).[666] On reviewing such decisions, courts must ensure the decision reflects a "proportionate balancing" of the *Charter* protections with the statutory objectives.[667] This approach may be contrasted with that taken by the House of Lords (now the Supreme Court of the United Kingdom). The United Kingdom's highest court has held that the process by which the rights-infringing decision was reached should not be an issue when considering whether an individual's rights have been violated but rather the focus should be on whether the decision itself complies with

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[663] *Ibid* at paras 36–42.
[664] Baker, *supra* note 26 at 245.
[665] See *Multani*, *supra* note 7 at para 120, Deschamps and Abella JJ. "To suggest that the decisions of administrative bodies must be justifiable under the *Oakes* test implies that the decision makers in question must incorporate this analysis into their decision-making process. This requirement makes the decision-making process formalistic and distracts the reviewing court from the objective of the analysis, which relates instead to the substance of the decision and consists of determining whether it is correct [as in *Trinity Western*] or reasonable (*Chamberlain*)."
[666] *Doré*, *supra* note 11 at para 56.
[667] *Ibid* at paras 57–58.

the Human Rights Act.[668] Contrastingly, the *Doré* approach requires that decision-makers undertake some form of proportionality analysis.

While the Court rejected the *Oakes* test in *Doré*, the decision seems to imply that the analysis should consider more than just whether the decision has a disproportionate effect, given the direction that courts should consider whether a "proportionate balance" has been struck and the suggestion that there is "conceptual harmony" between this approach and the *Oakes* framework.[669] The following sections explore what this proportionality requirement may mean when the courts are reviewing an administrative decision on a reasonableness standard of review.

#### 3.4.5.2 Proportionality and reasonableness

Much has changed in Canadian administrative law since Dickson CJC's comments in *Slaight* that patent unreasonableness review rested "to a large extent on unarticulated and undeveloped values".[670] In *Dunsmuir*, the Court offered a much richer conception of reasonableness review.[671] The Court's recent jurisprudence elucidating the content of the reasonableness standard makes clear that a reviewing court must examine both the reasoning process and the outcome reached when determining whether an administrative tribunal's

[668] *Begum, R (on the application of) v Denbigh High School*, [2006] UKHL 15. The review considers whether the administrative decision was a proportionate limit on the individual's right and, while it does not undertake a review of the merits of the decision (see para 30), the court does ask whether the decision was proportionate rather than just whether the decision-maker reasonably performed a proportionality analysis or whether the decision was substantively reasonable: *Ibid* at para 30. See Baker, *supra* note 26 at 277.
[669] *Doré*, *supra* note 11 at para 57.
[670] *Slaight*, *supra* note 7 at 1049. At the time *Slaight* was issued, the standard of review was whether administrative action was "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review": *C.U.P.E. v N.B. Liquor Corporation*, *supra* note 381 at 237.
[671] See above, Section 1.2.1. In *Dunsmuir*, the Court stated that deference "does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations": *Dunsmuir*, *supra* note 10 at para 48.

decision is reasonable.[672] Further, the notion of "reasonableness" has many varieties depending on the context in which the decision was made.[673]

On one end of the spectrum is reasonableness as defined by the United Kingdom's highest court in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [*Wednesbury*], that is, a decision is unreasonable only if it is "so absurd that no sensible person could ever dream that it lay within the powers of the authority".[674] This "*Wednesbury* unreasonableness" was later articulated as a decision "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."[675] Clearly, this brand of reasonableness analysis is quite different from an *Oakes*-style proportionality analysis, given that it rejects any reweighing of the factors the decision is based upon, is not structured, and does not require assessment of the analytical steps of rational connection, minimal impairment, and proportionate effect.[676] Given the difficulty conceiving of a proportionality analysis that does not inquire into the appropriate weighting of the *Charter* right against other interests, *Doré* must be taken to have rejected *Wednesbury*-style unreasonableness as the standard of review for rights-limiting administrative decisions.

At the other end of the spectrum, is reasonableness "in the strong sense",[677] requiring identification of the relevant considerations and balancing of those considerations in

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[672] As noted by the majority in *Dunsmuir*, "[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.": *Ibid* at para 47. Similarly, in *Newfoundland Nurses*, the Court held that "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes": *Newfoundland Nurses*, *supra* note 49 at para 14.
[673] *Catalyst Paper*, *supra* note 486 at para 18. See also Barak, *supra* note 70 at 374; Bobek, *supra* note 484.
[674] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, [1948] KB 223 at 229.
[675] *Council of Civil Service Unions v Minister for the Civil Service*, 1985 AC 374 (UKHL) at 410, Lord Diplock.
[676] Barak, *supra* note 70 at 375.
[677] Wojciech Sadurski, "Reasonableness and Value Pluralism in Law and Politics" in *Reasonableness and Law* (Dordrecht; New York: Springer, 2009) 129.

accordance with their weight.[678] In this sense, a decision is reasonable if it properly balances the relevant factors. Under this conception of reasonableness, it could also be argued that a decision is unreasonable if no rational connection exists between the purported objective of the decision and the means chosen to advance that objective, or if there are other means that could advance that objective (to the same extent) while being less restrictive to the constitutional right.[679] In this way, reasonableness review may be seen as a form of proportionality analysis, ensuring that decisions are the result of "a proper balance between conflicting considerations and reflect an appropriate means-ends rationality".[680]

There are also different forms of proportionality analysis (as noted in the previous section), and these forms of proportionality can be applied with varying degrees of deference. This distinction has been explored in the United Kingdom jurisprudence where, although a proportionality test has now replaced *Wednesbury* unreasonableness in cases involving the Human Rights Act and Convention rights, the courts still struggle with the relationship between these standards of review, and whether the courts should apply a reasonableness or correctness approach to the proportionality question.[681] Proportionality may be conceived of as just another version of unreasonableness ('reasonableness-conception') or alternatively as a way for judges to provide the 'correct' answer (the 'correctness-conception').[682] Both conceptions are evident in the UK jurisprudence. Views on proportionality vary, with some judges concluding that proportionality review is more intensive than *Wednesbury* unreasonableness review,[683] and pointing out that proportionality and *Wednesbury*

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[678] See Barak, *supra* note 70 at 374.
[679] *Ibid* at 377.
[680] Cohen-Eliya & Porat, *supra* note 70 at 481.
[681] Ian Leigh & Roger Masterman, *Making Rights Real: the Human Rights Act in its First Decade*, Human rights law in perspective v. 15 (Oxford ; Portland: Hart, 2008) at 149.
[682] Rivers, *supra* note 121 at 192–193.
[683] See *R v Secretary of State For The Home Department, Ex Parte Daly*, [2001] UKHL 26 at para 27, Lord Steyn; para 30, Lord Cooke of Thorndon. Under proportionality, the criteria deployed are "more precise and more sophisticated", so "the intensity of review is somewhat greater": proportionality "may require the reviewing

unreasonableness do not always yield the same result.[684] Others have concluded that proportionality adds little to the concept of unreasonableness.[685] As a result, the courts have at times held that administrative actions alleged to contravene a Convention right, or a common law fundamental right, are reviewed according to a correctness standard.[686] However, other decisions appear to prefer the reasonableness-conception of proportionality, emphasizing respect for the views of the original decision-maker.[687]

It should be noted, however, that the proportionality approach is also not a full 'merits review' in which the courts substitute their view of the correct decision for that of the primary decision-maker. In judicial review, judges do not have a primary responsibility but rather "a secondary responsibility to ensure that the primary decision-maker has acted in accordance with the requirements of legality".[688] As noted above (see Section 3.3.3.2), the courts show deference when applying a reasonableness standard of review or a proportionality analysis. The key difference between proportionality (in the *Oakes* test form) and reasonableness (in a form that does not adopt a structured proportionality test) is that a proportionality review provides a structured framework that encourages more stringent judicial review for rationality. In *Doré*, the Court takes a very deferential view of the proportionality analysis to be applied,

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court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions" and "may go further ... inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations" (at para 27, Lord Steyn). Their Lordships applied a proportionality test (in all but name) in holding that the infringement of a claimant's common law right to the confidentiality of his privileged legal correspondence was unlawful (for example, Lord Bingham concluded: "the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners": at para 21).

[684] *R (Association of British Civilian Internees, Far East Region) v Secretary of State for Defence*, 2003 EWCA Civ 473 (UKCA).

[685] *R (Alconbury) v Secretary of State for the Environment*, [2001] UKHL 23 at para 51.

[686] *Daly*, *supra* note 683; *Huang v Secretary of State for the Home Department*, [2007] UKHL 11; *Quila & Ors v Secretary of State for the Home Department & Ors*, 2010 EWCA Civ 1482 (UKCA) at paras 50–62.

[687] See *Belfast City Council v Miss Behavin' Ltd (Northern Ireland)*, [2007] UKHL 19; *Begum, R (on the application of) v Denbigh High School*, *supra* note 668. Other examples are set out at William Wade & C F Forsyth, *Administrative Law*, 10th ed (Oxford ; New York: Oxford University Press, 2009) at 310–312.

[688] Murray Hunt, "Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'" in Nicholas Bamforth & Peter Leyland, eds, *Public law in a Multi-layered Constitution* (Oxford; Portland, Or: Hart, 2003) 337 at 342.

that is, that a rights-limiting measure is proportionate if it falls "within a range of reasonable alternatives".[689] The primary way to show that a proportionality analysis has been properly undertaken is through the provision of adequate reasons or justification for the decision.[690]

#### 3.4.5.3 Reasons and justification for decisions

As outlined above (see Section 1.2.1 and 3.3.1.2.3), the idea of a culture of justification as a characteristic of the rule of law underlies the Court's approach to judicial review of administrative decisions. The Court has recognized that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided".[691] Therefore it would seem that there should be some obligation on the decision-maker who has made a decision impacting on *Charter* guarantees to justify his or her decision through the provision of reasons. Yet the *Doré* decision suggests only a minimal reason-giving requirement, given that the Court accepted that it was sufficient that the Disciplinary Council had been "conscious" of the fact that their decision may constitute a restriction on the lawyer's expressive rights. The Court also rejected the idea that the administrative decision-maker should bear the burden of justifying his or her decision as proportional to its objective.

#### 3.4.5.4 Balancing *Charter* values

The Court suggested that the approach adopted in *Doré* is similar to that taken in cases where the Court has "balanced" values and statutory objectives when reviewing administrative decisions.[692] The Court pointed to *Chamberlain*, in which the majority held that the school board had failed to respect the "values of accommodation, tolerance and respect for diversity"

[689] *Doré*, *supra* note 11 at para 56.
[690] Liston, *supra* note 23 at 80.
[691] *Alberta Teachers' Association*, *supra* note 43 at para 54.
[692] *Doré*, *supra* note 11 at paras 49–50, 55.

which were incorporated into its enabling legislation and "reflected in our Constitution's commitment to equality and minority rights".[693] However, that case sheds little light on the Court's approach to the constitutionality of administrative decisions, given the conclusion that the board's decision was unreasonable because the board had failed to act in accordance with its enabling legislation. In light of this conclusion, the Court held that it was not necessary to consider the constitutionality of the board's decision.[694] It may be that, similarly to the majority's judgment in *Trinity Western*,[695] the decision-maker would have been held to have erred by not taking into account the impact of its decision on the *Charter* right or freedom. A failure to consider a relevant *Charter* value thus constitutes an unreasonable decision.

The Court also points to *Pinet*,[696] in which the Court applied a reasonableness standard when reviewing a decision of the Ontario Review Board for compliance with s. 7 of the *Charter*. The *Pinet* case shows how the Court may interpret the administrative decision-maker's enabling statute to ensure a *Charter*-consistent interpretation, and thereby conclude that the discretionary decision is unreasonable in light of that interpretation. The Court stated that it was required to consider "whether the Ontario Review Board struck an appropriate balance between the twin goals of public safety and the needs of an accused who has been found not criminally responsible ("NCR") by reason of mental disorder".[697] Given that a proper interpretation of the Review Board's enabling legislation required that the decision was "the least onerous and least restrictive" of the appellant's liberty interests,[698] the Board must make its decision with the s. 7 rights of the detainee as "a major preoccupation".[699] The Court

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[693] *Chamberlain*, *supra* note 9 at para 21.
[694] *Ibid* at para 73.
[695] *Trinity Western*, *supra* note 9 at para 43.
[696] *Pinet*, *supra* note 9.
[697] *Ibid* at para 1.
[698] *Ibid* at paras 19–23. See also *Penetanguishene Mental Health Centre v Ontario (Attorney General)*, 2004 SCC 20.
[699] *Doré*, *supra* note 11 at para 55. Citing *Pinet*, *supra* note 9 at para 19.

concluded that the Review Board had not given sufficient weight to the appellant's liberty interests, as nowhere in the Review Board's reasons was there any reference to the "least onerous and least restrictive" requirement in relation to the conditions of its disposition and nor was there any consideration of the appellant's liberty interests.[700] In *Doré*, the Court suggested that the goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified.[701]

The analysis in *Lake* appears to be the type of framework the Court envisions adopting through the *Doré* approach. The Court suggested that, in *Lake*, "the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the prima facie infringement of mobility rights under s. 6(1)".[702] In *Lake*, the Court held that, while the reviewing court owes deference to the Minister's decision "including the Minister's assessment of the individual's *Charter* rights",[703] the Minister must apply the "proper legal principles" and carry out the "proper analysis".[704] The Court had previously held that, while extradition constitutes a prima facie infringement of a Canadian citizen's mobility rights under s. 6(1) of the *Charter*, that infringement can be justified under s. 1 by considering certain factors (the *Cotroni* factors).[705] On judicial review, the court must determine whether the Minister carried out the proper analysis (based on the *Cotroni* factors), considered the relevant facts, and reached a defensible conclusion based on those facts.[706] The reviewing court must determine whether the Minister's decision falls within a range of reasonable outcomes (but must not re-assess the

[700] *Pinet*, *supra* note 9 at para 49.
[701] *Ibid* at para 19.
[702] *Doré*, *supra* note 11 at para 55. Citing *Lake*, *supra* note 9 at para 27.
[703] *Lake*, *supra* note 9 at para 49.
[704] *Ibid* at paras 41, 49.
[705] See *United States of America v Cotroni; United States of America v El Zein*, [1989] 1 SCR 1469.
[706] *Lake*, *supra* note 9 at para 41.

relevant factors and substitute its own view).[707] In terms of the reasons required for the decision, the Court held that the Minister is not required to provide a detailed analysis for every factor.[708]

The Court has been clear that courts reviewing discretionary decisions on a reasonableness standard of review must not engage in a new weighing process.[709] The Court has reaffirmed this position in recent cases.[710] Courts must avoid second-guessing administrative decision-makers with respect to the weight or priority they assign to competing factors of relevance to their decision.[711] Courts may, however, ensure that only relevant considerations have been taken into account, and ensure that decision-makers were "alert" and "sensitive" to the range of legal considerations in play and the weight of considerations that are of clear legal importance.[712] As the Court stated in *Doré*, the administrative decision-maker must "demonstrate that they have given due regard to the importance of the [*Charter* rights] at issue".[713] The Court's direction that the administrative decision must reflect a "proportionate balancing" of the *Charter* rights and values at play and the statutory objectives,[714] and that the reasonableness analysis centres on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory

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[707] *Ibid*.
[708] *Ibid* at para 46.
[709] While the courts may ensure that relevant considerations were taken into account by the decision-maker, they must not inquire into the relative weight assigned to the various factors or how those factors were balanced: see *Maple Lodge Farms v Government of Canada*, *supra* note 509 at 7–8.
[710] See, for example, *Suresh*, *supra* note 258 at para 37; *Lake*, *supra* note 9 at para 41; *Khosa*, *supra* note 390 at para 149.
[711] See *Suresh*, *supra* note 258 at para 37.
[712] See *Baker*, *supra* note 9 at para 75. See also *Ibid* at para 65; *Németh v Canada (Justice)*, 2010 SCC 56 at para 58.
[713] *Doré*, *supra* note 11 at para 66.
[714] *Ibid* at para 35.

objectives,[715] suggests that the reviewing court must be satisfied to some degree that the "proper"[716] balance has been achieved.

#### 3.4.5.5 Assessing the "proper" balance

The Court in *Doré* indicates that the decision-maker is not required to undertake any equivalent of the first step of the *Oakes* test (justifying the importance of the objective). Thus it appears that the court is not required to scrutinize the first step of the *Oakes* test (justifying the importance of the objective). However, given that the *Doré* approach requires identification of the statutory objective and a balancing of that objective against the relevant *Charter* value, it is difficult to see how the courts could avoid enquiring into the importance of the objective. Additionally, as the definition of the objective impacts significantly on the rest of the analysis,[717] a decision relying on a minimally important statutory objective should fail when the proportionality balancing exercise is undertaken.[718] Further, if the statutory objective was thought to be insufficiently important, the enabling statute would be open to challenge for breaching the *Charter*. LeBel J suggested this was the case in *Multani*, stating that when applying s. 1 of the *Charter* to an administrative decision where the statutory authority for the decision is not itself challenged it would be "pointless to review the objectives of the act".[719] Therefore the fact that the Court did not adopt the first step of the *Oakes* test is likely to be immaterial.

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[715] *Ibid* at para 7.
[716] See *Ibid* at para 58.
[717] See Barak, *supra* note 550 at 371–372.
[718] This is a similar approach as is taken by the Court in relation to the "principles of fundamental justice" analysis. As Hamish Stewart points out, the doctrines applied in the principles of fundamental justice analysis are intended to address "failures of instrumental rationality", meaning that the Court accepts the legislative objective but scrutinizes the legislation enacted as the means to achieve the objective. If the legislation is not a rational means to achieve the objective, then the law fails in terms of its own objective: Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, Essentials of Canadian Law (Toronto: Irwin Law, 2012) at 151.
[719] *Multani*, *supra* note 7 at para 155.

In terms of the proportionality analysis part of the *Oakes* test, the Court does suggest that some form of minimal impairment review must be undertaken. The Court stated that the *Doré* analysis will ensure that the decision interferes with the relevant *Charter* guarantee "no more than is necessary given the statutory objectives".[720] The Court therefore appears to adopt LeBel J's *Multani* approach, which is that the issue "becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed".[721] However, although this suggests that a different approach should be taken than the usual administrative law reasonableness review, the Court's decision in fact contains no minimal impairment review in terms of considering whether a formal reprimand in Mr. Doré's case was in fact necessary to achieve the statutory objectives.

### 3.4.6 Conclusion: A new proportionality test?

The *Oakes* test is intended to impose a stringent standard of justification on government to reflect the commitment to uphold the rights and freedoms set out in the *Charter.*[722] The *Doré* approach rejects the *Oakes* proportionality test as the method of analysis for reviewing administrative action limiting a protected right or freedom. As the above analysis shows, given the lack of clear guidance provided by the Court in *Doré* about the methodology the courts should use to assess the "reasonable", "proportionate", "proper" balance, it is difficult to assess how the courts will now review a discretionary administrative decision that appears to infringe on *Charter* guarantees.

Some conclusions can be deduced as to what the *Doré* approach requires, however. While a structured proportionality analysis is not required of the decision-maker or the reviewing court, the decision-maker must have turned his or her mind to the relevant *Charter*

[720] *Doré*, *supra* note 11 at para 7.
[721] *Multani*, *supra* note 7 at para 155.
[722] *Oakes*, *supra* note 8 at 136.

values. As the above analysis suggests, reasonableness in the context of reviewing rights-limiting decisions may be interpreted in a strong sense, as requiring the court to assess whether the decision-maker has properly balanced the relevant factors. However, given the Court's rejection of re-weighing when conducting reasonableness review, and the minimal reason-giving requirement placed on administrative decision-makers, the *Doré* decision does not appear to call for such an approach. Instead, *Doré* merely requires that the decision-maker has considered (or was "conscious" of) the rights-limiting nature of his or her decision. The *Doré* approach bears more similarity to the more flexible balancing approach taken be the Court in applying *Charter* values to the common law, and appears to refer to proportionality in the sense of a "fair balance". This approach therefore seems to be less rigorous than the *Oakes* test at least with regard to the justification or reasons required of the government actor. The following chapter explores this and other potential implications of the *Doré* approach.

# 4 POTENTIAL ISSUES WITH THE *DORÉ* APPROACH

Chapter 4 explores the implications of the approach set out in *Doré*, particularly its impact on the protection of *Charter* guarantees and rule of law concerns. It also addresses the conceptual coherence of the *Doré* approach. I suggest that, although the *Doré* decision goes some way towards a coherent approach to integrating *Charter* and administrative law principles, it ultimately fails to provide a coherent framework for resolving the conflict between the administrative law principle of deference with the supremacy and fundamental nature of the *Charter*.

The lack of guidance from the Court in *Doré* on the methodology courts should apply when reviewing rights-limiting administrative decisions raises a number of questions and uncertainties about how the approach outlined by the Court will impact on the protection of *Charter* guarantees. While the *Doré* approach fits within the general trend in recent jurisprudence of recognizing administrative bodies' expertise and important institutional role, it also raises concerns that protection of *Charter* rights will be weakened due to the ability of administrative decision-makers to justify their rights-infringing decisions through a less-rigorous analysis than the courts apply to a law. Further, given the Court's adoption of a reasonableness standard and the rejection of a structured proportionality analysis, it is questionable whether the *Doré* approach will ensure adequate justification for decisions impacting on *Charter* values.[723]

The Court's reliance on a categorical distinction between law and discretion raises rule of law concerns. The *Doré* approach disregards the interconnectedness of law and discretion, risks an approach that ignores systemic flaws in the legislative scheme granting administrative discretion, and may create incentives to establish legislative schemes that grant broad and

[723] See Wildeman, *supra* note 23 at 364–5, 378.

undefined discretion to administrative bodies. In this way, the *Doré* approach does not address key rule of law concerns inherent in the exercise of discretion, such as the potential for arbitrariness, and lack of accessibility, predictability and precision in the law.

Future cases will therefore have to deal with concerns about the constraints on decision-making made pursuant to broad grants of discretion within complex regulatory frameworks, as well as how to interpret the *Doré* approach in a way that reflects the fundamental nature of *Charter* guarantees. The following sections consider the potentially problematic aspects of the *Doré* approach that are most likely to create difficulties for future cases. This analysis is then drawn on in Chapter 5 to show why the courts should adopt a modified approach to the judicial review of rights-limiting administrative decisions.

### 4.1 Conceptual coherence

Following *Vancouver Transit*, it was suggested that the Court had abandoned the search for conceptual coherence in favour of the predictability and simplicity of a categorical approach, and had yet to develop a workable and coherent approach to the relationship between the *Charter* and administrative law.[724] The *Doré* decision attempted to achieve a more coherent approach to the relationship between the *Charter* and administrative law by "integrating *Charter* values into the administrative law approach".[725] In doing so, the Court rejected the suggestion of the majority in *Multani* that taking an administrative law approach would result in the fundamental values contained in the *Charter* being reduced to "mere administrative law principles".[726]

In some ways, the *Doré* approach to the review of rights-limiting administrative decisions may be seen as an endorsement of the unity of public law thesis (see Section 2.1.1).

[724] Gratton & Sossin, *supra* note 5 at 147, 163.
[725] *Doré*, *supra* note 11 at para 35.
[726] *Multani*, *supra* note 7 at para 16.

The *Doré* approach supports a substantive, value-laden role for administrative law, and draws on the shared fundamental values of administrative law and the *Charter* by recognizing that administrative discretion must be exercised in accordance with these fundamental values (including those guaranteed by the *Charter*). The Court recognized that the values set out in the *Charter* are not the only fundamental values constraining discretionary decisions, so this approach also upholds the unwritten values underlying administrative law (such as reasonableness and fairness).[727] In its adoption of a reasonableness standard of review, and the resulting deference to the administrative decision, the *Doré* approach also recognizes administrative decision-makers as having a legitimate role in articulating the fundamental values of society that are embodied in the *Charter*.

However, other aspects of the Court's decision do not further a coherent and unified framework for resolving the conceptual tensions in cases involving administrative law and the *Charter*. In particular, the Court's determination to keep separate the methodological approaches taken in administrative law and that taken under the *Charter* suggests an understanding of administrative law and constitutional law approaches as being conceptually distinct. This view of administrative and constitutional law approaches as being "conceptually distinct" was advocated for by the dissent in *Multani*, with Abella J suggesting that the constitutional justification of a *Charter* infringement is based on societal interests, rather than the needs of the individual parties.[728] Abella J suggested that "an administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic [and the] values involved may be different".[729] A micro/macro-cosmic distinction is one way of

[727] See *Doré*, *supra* note 11 at para 34. The *Doré* approach also avoids concerns about the excessive "constitutionalization" of administrative law, by ensuring courts draw upon administrative law jurisprudence as a source of guidance for administrative decision-making. A similar point is made by Evans (*supra* note 331 at 73). See also *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 189.
[728] *Multani*, *supra* note 7 at para 132.
[729] *Ibid*.

viewing cases involving administrative decisions versus those involving legislation. An administrative decision will generally have a direct impact on an individual whereas legislation generally applies to a sector of society or a number of individuals. However, challenges to administrative decisions will often have a much wider impact than just the outcome for the individual applicant. For example, Mr. Pinet's challenge to a parole board's decision on his case resulted in a direction from the Court about the primacy of liberty interests that most likely impacted on parole board decision-making across the nation.[730]

In *Doré*, the Court suggested that this distinction is due to the fact that, with administrative decisions, *Charter* values are applied in relation to a particular set of facts, whereas, when a particular "law" is being assessed for *Charter* compliance, "we are dealing with principles of general application".[731] However, cases challenging legislation on the basis of inconsistency with the *Charter* invariably stem from an individual applicant (or group of individuals), and the impact of the legislation on the individual, and therefore consider the application of the *Charter* protections to those facts. Further, cases involving the impact of administrative decisions on *Charter* protections will frequently need to consider societal interests and the application of the *Charter* in a general sense. The distinction between a microcosmic and macrocosmic (or particular versus general) analysis also fails to take into account the large body of jurisprudence that focuses on the criminal justice system, the majority of which are "microcosmic" cases yet the Court has carried out a full-fledged *Charter*

[730] See *Pinet*, *supra* note 9.
[731] *Doré*, *supra* note 11 at para 36 (emphasis added). The concept of laws as rules of general application, contrasted with discretionary decisions as ad hoc decision-making, also influenced the dissent in *Multani*. Abella and Deschamps JJ advocated for a distinction between general norms and individualized decisions on the basis that an administrative decision is not a law or regulation but rather "the result of a process provided for by statute and by the principles of administrative law in a given case" and "[e]stablishing a norm and resolving a dispute are not usually considered equivalent processes": *Multani*, *supra* note 7 at para 112.

review.[732] The basis on which the Court distinguished the administrative law and constitutional law approaches is therefore dubious.

### 4.2 Justificatory standard for *Charter* infringements

The *Doré* approach also potentially disrespects the supremacy and fundamental nature of *Charter* guarantees by failing to ensure administrative decisions impacting on *Charter* guarantees are adequately justified. The introduction of the *Charter* enhanced the culture of justification in Canada.[733] In particular, s. 1 and the *Oakes* framework, which places the justificatory onus on the government, is designed to ensure that any limitation on the *Charter*-guaranteed rights and freedoms is both "reasonable" and "demonstrably justified in a free and democratic society" (as required by s. 1 of the *Charter*). As outlined above,[734] administrative law has also moved toward a conception of the rule of law based on a culture of justification under which an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. Accordingly, reasonableness review is said to be concerned with "justification, transparency and intelligibility" within the decision-making process.[735]

However, I suggest that the justificatory standard applied in *Doré* is deficient in several regards. Firstly, the *Doré* approach relieves the party defending the decision impacting on *Charter* rights of the obligation to demonstrably justify the infringement.[736] Secondly, the decision did not further a culture of justification as the Court did not require the administrative decision-maker to fully justify its decision and did not itself fully justify its conclusion that the limitation on Mr. Doré's right to freedom of expression was reasonable. Thirdly, when

[732] See, for example, *R v Therens*, [1985] 1 SCR 613; *R v Hufsky*, [1988] 1 SCR 621; *R v Ladouceur*, [1990] 1 SCR 1257; *R v Suberu*, 2009 SCC 33..
[733] McLachlin, *supra* note 399 at 178.
[734] See Sections 1.2.1 and 3.3.1.2.3.
[735] See *Dunsmuir*, *supra* note 10 at para 47.
[736] Fox-Decent & Pless, *supra* note 6 at 437.

reviewing the decision in issue in *Doré*, the Court failed to apply the proportionality test in a manner that ensures the transparency, intelligibility and justification of any limitation on *Charter* rights.

### 4.2.1 Burden of proof

According to *Charter* jurisprudence considering s. 1, the burden of proving that an infringement of an individual's *Charter* guarantee is justified rests on the party seeking to have that limitation upheld.[737] This reflects the structure of s. 1, which provides that *Charter* rights and freedoms are guaranteed *except* where the infringement can be justified.[738] The presumption is therefore that *Charter* rights are guaranteed "unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited".[739] As the Court stated in *Little Sisters*, "[i]t is not open to the state to put the onus on an individual to show why he or she should be allowed to exercise a *Charter* right".[740]

Conversely, with the reasonableness standard of review in administrative law, the onus is on the individual seeking to challenge the decision to show that there is evidence that the discretion was abused such that the decision reached was unreasonable. In its adoption of an administrative approach based on reasonableness review, the *Doré* decision therefore places the burden of proving that the "proportionate balance" has not been struck on the individual alleging that his or her *Charter* rights have been infringed by an administrative decision.[741] As noted above (see Section 3.3.2.1), the Court's approach in *Doré* appears to adopt Abella J's suggestion in *Multani* that administrative bodies should not be treated as parties with an interest in a dispute.[742] However, the Court did not clarify the conceptual difficulty it sees

[737] *Oakes*, *supra* note 8 at 137.
[738] Fox-Decent & Pless, *supra* note 6 at 434–435.
[739] *Oakes*, *supra* note 8 at 137.
[740] *Little Sisters*, *supra* note 262 at para 101.
[741] See Liston, *supra* note 23 at 33.
[742] *Multani*, *supra* note 7 at para 123.

with defining the "pressing and substantial" objective of a decision. The Court also neglected to explain the difficulty it saw with who should have the burden of defining and defending the objective of a decision.

Abella J was concerned that placing the burden of proof on administrative bodies, and requiring administrative bodies with quasi-judicial functions to adduce evidence to justify their decisions under s. 1, would undermine the administrative bodies' independence.[743] I disagree. The concern about preserving administrative decision-makers' independence and impartiality is based on a conception of administrative decision-makers as adjudicators. Adjudicative decision-makers have traditionally only been granted limited standing in cases involving substantive challenges to their decisions.[744] The rationale for this limitation is that adversarial participation of the tribunal (or tribunal counsel) discredits the impartiality of the administrative tribunal where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties.[745] This approach has been amended, however, to reflect the fact that administrative bodies are often in the best position to explain the reasonableness of their decisions given their specialized expertise.[746] Recent cases have advocated for a contextual approach to assessing any concerns about tribunal impartiality, which takes into account the nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to knowledgeably respond to the attack on the tribunal's decision.[747] It is difficult to envisage how an administrative decision-maker's independence or impartiality could be compromised through its adducing evidence to justify its *Charter*-infringing decision, at least without full consideration of the

[743] *Ibid* at para 132.
[744] See *Northwestern Utilities Ltd. v Edmonton*, [1979] 1 SCR 684; *Henthorne v British Columbia Ferry Services Inc.*, 2011 BCSC 409.
[745] *Northwestern Utilities*, *supra* note 744 at 709.
[746] See *Caimaw v Paccar of Canada Ltd.*, [1989] 2 SCR 983; *Children's Lawyer for Ontario v Goodis*, [2005] OR (3d) 309 (ONCA).
[747] *Children's Lawyer for Ontario v Goodis*, *supra* note 746 at para 43.

type of decision-maker and the nature of the decision-making process. Indeed, in the *Doré* case, the Barreau du Québec was represented before the Supreme Court and presented argument that the sanction imposed on Mr. Doré was not disproportionate.[748]

In *Doré*, the Court also suggested that if the *Oakes* test was adopted it would be conceptually difficult to see who would have the burden of defining and defending the objective of the rights-limiting administrative decision.[749] This may be a reason for not adopting the first limb of the *Oakes* test but does not shed any light on why administrative decision-makers should not bear the burden of proving their decisions are justified according to the *Doré* standard of "proportionate balancing". Just because aspects of the *Oakes* test are poorly suited to the review of discretionary decision does not mean that the decision-maker should not bear the burden of proving that the decision reached is justifiable.

The approach taken in *Doré* places a significant evidential burden on the individual to prove that the decision-maker did not proportionately balance his or her rights with the statutory objectives. It is not clear how strong the evidentiary basis put forward by the applicant will need to be. However, applicants for review of discretionary decisions will often have difficulty accessing the kind of evidence required, particularly the complete or comprehensive reasons for the decision. The Court has held that *Charter* decisions "should not and must not be made in a factual vacuum", and cannot be based on "the unsupported hypotheses of enthusiastic counsel".[750] This was relied upon in a recent Federal Court decision involving a challenge to an immigration officer's decision refusing the individual's

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[748] Counsel for the respondent Pierre Bernard, Assistant Syndic of the Barreau du Québec, argued that the sanction imposed was not disproportionate because it was arrived at through a process of elimination, whereby other sanctions available (such as a fine) were not appropriate: see Gilles Doré v. Pierre Bernard (in his capacity as Assistant Syndic of the Barreau du Québec), et al. 33594, Webcast, online: Supreme Court of Canada <http://www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=33594> at minutes 165-166 and 172.

[749] *Doré*, *supra* note 11 at para 38. See also *Ibid* at para 4.

[750] *Mackay v Manitoba*, [1989] 2 SCR 357 at 361–362. See also *Oakes*, *supra* note 8 at 137–138.

application for permanent residence on the grounds that the officer violated the applicant's right to equality (guaranteed by s. 15(1) of the *Charter*) by not taking into account his American Sign Language test scores.[751] In that case, the Court concluded that, given "the factual pattern of this case and the lack of evidence adduced by the applicant with regard to the alleged violation of his s. 15 *Charter* right to equality, the Court must decline to address the *Charter* question raised by the applicant".[752]

In order to counteract the arbitrariness or luck regarding applicants' access to the rationale underlying the decision,[753] the courts have imposed a duty on administrative decision-makers to provide reasons for decisions in certain circumstances. The reasons provided must display a reasoned justification for the decision. Given the onus on an applicant to prove an unreasonable and disproportionate limitation on his or her *Charter* rights, however, it is questionable whether the *Doré* approach to requiring such reasoned justification is sufficient.

### 4.2.2 Justification for the infringement

The Court provided little explanation in *Doré* of how the administrative decision-maker's reasoning regarding the *Charter* value at issue was intelligible and justified.[754] The Court merely noted that the Disciplinary Council was "conscious" of the fact that the statutory provision under which it made its decision "may constitute a restriction on a lawyer's expressive rights".[755] The Court did not engage in any probing analysis of the extent to which the Council actually did consider Mr. Doré's right to freedom of expression and the reasons

[751] See *Smirnov v Canada (Citizenship and Immigration)*, 2013 FC 554. The applicant also challenged the regulations under which the decision was made, on the basis that the law creates a distinction based on disability due to the requirement to speak and listen, such that no deaf person could ever succeed in obtaining permanent residency under the Canadian experience class. This challenge was also rejected.
[752] *Ibid* at para 36.
[753] Dyzenhaus, *supra* note 155 at 7.
[754] See *Dunsmuir*, *supra* note 10 at para 47.
[755] *Doré*, *supra* note 11 at para 70.

why this infringement of this right was justified. Given the lack of reasons provided by the decision-maker, the Court could not engage in an evaluation of whether the reasons for the decision justified the conclusion reached, or follow the "line of analysis" within the reasons that could reasonably have led the decision-maker from the evidence to the conclusion at which it arrived.[756] The Court applied the proportionality analysis to the Disciplinary Council's decision in a single paragraph, before concluding that the decision to issue a reprimand satisfied the proportionality criterion.[757] This failure to fully engage with the rationale for the rights-limiting decision, and the failure to require the administrative decision-maker to fully justify its decision, does not promote a culture of justification in decision-making and may permit a box-ticking approach by decision-makers to the consideration of relevant *Charter* guarantees.

The Court also failed to provide a full justification as to why it considered the Council's decision was reasonable. The Court noted that a decision would be found to be reasonable if "the decision-maker has *properly* balanced the relevant *Charter* value with the statutory objectives".[758] However, the Court's conclusion that the decision "cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives" is preceded by only a very brief outline of the Council's reasoning, and a suggestion that Mr. Doré's "excessive degree of vituperation" warranted reprimand.[759]

The Court stated that the balance the Court must consider is "the fundamental importance of open, and even forceful, criticism of our public institutions with the need to

[756] See *Law Society of New Brunswick v Ryan*, *supra* note 393 at para 55; *Dunsmuir*, *supra* note 10 at para 47.
[757] *Doré*, *supra* note 11 at para 70.
[758] *Ibid* at para 58 (emphasis added). It has been suggested that, with *Doré*, the Court "has unleashed a new set of possibilities for revisiting the weight accorded to competing legal values on reasonableness review": Wildeman, *supra* note 23 at 349.
[759] *Doré*, *supra* note 11 at paras 68–71.

ensure civility in the profession".[760] However, the Court then suggested that all it was considering was whether the discipline (a reprimand) "reflects a proportionate application of the statutory mandate with Mr. Doré's expressive rights".[761] The Court did not explore the balance between freedom of expression (in the form of criticism of public institutions) and the objective of maintaining civility within the legal profession. Further, the Court did not consider the relevance of the private nature of Mr. Doré's communication, the context in which the letter was written, or assess the appropriateness of alternative discipline options available in these circumstances. We can only speculate as to whether the result would have been different if the reasonableness of Mr. Doré's 21-day suspension penalty had been before the Court,[762] as the Court gave no indication as to whether that particular penalty would be considered disproportionate, or whether the Council's awareness that this penalty would impinge upon Mr. Doré's freedom of expression would have been sufficient to conclude that that decision was reasonable.

Justification by the courts regarding the reasonableness of decisions that infringe on *Charter* rights or freedoms is particularly important given the constitutional guarantee that an individual's *Charter* interests are subject only to reasonable *and* demonstrably justified limits.[763] There is a danger that a general doctrine of deference may deflect judges from their responsibility for deciding a particular case on its own legal merits, or inappropriately deferring to the governmental actor's interpretation or decision.[764] It is inimical to the normative and institutional foundation of the *Charter* to unquestioningly defer to an administrative decision-maker's own determination of whether his or her discretionary

[760] *Ibid* at para 66.
[761] *Ibid* at para 67.
[762] Mr. Doré did not appeal the 21-day suspension imposed by the Disciplinary Council, so the Court only considered the reasonableness of the Council's conclusion that a reprimand was warranted: *Ibid*.
[763] As required by *Charter*, *supra* note 1, s 1. For further discussion of this point, see Fox-Decent & Pless, *supra* note 6 at 434–435.
[764] Allan, *supra* note 93; Allan, *supra* note 99 at 43.

decision violates an individual's *Charter* rights.[765] The special status given to the rights set out in the *Charter* by the Canadian people demands that the people be given the opportunity to know and judge the balancing struck between these rights and other interests. The judicial review process can (and should) provide this opportunity. Given this, the lack of transparency and justification in the Court's reasons in *Doré* for determining that the decision was reasonable and proportionate is troubling. Clear justification for judicial review decisions may also have important and far-reaching effects on the quality of administrative decision-making by providing guidance to future decision-makers. Justification by the judiciary is therefore important both for ensuring that judges reach transparent and logical decisions, and for providing guidance to administrative decision-makers interpreting the *Charter* in future decisions.

The Court in *Doré* thus failed to promote a culture of justification in decision-making, in that it did not require the administrative decision-maker to fully justify its decision and did not fully engage with, or explain the rationale for, the rights-limiting decision. This lack of justification was amplified by the Court's rejection of a structured proportionality test or other methodology to ensure transparency, intelligibility and justification of any limitation on *Charter* rights.

### 4.2.3 Rejection of a structured proportionality test

Proportionality may be viewed as essentially a requirement of justification.[766] Judicial review for proportionality compels public authorities into a process of reasoned engagement,[767] whereby governments are required to provide justification for the rationality of their actions. As outlined in Section 1.3.1.1, some of the principal benefits of a structured

[765] Macklin, *supra* note 3 at 317.
[766] Cohen-Eliya & Porat, *supra* note 70 at 466.
[767] Kumm, *supra* note 70 at 154. Kumm suggests that judicial review can be understood as a form of institutionalized Socratic contestation.

proportionality analysis are its ability to enhance transparency in decision-making and facilitate an institutional dialogue. While no analytical process can guarantee objective decision-making, a structured doctrinal test can present a challenge to a judge's ideological views and reduce the likelihood of arbitrary decisions. The process of the proportionality test forces judges to "formulate their judgments", making the outcome "more reasoned" and "more true".[768]

As explored above in Section 3.4, the manner in which the Court applied a proportionality analysis in *Doré* lacked the structured nature of the *Oakes* test. The *Doré* decision merely requires that the decision-maker has considered (or was "conscious" of) the rights-limiting nature of his or her decision. While the Court suggested that the decision should interfere with the relevant *Charter* guarantee "no more than is necessary given the statutory objectives",[769] the decision reveals no consideration of whether a formal reprimand was in fact necessary to achieve the statutory objectives. Given its rejection of a structured proportionality framework and the lack of justificatory requirement on the decision-maker, the *Doré* approach to judicial review of rights-limiting administrative decisions therefore has the potential to be much less transparent, and less intelligible, than the *Oakes* test approach.[770]

The *Doré* approach also permits a less robust balancing exercise than the *Oakes* test. Given the Court's rejection of re-weighing when conducting reasonableness review, as well as the minimal reason-giving requirement placed on administrative decision-makers, the *Doré* approach risks that the courts will not give the *Charter* right adequate weight in the

[768] Attaran, *supra* note 81 at 262. For further benefits of a structured proportionality analysis, see Section 1.3.1.1.
[769] *Doré*, *supra* note 11 at para 7.
[770] In this regard, Wilson J warned against replacing the strict standard of review under the *Oakes* test with a more deferential standard of "reasonableness": Bertha Wilson, "Human Rights and the Courts (Seminar on the Functioning of Government: The Canadian Experience, Ottawa, May 30, 1991)" in *Speeches delivered by the Honorable Bertha Wilson, 1976-1991* (Ottawa: Supreme Court of Canada, 1992) 472 at 747.

balancing.[771] A structured proportionality test, on the other hand, would require the reviewing court to assess the balance that the decision-maker has struck and to examine the relative weight accorded to the right and any competing interests or considerations. The Court's rejection of the *Oakes* test also risks the courts disregarding the rationale and reasoning contained in *Charter* cases, and consequently issuing decisions that are out-of-step with *Charter* jurisprudence.

An important question is whether a direct application of the *Charter*, including the *Oakes* test, actually results in disparate treatment of similar cases compared with a "proportionate balancing" approach. While it is not clear that a reasonableness review will necessarily fail in terms of rights protection, or that application of the *Oakes* test would necessarily be more favourable to an individual complaining of an infringement of *Charter* rights than the application of a reasonableness standard of review, (as noted above) the way in which the courts reach outcomes is important. The methodology the courts use to reach decisions is significant in terms of education and future administrative decision-making. Given both the deferential approach of the Court and the "relatively inchoate analysis of the relative weight of statutory purposes and competing *Charter* values",[772] the *Doré* approach is less rigorous than the *Oakes* test (at least with regard to the justification or reasons required of the government actor). This lack of clarity may permit courts to take varying approaches in determining whether the "proportionate" or "proper" balance has been achieved.

[771] This critique has been levelled at the Court's adoption of the balancing approach to integrating *Charter* values into the common law: see Ross, *supra* note 633 at 132. Ross argued that the lack of weight assigned to freedom of expression in *Hill* was completely out of line with previous *Charter* jurisprudence.
[772] Wildeman, *supra* note 23 at 364, 378.

### 4.2.4 Potential for varying approaches

#### 4.2.4.1 Impact of the type of decision under review

As noted in Section 3.3.3.2.2, "reasonableness" can take different forms in different contexts, and will be assessed in the context of the particular type and expertise of the administrative decision-maker involved, amongst other relevant factors.[773] The Court's reliance in *Doré* on a conception of administrative decision-makers as judicial-like therefore raises questions about how the courts will apply the *Doré* approach to future cases, particularly those involving non-adjudicative decision-makers.[774] The Court does not clarify in *Doré* how the type of administrative decision-maker, or the decision-maker's actual expertise in the subject matter at issue, will influence the standard of review.[775] For example, *Doré* considered an adjudicatory decision-maker, so its applicability to other administrative bodies such as a minister exercising discretion in a political area is debatable. Decision-makers that lie at the policy or legislative end of the spectrum are generally accorded more deference by the courts, so one would expect that an even more deferential version of the *Doré* approach would be taken in cases involving these decision-makers. It is unclear, however, whether the *Doré* decision extends to discretionary decisions made by all administrative decision-makers, such as police officers,[776] and therefore *Doré* may in fact have "siloed" off certain areas of public law.

The "nature of the decision and the statutory and factual contexts" may also impact on the determination of whether the decision reflects a proportionate balancing of the *Charter* protections at play.[777] Whether the decision is categorized as dealing with facts, mixed fact

[773] Binnie J raised the importance of the type of decision-maker and the nature of the decision in *Dunsmuir*: see *Dunsmuir*, *supra* note 10 at paras 135–139, Binnie J.
[774] For example, municipalities, Ministers or immigration officers making decisions that take into account a number of policy considerations.
[775] *Catalyst Paper*, *supra* note 486.
[776] For some examples of cases reviewing discretionary decisions by police officers, see Section 4.3.1.2.
[777] *Doré*, *supra* note 11 at para 57.

and law, or a question of law may impact upon the level of deference applied by the court. The intensity of the proportionality analysis may also vary according to considerations such as relative expertise and strength of the relevant rights and interests (including public or democratic interests). It is clear, therefore, that the stringency or rigorousness of the *Doré* approach is likely to vary depending on the type of decision-maker, and the nature and context of the decision under review.

#### 4.2.4.2 Avoiding the *Charter*?

The *Doré* decision leaves many questions unresolved and appears to allow for varying approaches on judicial review, including categorizing the case as "administrative" and applying established administrative law techniques to resolve the case, despite a *Charter* challenge to the decision. For example, in *Pridgen v University of Calgary* [*Pridgen*],[778] judges on the Alberta Court of Appeal avoided applying the *Charter* despite a challenge to an administrative decision on the basis that it was inconsistent with the *Charter*. In that case, two University of Calgary students sought judicial review of the University's decision to discipline them for comments made about a professor on Facebook on the basis that the University acted unreasonably and infringed their right to freedom of expression as guaranteed by s. 2(b) of the *Charter.* Although all three judges in *Pridgen* concluded that the University's decision was unreasonable, only Paperny JA addressed the *Charter* issue. The two other judges decided the case purely on administrative law grounds, concluding that there was "no need to resort to a *Charter* analysis in this case" (despite the students' *Charter* claim).[779] Paperny JA noted that the University had not conducted any *Charter* inquiry, and had made no attempt to balance its

[778] *Pridgen v University of Calgary*, 2012 ABCA 139.
[779] *Ibid* at para 176, McDonald JA. While O'Ferrall JA cited the fact that no consideration was given to the students' rights to freedom of expression as a reason for the decision being unreasonable, he rejected a *Charter* analysis because the students had applied for the administrative law remedies: *Ibid* at paras 179–183, O'Ferrall JA .

statutory mandate with freedom of expression.[780] She concluded that the University's decision had therefore breached the students' right to freedom of expression "and cannot be saved by section 1".[781] The fact that the *Doré* decision was released only shortly before *Pridgen* may account for some of the confusion on the part of the judges over the appropriate approach to take.[782] However the case is also illustrative of a fundamental concern that *Charter* review cannot deal with all aspects of administrative decision-making. It is understandable that, when faced with reviewing an administrative decision, judges will turn to administrative law. However, the *Doré* approach is clearly intended to ensure that *Charter* values are considered when relevant, and directs that this consideration can take place within an administrative law framework. Given that the *Charter* is supreme law, it would be concerning if courts could avoid applying the *Charter* when an administrative decision is challenged as being inconsistent with the *Charter*.

#### 4.2.4.3 Correctness in some cases?

In *Doré*, the Court clarified that the fact that a *Charter* guarantee is in issue should not change the standard of review applicable.[783] However, *Doré* arguably leaves open the possibility that a correctness standard of review will still be adopted in some cases, either in relation to the whole decision or to the issue of whether the decision-maker has identified the

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[780] *Pridgen*, *supra* note 778 at para 127, Paperny JA. Paperny JA stated:

> The balance to be struck is between the seriousness of the impugned conduct and its effect on the tenor of debate, and the student's ability to criticize, comment on or refute the quality of education he or she receives. The University's actions in disciplining the Pridgens did not balance their expressive rights with the University's statutory objectives; indeed, the University denied the existence of those rights entirely.

[781] *Ibid* at para 128, Paperny JA. Justice Paperny also noted that the University's decision was unreasonable from an administrative law perspective.

[782] *Pridgen* was released on May 9, 2012 (less than two months after *Doré*).

[783] The Court confirmed that reasonableness remains the applicable review standard for disciplinary decisions and "the fact that *Charter* interests are implicated does not argue for a different standard": *Doré*, *supra* note 11 at para 45. The Court indicates that the standard of reasonableness is more appropriate in such a case because "[e]ven where *Charter* values are involved, the administrative decisionmaker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*": *Ibid* at para 54 (emphasis in original). Fox-Decent and Pless point out that this distinction is puzzling given that, in *Charter* challenges to legislation, the Court generally insists that a law must be tested in its actual application, and the analysis is undertaken with reference to the particular facts of the case: Fox-Decent & Pless, *supra* note 6 at 432.

correct right and scope of that right.[784] Given that the reasonableness standard of review gives rise to the potential for inconsistency in the interpretation and application of constitutional rights and values,[785] judges may be concerned about such inconsistency and therefore be tempted to apply a correctness standard. Even following the *Doré* approach, there is room for courts to apply a correctness standard. For example, a correctness standard may be applied in a situation where the administrative decision-maker is adjudged to not have expertise in interpreting and applying the *Charter*, and where the court considers that the decision raises a question of importance to the legal system (thus potentially falling within the exception of a "question of general law … of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise").[786]

The *Doré* approach could also potentially be interpreted to mean that courts should ensure that administrative decision-makers' interpretations of the scope of the relevant *Charter* right must be correct. This interpretation would fit with the Court's approach in *Canada v PHS*, in which the Court applied s. 7 of the *Charter* to the Minister's decision with no reference to deference.[787] It would also accord with the manner in which courts review legislation subject to a *Charter* claim, where the court tests the balance struck through the legislation for correctness on a full *Charter* analysis. Only after a violation is proven do the

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[784] The focus in *Doré* was on whether the limit imposed on Mr. Doré's guarantee to freedom of expression was reasonable, rather than whether this *Charter* guarantee was breached. This is primarily the result of the fact that, in *Charter* jurisprudence, the Court has defined freedom of expression expansively so that all of the analytical work is done in the s. 1 analysis: see Miller, *supra* note 104 at 98. As a result, the Court provided very little guidance on how courts should review administrative decisions for compliance with *Charter* when the scope or application of a *Charter* right or freedom is in issue.

[785] Wildeman raises the question of the possible implications of the rejection of correctness review for consistency in the interpretation and application of constitutional rights and values: see Wildeman, *supra* note 23 at 364.

[786] See *Dunsmuir*, *supra* note 10 at para 55.

[787] *Canada v PHS*, *supra* note 105 at para 114. See also *Dunsmuir*, *supra* note 10 at para 142, Binnie J. Binnie J stated:

> In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts.

courts show any deference to the legislature. The Alberta Court of Appeal has applied *Doré* in this way, suggesting that "[a]s long as the tribunal's decision correctly interprets the *Charter* text, the decision will not be disturbed unless its assimilation of *Charter* values is disproportional, and therefore unreasonable".[788]

If this interpretation is taken, whether or not the right has an internal limitation will become significant for the approach taken on review. For example, in freedom of expression cases s. 2(b) is accorded a large and liberal interpretation, and the weighing of competing values takes place in the s. 1 analysis.[789] In contrast, the Court interprets the s. 7 right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" in a manner that results in *Oakes* test-like justification considerations being considered when defining the right.[790] The first stage of the review (interpretation of the right) therefore considers contextual factors and the equivalent of the *Oakes* test.[791] Accordingly, it is unclear how a s. 7 challenge to an administrative decision would proceed: would the Court determine whether the administrative decision-maker had correctly interpreted and applied s. 7 (based on the Court's view of the application of the principles of fundamental justice to the case) or apply the *Doré* approach of assessing whether a proportionate balance has been struck? In my view, it is not defensible to adopt a differing methodological approach based on a distinction between *Charter* rights that are internally limited and those that do not contain limiting language or are interpreted broadly.

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[788] *United Food and Commercial Workers v Alberta (Attorney General)*, 2012 ABCA 130 at paras 40, 87. See also *R v Whatcott*, 2012 ABQB 231. In that case, the Alberta Court of Queen's Bench concluded that the University's use of the provincial trespass legislation to prohibit Mr. Whatcott from distributing his (allegedly anti-homosexual) flyers on campus violated Mr. Whatcott's freedom of expression as protected by s. 2(b) of the *Charter*. The Court held that "while a *Charter* analysis addresses as separate steps whether the *Charter* was infringed and, if so, whether the infringement can be justified, the steps are not completely distinct one from the other. Where the first step is reviewed on a correctness standard, so too should be the second.": *Ibid* at para 19.
[789] *Keegstra*, *supra* note 135 at 734.
[790] See above, Section 3.4.3.
[791] See *Canada v PHS*, *supra* note 105.

The *Doré* approach to review of administrative decisions impacting on *Charter* values appears to be more deferential than the *Oakes* test. Arguably, legislation (which is enacted by democratically elected bodies) is more worthy of judicial deference than is the exercise of administrative discretion.[792] Judges may therefore be justifiably concerned that this non-stringent approach will not set aside decisions that are inconsistent with the *Charter*, and this may lead judges to apply a correctness standard, either openly or covertly.[793] However, applying a correctness standard of review to rights-impacting administrative decisions would not enhance a institutional dialogue or respect for administrative decision-making, given that correctness review entails the court determining the "correct" answer and therefore not engaging with the decision-maker's justificatory reasons. It is also difficult to conceive of a sound rationale for segmenting the judicial review of an administrative decision into correctness review for whether the right has been infringed and reasonableness with respect to the justification for infringing that right, or for applying a differing standard of review purely on the basis that limiting language is contained within the right.

### 4.3 Discretion and the rule of law

Another troubling distinction made by the Court in *Doré* is that between law and discretion.[794] The reviewing court's decision on whether the source of the limit is located in

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[792] See Susan L Gratton, *Administrative Law in the Welfare State: Addressing the Accountability Gap in Executive Social Policy-making* (PhD Thesis, University of Toronto (Canada), 2011) [unpublished] at 181.

[793] Judges may also be concerned that administrative decision-makers are not well-suited to integrating system-wide or fundamental values into their specialized areas of decision-making: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at 625. The issue of institutional expertise in relation to constitutional rights has caused the courts some trouble. Historically, the Court has generally not recognized human rights tribunals as having specialized expertise, given that rights adjudication is part of the judicial function and institutional self-understanding: see Macklin, *supra* note 3 at 296; Wildeman, *supra* note 23 at 338. However, the Court has recently shown deference where the matter is fact intensive or goes to tribunal processes: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 45; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 25–27.

[794] See *Doré*, *supra* note 11 at para 37. See also *Hutterain Brethren* where the majority suggested that s. 1 should perhaps not be applied if a government action or practice (as opposed to legislation) is at issue, emphasizing that laws are different to particular decisions when it comes to a s. 1 analysis: *Hutterian Brethren*, *supra* note 8 at paras 66–69.

legislation (or a policy or rule that meets the definition of "law"),[795] or a discretionary decision, will dictate the analytical approach taken to determine whether a limit on a *Charter* right is justified (that is, whether to apply the *Oakes* test or the *Doré* approach). If the limit can be attributed to a legislative provision, the court will apply the *Oakes* test but if it cannot be, the court will follow the *Doré* approach. This means that a discretionary decision is not subject to the same justificatory requirements as legislation, regulations, rules or guidelines.

In this section, I argue that this categorical approach does not seem to appreciate the difficulty of distinguishing between law and discretion in the modern administrative state.[796] The approach the Court has taken in recent cases also fails to ensure that limitations on *Charter* rights are authorized by law, raising concerns about the forseeability of rights-limitations and a lack of constraints on administrative discretion. This approach does not ensure that the *sources* of unconstitutional state activity are identified and remedied. Further, the different standards of review for "laws" and discretionary decisions may create incentives for legislators to grant broad discretion to administrative bodies, rather than enacting detailed statutory provisions or regulatory rules to constrain discretion.

### 4.3.1 Categorical approach to law and discretion

In *Doré*, the Court embraced a categorical approach to law and discretion whereby the source of limitation on *Charter* rights (a "law" or a discretionary decision) takes on a particular significance in terms of the methodological framework the courts will apply. The *Doré* approach applies to discretionary administrative decisions challenged as being inconsistent with the *Charter*; it does not change the approach courts should take when reviewing legislation or binding rules under the *Charter*. As outlined above (see Section

[795] See *Vancouver Transit*, *supra* note 7 at para 56–63. For an explanation of the distinction made in that case between "law" and administrative policies or decisions, see Section 3.3.2.2.
[796] See Lorne Sossin, "The Rule of Policy: Baker and the Impact of Judicial Review on Administrative Discretion" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, Oregon: Hart Publishing, 2004) 87 at 112; Gratton & Sossin, *supra* note 5 at 161; Gratton, *supra* note 41 at 509.

3.3.2.2), in *Vancouver Transit* the Court established a distinction between policies that are "legislative in nature" (which are considered "law") and those that are "administrative in nature".[797] In *Doré*, the Court takes this analysis further, suggesting that the *Charter* framework is inappropriate in cases involving challenges to administrative decisions on individual cases as opposed to "a law or other rule of general application".[798] However, the *Charter* framework will continue to be applied to a decision made on the basis of a law or "rule of general application" (that is, when the decision-maker has express authority to infringe the individual's *Charter* guarantee).[799] Therefore, where an alleged limitation of a *Charter* guarantee is at issue, the applicable analysis will depend on whether the limit results from a "law" or from an administrative decision. Courts will therefore undertake a different analysis, depending on whether the *Charter* infringement is alleged to stem from a legislative provision or rule, or a discretionary decision.

#### 4.3.1.1 Discretion in administrative law

At one time, administrative law drew a similar categorical distinction between law and discretion. The courts have struggled to find the proper place of discretion within the legal system. Within administrative law, the courts oscillated between a view of discretion governed by politics (the traditional view) and one governed by legal principles.[800] Questions of statutory interpretation were traditionally considered to be different from issues involving

[797] *Vancouver Transit*, *supra* note 7 at para 58–63. This reflects a continuum of types of law: from general norms at the broadest (statutes, constitutional laws), to less broad but still general (regulations, orders, directives), to soft law (manuals, policies, guidelines), to individual decisions, to norms that are not "law" but persuasive authority (unincorporated international norms). There is a fluidity amongst these categories so that soft law can become binding or have that effect if norms are incorporated. In contrast, within a civil law system the distinction between those things which are "law" ("régles de droit") and those which are not "evokes relatively certain content" compared to the concept of law in the common law: Leckey, *supra* note 281 at 614.
[798] *Doré*, *supra* note 11 at para 39.
[799] See Fox-Decent & Pless, *supra* note 6 at 424–437.
[800] Cartier, *supra* note 162 at 403.

control of discretionary power.[801] Until *Baker*, judicial review was exercised differently depending on the kind of decision under examination. When called upon to review administrative interpretations of the law, the courts demonstrated deference unless those decisions were "unreasonable" or "patently unreasonable" (or failed according to the correctness standard of review if the conditions for deference were not met). Administrative discretionary decisions, on the other hand, were reviewed to ensure that legal limits were respected by decision-makers but without reviewing the substance of those decisions. The courts would not interfere with a discretionary decision except in cases of "abuse of discretion" (as discretionary decisions generally involve policy choices, so subjecting discretion to substantive legal scrutiny was viewed as interference by the courts in politics).[802] The courts therefore traditionally exercised less control over discretion than over decisions based on statutory provisions.[803] However, with the increased specialization and expertise of administrative tribunals, the courts came to recognize that the legislature sometimes intended legal questions to be determined by those bodies rather than by the courts, and the traditionally distinct categories of legal interpretation and discretion began to converge.[804] This was accompanied by the concurrent development of a contextual and purposive approach to

[801] David Dyzenhaus, Murray Hunt & Michael Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 OUCLJ 5 at 14; Cartier, Geneviève, *supra* note 25 at 61.
[802] Cartier, *supra* note 162 at 395. The alleged dichotomy between questions of law (which are appropriate for the courts) and questions of policy (which are not) recalls Ronald Dworkin's argument that judges should base their decisions on matters of principle rather than policy: Dworkin, *supra* note 121 at 122. Dworkin defines a "principle" as a "requirement of justice or fairness or some other dimension of morality" and "policy" is as "a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community".
[803] Note, however, that that the courts have always limited discretionary powers by reading implied conditions on those powers into (or out of) statutes, by intuiting the purpose of the power, and by identifying the factors or considerations relevant to its exercise. This limiting of discretionary power "is partly an exercise in divining statutory purpose and relevant considerations, and partly an application of the strong rule of law ideal that no power is unfettered": Dyzenhaus, Hunt & Taggart, *supra* note 801 at 26.
[804] See, for example, *C.U.P.E. v N.B. Liquor Corporation*, *supra* note 381; *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311.

statutory interpretation in public law, which assists a reviewing court in concretizing broad or vague grants of statutory discretion.[805]

In *Baker*, the majority held that administrative interpretations of the law are essentially no different from administrative exercises of discretionary power, and therefore the same approach should be used in reviewing both types of decision. The Court reasoned that there is no "rigid dichotomy" between discretionary and nondiscretionary or rule-based decisions, and no "easy distinction" may be drawn between statutory interpretation and discretion.[806] Accordingly, *Baker* eliminated any persisting categorical distinction between law and discretion for the purposes of administrative law.[807] *Baker* also recognized that the substance of discretionary decisions can be subjected to legal control.[808] While discretionary decisions that balance multiple factors usually attract deference "because of its indeterminacy, the interplay of factors, and the courts' stated reluctance to reweigh evidence on review",[809] administrative agents never have the power to make a truly unfettered choice. Even if no express standards are prescribed, the purpose of the legislative scheme and the principles of law will always constrain the exercise of discretion.[810]

Given this rejection of the law-discretion dichotomy in administrative law, in the next section I consider whether there is any reason why such a distinction should be made when discretionary decisions are challenged on *Charter* grounds.

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[805] Wildeman, *supra* note 23 at 329–332.
[806] The Court explained: "Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. … In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.": *Baker*, *supra* note 9 at para 53–54. See also *Suresh*, *supra* note 258.
[807] See Cartier, *supra* note 162 at 396–399; Gratton, *supra* note 41 at 485.
[808] Cartier, *supra* note 375 at 320.
[809] Macklin, *supra* note 3 at 317.
[810] Discretion must be exercised "in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law … in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*": *Baker*, *supra* note 9 at para 53. See also *Roncarelli*, *supra* note 168 at 140, Rand J.

#### 4.3.1.2 Issues with the categorical approach

Before the Supreme Court, Mr. Doré did not challenge the legislation under which the Council made its decision as being inconsistent with the *Charter*. If he had done so, however, the Court would presumably have conducted an analysis of the law with reference to the *Charter*. The Court would have had to initially determine whether the legislative provision infringed Mr. Doré's freedom of expression. The legislative provision that, in its application, caused an infringement on Mr. Doré's freedom of expression was an article of the Québec *Code of ethics of advocates* (a regulation) which provided that lawyers must behave with "objectivity, moderation and dignity".[811] Arguably, there is nothing in this provision that infringes on Mr. Doré's freedom of expression. Rather, it was the application of this provision in the form of a Disciplinary Council decision that constituted the denial of his freedom of expression. Alternatively, Mr. Doré could have argued that this provision did not authorize the Council to take action infringing on his freedom of expression as, given the vague nature of the provision's wording, it cannot be said that such an infringement was "prescribed by law".

Fox-Decent and Pless suggest that the correct reading of *Doré* may be that express authority to infringe a *Charter* right requires application of the *Oakes* test but imprecise authority does not.[812] This distinction can be traced back to early cases, where the Court held that state action infringing a *Charter* right must be grounded in a legal instrument.[813] These cases were primarily looking at discretionary decisions within the criminal law. For example, in *R v Therens*, a police officer infringed a detained individual's right to counsel when the police officer took a breath sample without informing the individual of his right to seek legal advice (as set out in s. 10(b) of the *Charter*). The Court held that the limitation on the right to

[811] *Code of Ethics*, *supra* note 16.
[812] Fox-Decent & Pless, *supra* note 6 at 431.
[813] See *R v Therens*, *supra* note 732; *R v Hufsky*, *supra* note 732; *R v Ladouceur*, *supra* note 732.

counsel in this context was not express or necessarily implicit in the relevant Criminal Code provision but it was rather "imposed by the conduct of the police officers".[814] As the limitation was not provided for by the written law (statute, regulation, or common law), the Court held that the limitation was not prescribed by law within the meaning of s. 1.[815] If the limitation arose from the practical implication of the law, however, the limitation would meet the prescribed by law requirement.[816]

The distinction between express and imprecise authority to infringe a *Charter* right was also important in the approach taken in the 1989 case of *Slaight*.[817] Although in *Slaight* the Court did not adopt the test from the earlier cases that the prescribed by law condition requires that the limitation is express or necessarily implicit in the terms of the statute, the Court still relied upon the distinction between whether or not the legislation in issue confers the power to infringe a protected right.[818] If the law confers the power to limit *Charter* rights, then the limit is attributed to the law and the "prescribed by law" condition is met (unless the law fails the intelligible-standard test). If the law confers an imprecise discretion, the limit is attributed to the decision so the "prescribed by law" analysis focuses on ensuring that the decision-maker had the statutory authority to make the decision. However, this framework requires a method of distinguishing between *Charter* limits occurring as a result of a law and those arising as a result of the exercise of discretion.

While ideal types of discretion and law may lie at opposite ends of a spectrum, most legal rules and discretionary powers encountered in "real life" administrative law fall

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[814] *R v Therens*, *supra* note 732 at 621.
[815] *Ibid* at 645. See also *R v Simmons*, [1988] 2 SCR 495.
[816] See *R v Thomsen*, [1988] 1 SCR 640 at 651. In that case, the Court held that the fact that there was to be no opportunity for contact with counsel prior to roadside breath testing was implicit in the provisions of the *Criminal Code*, and was therefore "prescribed by law".
[817] Fox-Decent & Pless, *supra* note 6 at 431.
[818] *Slaight*, *supra* note 7 at 1080.

somewhere in between.[819] In practice, it is difficult to determine whether a legislative provision is intended to confer a particular rights-infringing power on an administrative decision-maker, especially where a *Charter* limit occurs through government action lying in the middle ground of the law/discretion spectrum. Administrative decisions impacting on an individual's *Charter* rights will almost always be based on a combination of legal and discretionary power. Every agency of law-enforcement (whether a court, a government department or a board) inevitably exercises some discretion when it applies statutory rules or standards to individual cases. While cases involving administrative action based on either a reasonably clear legal standard or a wide discretionary power may be relatively easy to classify, cases lying in the middle of the law to discretion spectrum are more difficult to classify. These middle-ground cases, sometimes termed "weak discretion", involve broadly worded legislative provisions that grant a degree of discretion to an administrative decision-maker but also contain some statutory guidance on the exercise of that discretion.[820] In these cases, the administrative decision-maker may interpret the statutory provision as requiring the limitation of a *Charter* right or freedom. The interpretation and application of the legislative provision to the facts of a case will involve an exercise of discretion. In these cases, deciding whether the resulting limitation on *Charter* guarantees is located within the law or within the decision will prove difficult, and perhaps impossible, to do on a principled basis.[821] It may be simply too difficult to agree on the point at which law ends and discretion begins.

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[819] Van Harten, Mullan & Heckman, *supra* note 161 at 953. For an example of this complexity, see *Little Sisters*, *supra* note 262. In that case, the Court diverged on whether the source of the infringement was the discretionary decisions or the legislation granting the discretionary authority (which prohibited the importation of "obscene" materials). The majority took the view that that the legislation itself was constitutional, and the discrimination would disappear if the customs officials applied the legislation correctly, so a detailed declaration of the importer's rights was an adequate remedy: *Ibid* at para 159. In contrast, the minority were of the view that "in the face of an extensive record of unconstitutional application", the Court should strike down the legislation for its "failure to provide an adequate process to ensure that *Charter* rights are respected when the legislation is applied at the administrative level": *Ibid* at para 204, Iacobucci J, dissenting in part.

[820] See Gratton, *supra* note 41 at 483.

[821] See *Ibid*. See also Evans, *supra* note 331 at 73; Gratton & Sossin, *supra* note 5 at 161.

Accordingly, it has been suggested that the "elegant distinction" between law and discretion falls apart in practice since it fails to account for cases involving weak discretion.[822]

This categorical approach to the review of law and discretion may also result in arbitrary outcomes for individuals depending on the structure of the legislative scheme. As a result of *Doré*, applicants will have to plead that both a particular administrative decision and the underlying enabling legislation have infringed their *Charter* rights to ensure that both analytical options are engaged.[823] If not, they risk the court conducting an isolated analysis that may ignore issues of vagueness and lack of clarity in the enabling legislation, regulations or binding rules. This would have impact on the remedies available. If the *Charter* analysis is applied to the legislation itself, a finding of infringement renders the law of no force and effect under s. 52(1) of the *Charter*. If, however, the analysis is applied to the discretionary decision, the resulting remedy will be directed at the decision with the legislation remaining intact.[824] Further, s. 24(1) is treated as a remedy of last resort, to be invoked only where a *Charter* violation cannot be remedied by the application of the general law.[825] Therefore it is likely that the courts will rely on administrative law remedies in cases where an administrative decision is held to be inconsistent with *Charter* values. Access to damages under s. 24 is therefore restricted.[826]

The distinction drawn between rules and discretion also leaves open the possibility that the identical limitation on a *Charter* right may be scrutinized differently between provinces,

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[822] Gratton, *supra* note 41 at 495.
[823] See *Ibid* at 501.
[824] See *R v Ferguson*, 2008 SCC 6 at para 61. Choudhry and Roach have argued that the remedy of striking down legislation under s. 52(1) should be available even where a *Charter* violation results from a discretionary decision: Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41 Osgoode Hall LJ 1 at 18–22. Others have argued that soft-law instruments should be given legal status for the purpose of *Charter* scrutiny, in order to make s. 52(1) available to remedy such cases: Laura Pottie & Lorne Sossin, "Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare" (2005) 38 UBC L Rev 147.
[825] Hogg, *supra* note 2 at 40.2(g.5).
[826] If a claimant seeks compensation, he or she cannot get it on judicial review: see, for example, *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 at para 52.

depending on whether the limitation is framed as a rule or left to the exercise of discretion. For example, if British Columbia implemented legislation banning kirpans in schools but Québec left the decision on whether to ban kirpans to school boards' discretion, a different approach would be taken by the courts in reviewing a *Charter* challenge to the ban. Given the nature of the *Charter* right at stake and the identical impact on the affected individuals, treating these two methods of limiting a right differently for the purposes of determining whether the right is legitimately infringed is not justifiable.

The categorical approach taken in *Doré*, which distinguishes between limitations arising from "law" and those arising from discretion, is therefore problematic. As LeBel J suggested in his concurring opinion in *Multani*, the "norm-decision" duality (preferred by Abella and Deschamps JJ)[827] underestimates the problems that arise in applying the classifications and risks narrowing the scope of constitutional review of compliance with the *Charter*.[828] Isolating the analysis regarding *Charter* consistency to the discretionary decision or to a rule or policy or the enabling legislative provisions is therefore unfounded and may result in inconsistent results in particular cases.

### 4.3.2 Rule of law concerns arising from the *Doré* approach

As noted above, broad grants of discretion give rise to fundamental rule of law issues, including the potential for arbitrariness and a lack of predictability, transparency and certainty. While vagueness is an inherent part of the delegation of discretionary authority, the breadth of the discretion is directly related to uncertainty in the application of the law.[829] The *Doré* approach, particularly the law-discretion distinction, may exacerbate these issues.

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[827] See *Multani*, *supra* note 7 at para 119.
[828] *Ibid* at para 151.
[829] "Vague laws intruding on fundamental freedoms create paths of uncertainty onto which citizens fear to tread, fearing legal sanction": *Committee for the Commonwealth of Canada v Canada*, *supra* note 191 at 241, L'Heureux Dubé J. Also, the broader a discretion, "the greater the scope for subjectivity and hence for arbitrariness": Rt. Hon Lord Bingham of Cornhill KG, *The Rule of Law* (Sixth Sir David Williams Lecture, 2006),

The risks associated with broad grants of discretion are well illustrated by the Court's decision in *Canada v PHS*.[830] The Court's decision in that case suggests that legislation is constitutionally sound if it *could* be applied in accordance with the *Charter*. The Court held in that case that, while the challenged legislation limits the s. 7 *Charter* rights of the individual claimants, it does so in accordance with the principles of fundamental justice because the Minister has the discretionary power to grant exemptions to the application of that legislation.[831] In this way, the discretion to grant an exemption is a "safety valve" so that the legislation will not apply where such application would be arbitrary, overbroad or grossly disproportionate in its effects.[832] As a result, whether or not an individual will be deprived of his or her *Charter* rights will be dependent on the exercise of ministerial discretion. Yet the only guidance the Court provided regarding the appropriate exercise of the Minister's discretion was as follows:[833]

> [The] discretion must be exercised in accordance with the *Charter*. This requires the Minister to consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice.

This raises issues regarding the certainty of the law. Given the scant direction from both the legislature and the judiciary on how the Minister's discretion should be exercised, there is a significant risk that the discretion could be exercised improperly or arbitrarily. This means

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online: Public Centre for Law <www.cpl.law.cam.ac.uk/sir_david_williams_lectures>.

[830] *Canada v PHS*, *supra* note 105.

[831] Section 56 of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*Controlled Drugs and Substances Act*] provides:

> The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

[832] *Canada v PHS*, *supra* note 105 at para 114.

[833] *Ibid* at para 153. The Court also noted that: "The factors considered in making the decision on an exemption must include evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition."

that individuals affected by the Minister's decision under that legislative provision have "no real certainty with respect to the protection of their *Charter* rights".[834]

The Court did not address whether the law as it stands provides sufficient clarity as to how the discretion will be applied, or whether individuals should be entitled to greater certainty when their rights are at stake.[835] The Court concluded that, as the Minister's decision did not comply with the principles of fundamental justice, no "s. 1 justification could succeed",[836] and therefore did not consider these issues to determine whether the decision was "prescribed by law" within the meaning of s. 1.

The approach the Court has taken in recent cases therefore risks a situation where *Charter* violations are attributed to "aberrational official conduct", rather than the systemic flaws in the discretionary legislative scheme.[837] This does not bode well for identifying and remedying the sources of unconstitutional state activity.[838] Given the different standards of review for "laws" and discretionary decisions (as outlined above), this approach may also create incentives for legislators to grant broad discretion to administrative bodies, rather than enacting detailed statutory provisions or regulatory rules.[839]

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[834] Rahool P Agarwal, "Case Comment: Canada (Attorney General) v PHS Community Services Society" (2011) 20:2 Constitutional Forum 41 at 43.
[835] *Ibid*.
[836] *Canada v PHS*, *supra* note 105 at para 137.
[837] Choudhry & Roach, *supra* note 824 at 11. For example, in a case such as *Canada v PHS*, where the legislation granting a broad discretion survives *Charter* scrutiny but the discretionary decision is quashed, individuals arguably have no real certainty with respect to the protection of their *Charter* rights as "[i]nstead of a legislative scheme that protects *Charter* rights from the start, claimants will have to resort to the courts every time they feel the Minister has acted unconstitutionally": Agarwal, *supra* note 834 at 43. See also *R v Ladouceur*, *supra* note 732 at 1267, Sopinka J.
[838] See Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2002) 45:4 Canadian Public Administration 465 at 480. In this regard, I do not agree with Ross' suggestion that where the legislature grants authority that only incidentally may affect *Charter* guarantees, it is unreasonable to expect that potential breaches are anticipated and steps taken to prevent them: Ross, *supra* note 184 at 392–393.
[839] Due to a legislative limitation on *Charter* rights being required to meet the prescribed by law ("intelligible standard") requirement as well as the *Oakes* test. A broad discretionary decision, on the other hand, would not be subject to the same justificatory requirements. Furthermore, given that the executive has a significant degree of control over the legislative process, the current framework "creates the perverse incentive for governments to implement constitutionally controversial policies in secret through sub-legal means": Choudhry & Roach, *supra* note 824 at 34. Note the concern, however, that a preference for government by rules may be "a surrogate for a direct attack upon the substantive content of legislation enacted to curb the abuse of economic power, to

As the Court noted in *Vancouver Transit*, administrative policies are "usually accessible only within the government entity and are therefore unhelpful to members of the public who are entitled to know what limits there are on their *Charter* rights".[840] Broad and undefined grants of discretion that allow limitations on rights are even more unhelpful for individuals in determining what limits exist with respect to their *Charter* rights.

Accordingly, the *Doré* approach raises concerns about the extent to which the executive is controlled by the rule of law. As the Court has observed, "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action".[841] Government action in derogation of rights must therefore be authorized by law (to prevent arbitrary action and so individuals know what is prohibited). By failing to ensure that state action infringing on rights is appropriately authorized by law, and that the law is sufficiently accessible and precise, the *Doré* approach therefore does not further the rule of law.

### 4.4 Conclusion

The minimal requirement of justification for administrative action and lack of controls on administrative discretion suggest that the *Doré* approach may fail to ensure that limitations on *Charter* guarantees are justified. The methodology the courts use to reach decisions can be significant. While it is not clear that a reasonableness review will necessarily fail in terms of rights protection, protection of the values guaranteed by the *Charter* is potentially weakened by the *Doré* approach due to the fact that an administrative decision-maker can potentially justify a decision through a less-rigorous analysis than the courts require of a law. As the

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redistribute wealth, and to tackle other social problems that private law and the market have not resolved": Evans, *supra* note 331 at 67.

[840] *Vancouver Transit*, *supra* note 7 at para 63.

[841] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70.

burden of proof lies on the applicant in administrative law cases, it will likely be easier for an administrative decision-maker to justify a rights infringement (as the claimant must show that the infringement is not justified, rather than the burden lying with the state actor). This approach places a large burden on the claimant and may result in the decision-maker having only a minimal (if any) obligation to justify its decision. The Court's rejection of a structured approach to the proportionality test also risks an approach that fails to fully justify *Charter* infringements.

Following *Doré*, only legislation would be subject to the *Oakes* test, whereas the application of the legislation would be assessed under the *Doré* approach. An individual whose *Charter* guarantee has been limited by an administrative actor should be entitled to the same protection of that guaranteed right of freedom whether that limit derives from the actual wording of a law or rule, or from the application of such a law or rule.[842] Yet the ultimate success or failure of a *Charter* challenge may hinge on how the challenge is categorized according to this preliminary distinction. Furthermore, as argued above, this conceptual demarcation between law and discretion is simply not possible; all limitations of *Charter* rights necessarily occur as a result of some combination of legal authority and discretionary application.[843] It is not practicable to categorize challenges to administrative actions on *Charter* grounds by the source of the limit on the *Charter* right (because of the complex interaction between the sources of authority for the decision). Law and discretion are invariably inextricably intertwined. The *Doré* approach also creates the potential for *Charter* violations being attributed to an unreasonable administrative decision while systemic flaws in the legislative scheme or legislative grant of discretionary power are ignored. The *Doré* approach therefore does not ensure the existence of sufficient constraints on broad grants of

[842] See *Multani*, *supra* note 7 at para 21.
[843] Gratton, *supra* note 41 at 502.

discretion allowing for rights-limitation, nor does it ensure that there is an adequate degree of forseeability regarding how that discretion will be exercised.

In the following chapter, I suggest an alternative approach that addresses many of the potential problems with the Court's approach in *Doré*.

# 5 A BETTER APPROACH

Given the potential problems with the *Doré* approach, I propose that the Court should look again at the approach taken to judicial review of rights-limiting administrative decisions. Whether the problems and weaknesses of the *Doré* approach materialize depends on how the *Doré* decision is interpreted in subsequent cases. In this chapter, I outline an approach to the review of administrative decisions that builds on the *Doré* approach but provides greater assurance that decisions limiting an individual's *Charter* rights will only be acceptable if the decision complies with certain rule of law and justificatory standards.

To summarize, I argue that the *Doré* approach does not comply with the basic guarantee agreed upon by Canadians, as set out in s. 1 of the *Charter*. While an administrative law approach is appropriate, judicial review should be conducted with reference to the guarantees contained in s. 1 of the *Charter* that limits on *Charter* rights must be "prescribed by law", "reasonable", and "demonstrably justified in a free and democratic society". The courts should therefore ensure that the rights-limiting decision is prescribed by law, in the sense that it is authorized by the legislative regime and that the administrative discretion is structured through some publicly-accessible guidelines. To ensure that the rights-limitation is reasonable and demonstrably justified, the court should apply a more structured proportionality analysis, through which the administrative decision-maker is required to provide reasons for his or her decision and the court reviews the decision utilizing a modified *Oakes* test. While this approach may involve a more interventionist approach to reasonableness review than usual, I suggest that a more stringent approach is justified in light of the fundamental interests at stake when *Charter* values are at issue.

### 5.1 Administrative decision-makers and section 1 of the *Charter*

Historically, the Court held that the *Charter* applies to administrative actors, and therefore limits the discretion of administrative decision-makers.[844] Section 32 does not refer to the executive or administrative branches of government expressly. However, the traditional rationale for the *Charter* applying to administrative actors stems from the fact that s. 32 of the *Charter* applies to Parliament, government, and the legislatures and, since neither Parliament nor a legislature can pass a law in breach of the *Charter*, neither can they authorize action that is in breach of the *Charter*.[845] Section 32 does also provide that the *Charter* applies to the "government" of Canada and the provinces. Hogg suggests that the references to government, to the extent that government acts under statutory authority, add nothing (given that such acts are caught by the references to "Parliament" and "legislature").[846] He suggests that the references in s. 32 to "government" operate to make the *Charter* applicable to governmental common law powers of prerogative.[847] However, should the traditional rationale for the *Charter* applying to administrative actors (that the legislature cannot authorize action that breaches of the *Charter*) be rejected, most administrative decision-makers will nonetheless fall within the definition of "government".

Despite this, the Court in *Doré* rejects an approach that applies the *Charter* directly to administrative actors exercising discretion. Although the Court did not explicitly state that the *Charter* does not apply directly to discretionary decisions, the Court made much of the similarity between administrative decision-makers exercising discretion and judicial

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[844] *Charter*, *supra* note 1, s 32. Section 32(1) provides that the *Charter* applies to:
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[845] See Hogg, *supra* note 2 at 37.2(c).
[846] *Ibid*.
[847] Exercises of the Crown prerogative are subject to *Charter* review: see *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455, Dickson J (as he then was).

development of the common law, and the need for an approach differing from the *Oakes* test in both cases.[848] However, the Court's rationale for rejecting the *Oakes* test in administrative law cases differs significantly from the reasons for adopting the "constitutional values" test in developing the common law. The Court's primary concerns in the latter case are that the courts are not part of "government" for the purposes of s. 32(1),[849] that the analysis which applies in cases involving government action should not be imported into private litigation,[850] that courts should leave significant changes to the common law to the legislature,[851] that the *Charter* 'challenge' to a common law rule does not allege a violation of a *Charter* right but instead "addresses a conflict between principles",[852] and that the party seeking to change the common law should not be allowed to benefit from a reverse onus.[853]

In rejecting the application of the *Oakes* test to administrative decisions, the Court emphasized the need for institutional dialogue, the conceptual difficulty of applying the *Oakes* test to discretionary decisions, and deference to administrative decision-makers.[854] However, as argued above, the *Oakes* test can in fact encourage institutional dialogue (see Section 3.3.1), the conceptual difficulties with applying the *Oakes* test to discretionary decisions can be overstated (see Section 4.2.1), and the *Oakes* test allows for deference to be shown to the initial decision-maker (see Section 3.3.3.2.1). The Court's decision did not distinguish between the guarantee set out in s. 1 and the *Oakes* test (being the methodology by which the Court generally assesses compliance with s. 1),[855] and as a result there is no reference at all in the decision as to whether the limit on Mr. Doré's freedom of expression is "justified in a free

[848] See *Doré*, *supra* note 11 at paras 38–42.
[849] *Dolphin Delivery*, *supra* note 505 at 599.
[850] *Hill v Church of Scientology of Toronto*, *supra* note 638 at para 93.
[851] *Ibid* at para 96.
[852] *Ibid* at para 97.
[853] *Ibid* at para 98.
[854] See above, Section 3.3.
[855] See Fox-Decent & Pless, *supra* note 6 at 434–435.

and democratic society". However, even putting aside the strong arguments in support of the *Charter* applying to the common law,[856] there are many reasons to suspect that the rationale for adopting the "constitutional values" test in developing the common law does not apply to administrative decision-makers and suggesting that the *Charter* should apply directly to administrative decision-makers.

Further, administrative decision-making differs significantly from the character of the courts developing the common law. Administrative decision-makers are government actors and administrative cases are not private. Challenges to administrative decisions do in fact allege a violation of a *Charter* guarantee (and, as explored above, it is largely a matter of happenchance whether that violation arises from the application of a law or rule, or from a discretionary decision made under those rules or laws). There is also an action by the state (in the form of an administrative decision) to ground an analysis under the *Charter*.[857] Furthermore, while the Court has held that judicial involvement in private litigation is not as a "contending" party but rather as a neutral arbiter,[858] administrative decision-makers are not neutral arbiters within the process. Administrative decision-makers routinely defend and justify their decisions before the courts but not in a contentious manner. Government actors should not be seen as contending parties in *Charter* litigation either (but rather as branches of the state engaged in a dialogue about the appropriate protection of *Charter* guarantees).

Accordingly, the Court overstated the similarities between administrative decision-making and judicial development of the common law, and the Court's reasons for rejecting the

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[856] The essence of the arguments is that the common law is law and therefore (pursuant to the s. 52 supremacy clause) is subject to the Constitution, including the *Charter*. The common law (and judges) should not be above the *Charter*, since judge-made law (and judges) is an element of the coercive power of the state, which the *Charter* was designed to regulate. See Ross, *supra* note 633 at 119–121; Boivin, *supra* note 604 at 280; Slattery, *supra* note 633; Hogg, *supra* note 633 at 275; Elliot, *supra* note 633 at 210–211, 214. For arguments in support of the Court's approach, see Amnon Reichman, "A Charter-Free Domain: In Defence of Dolphin Delivery" (2001) 35 UBC L Rev 329 at 342–343; *Dolphin Delivery*, *supra* note 505 at 595–600.
[857] See Wildeman, *supra* note 23 at 363.
[858] *Dolphin Delivery*, *supra* note 505 at 600.

*Oakes* test are flawed. Application of the *Charter* should depend on the fact of state power, not on the form of that power. I therefore suggest that the *Doré* approach should be modified to comply with the *Charter*.

## 5.2 Recommended approach

I suggest that the courts should adopt an approach to judicial review of rights-limiting administrative decisions that builds on the *Doré* "proportionate balancing" approach. I propose a review framework that, firstly, provides greater assurance that such decisions will only be justified if the limit is imposed by a statutory scheme that meets the rule of law principles underlying the s. 1 "prescribed by law" requirement and, secondly, scrutinizes the rights-infringing decision utilizing a structured proportionality analysis. This approach would assist with alleviating the potential problems raised by the *Doré* decision as identified in Chapter 4. It would also offer a more coherent conception of the relationship between administrative law and the *Charter* in that it would better respect the requirements in s. 1 of the *Charter* that any limits on *Charter* guarantees are "prescribed by law", "reasonable" and "demonstrably justified in a free and democratic society", while remaining consistent with administrative law principles.

### 5.2.1 Relationship between administrative law and the *Charter*

Administrative law and constitutional law are both concerned with the legal regulation of governmental power.[859] Both are also concerned with protecting individual rights and share the same overarching purpose of managing the relationship between state and citizen.[860] The Constitution may be viewed as "the latticework on which the vines of the administrative state

[859] Van Harten, Mullan & Heckman, *supra* note 161 at 3.
[860] Tom Ginsburg, "Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law" in Susan Rose-Ackerman & Peter L Lindseth, eds, *Comparative Administrative Law* (Cheltenham, UK ; Northampton, MA: Edward Elgar, 2010) 117 at 117.

and administrative law grow".[861] As explained in Section 1.2, the Constitution encompasses the set of arrangements by which we govern ourselves, which includes the systems and values revealed in legislation, custom, judicial judgments, and agreements between the federal and provincial governments. Administrative law and constitutional law approaches may be conceptually distinct but according to the "unity of public law thesis" they are not in conflict or mutually incoherent. They share purposes and values so there is overlap in some of the fundamentals. The function of judicial review of administrative action is to ensure the legality, the reasonableness, and the fairness of the administrative process *and its outcomes*.[862] The purpose of judicial review under the *Charter* is to scrutinize the outcome of a law or decision in order to protect the fundamental values set out in the *Charter*. These functions are congruent, and the underlying purposes and goals of judicial review under the *Charter* and under administrative law are therefore similar and complementary.[863]

As LeBel J pointed out in *Multani*, while cases involving administrative law and the *Charter* engage "diverse legal concepts belonging to fields of law that are in principle separate", the legal methodologies employed must form part of a coherent legal framework.[864] I suggest that an administrative law approach to such cases, employed with reference to the guarantees contained in the *Charter*, will accord with the purposes and goals of judicial review both under the *Charter* and under administrative law, and will achieve a coherent legal framework.

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[861] Flood & Dolling, *supra* note 23 at 5.
[862] *Dunsmuir*, *supra* note 10 at para 28.
[863] For a contrary viewpoint, see Gratton, *supra* note 41 at 480. Gratton argues that the purposes of the *Charter* and administrative law are functionally different: "The *Charter* was enacted to protect the fundamental social values shared by Canadians. … Administrative law, in contrast, ensures that these fundamental rights and freedoms are faithfully translated from their legislative context through their application by the institutions of government. The former is concerned with the content of a law or decision; the latter, with the process of decision making and the relationship between the decision and its legislative antecedent." However, she notes that, as long as these different purposes are respected, "the *Charter* and administrative law are highly compatible" (at 481).
[864] *Multani*, *supra* note 7 at para 141.

### 5.2.2 Administrative law approach

The Court in *Doré* preferred an administrative law approach because, the Court suggested, such an approach would open an institutional dialogue about the appropriate use and control of discretion, *Charter* analysis is "poorly suited" to review of discretionary decisions, and a deferential approach to review of administrative decisions is appropriate.[865] As argued above, the Court's reasoning regarding the incompatibility of *Charter* analysis with discretionary administrative decisions is flawed. Despite this, however, I believe that an approach based on administrative law is appropriate. In particular, an administrative law approach to review of administrative decisions is preferable because: this approach allows for constitutional and administrative law to be integrated, avoiding bifurcation of these two interrelated branches of public law;[866] administrative law applies to a broader range of discretionary decisions made by public actors than the *Charter* does and there are limits to the reach and scope of the *Charter*; and a focus on administrative law principles such as procedural fairness and good administrative practice can be beneficial to *Charter* right claimants.

An administrative law approach to the review of rights-limiting administrative decisions avoids concerns about the excessive "constitutionalization" of administrative law. While constitutional bills of rights such as the *Charter* guarantee some of the values that are considered fundamental to society, they are not the only source of such values. Therefore, the *Charter* "should not be allowed to subsume all legal space".[867] To elevate *Charter* rights and freedoms above other fundamental values raises the potential for individualist values to override the important and democratically underwritten public purposes underlying the

[865] See above Section 3.3.
[866] Although I acknowledge that such bifurcation of the branches of public law could arguably also be avoided through the use of a *Charter* approach.
[867] Reichman, *supra* note 856 at 358.

administrative state.[868] By integrating administrative law doctrine and *Charter* principles, we may also achieve benefits though the "administratization" of constitutional law.[869]

An administrative law approach also ensures that judicial review is available in relation to a broad range of discretionary decisions. The *Charter* applies to "government" actors.[870] "Government" has been defined as institutions for which the government has statutory authority to exercise substantial control,[871] and those institutions acting to further a specific government policy or program.[872] Administrative law, on the other hand, applies to any statutory body and decision-making made pursuant to the royal prerogative. Administrative law therefore applies to administrative tribunals (ranging from labour to employment to human rights to securities to welfare), Ministers, regulatory boards, hospitals, universities, elected school boards, bureaucrats, Aboriginal bands, commissions, municipalities, police officials, public-private entities, and possibly civil society organizations such as religious communities and clubs. While the *Charter* will apply to most of these institutions in some contexts, it will not apply to activities or decisions over which the government does not exert the required level of "control". Thus, administrative law captures a broader range of discretionary decisions made in these institutions.

In addition, administrative law focuses not just on the outcome of the decision but also on aspects of the decision-making process, including procedural fairness and good administrative practice. In contrast, the focus of review under the *Charter* is on the impact of the decision on individual rights and freedoms, which will generally focus on the outcome of the decision (although procedural fairness is a key concern in jurisprudence dealing with ss. 7-14 of the *Charter*). Many challenges raising arguments based on the *Charter* guarantees will

[868] Wildeman, *supra* note 23 at 378.
[869] Cohen-Eliya & Porat, *supra* note 70 at 487–489.
[870] *Charter*, *supra* note 1, s 32.
[871] See *McKinney v University of Guelph*, [1990] 3 SCR 229.
[872] See *Eldridge*, *supra* note 7.

involve not only arguments that the individual's rights have been infringed but also arguments that the decision was otherwise unreasonable or unfair. In *some* cases, therefore, the *Charter* approach may be ill-equipped to engage in the type of reasoning and constraints involved in reviewing discretionary decision-making.[873] An administrative law approach, on the other hand, ensures courts draw upon administrative law jurisprudence as a valuable source of guidance on administrative decision-making.[874] An administrative law approach allows the court to review, and provide guidance on, fair process and the factors that must be taken into account in the decision-making process in cases dealing any *Charter* right (not just those in which procedural fairness is within the definition of the right). This focus on administrative law principles such as procedural fairness and good administrative practice should result in better decisions that are more respectful of individuals' *Charter* guarantees.[875]

Therefore, in my view, the administrative law review approach is appropriate. However, the review should be modified in some key ways to ensure the concerns identified in the previous chapter are addressed. Accordingly, I argue that the administrative law approach should be employed to review rights-infringing administrative decisions with reference to the guarantees contained in s. 1 of the *Charter*.

### 5.2.3 Infringement of right

As argued above,[876] it is not defensible to adopt correctness review for whether the right has been infringed. Such an approach would result in a differing methodological approach depending on whether the *Charter* right in issue is internally limited or whether it does not contain limiting language or is generally interpreted broadly. This distinction would result in

[873] See Cartier, Geneviève, *supra* note 25; Cartier, *supra* note 375.
[874] Evans, *supra* note 331 at 73.
[875] Bredt and Krajewska suggest that, although a tribunal may be restricted in the remedies it can provide under s. 24, a tribunal may be able to provide an effective remedy against a *Charter* breach by interpreting the administrative body's enabling statute consistently with *Charter* values: Bredt & Krajewska, *supra* note 328 at 463–464.
[876] See Section 4.2.4.3.

the courts imposing their view of the scope and meaning of certain rights and the justifiability of the infringement of those rights, without engaging with the decision-maker's justificatory reasons. Applying a correctness standard of review to rights-impacting administrative decisions would therefore be a step backwards for respecting administrative decision-making, and for a public dialogue between administrative decision-makers and the judiciary (as correctness review entails the courts imposing their view of the correct decision). Accordingly, I suggest that the courts should review whether or not an administrative decision has infringed upon a *Charter* right using a reasonableness standard of review (in the sense described in Section 5.2.5). In short, the courts should rigorously scrutinize the decision-maker's reasoning and justification for its decision as to whether an individual's right has been infringed, and determine whether this decision falls within the range of acceptable outcomes that are defensible in respect of the facts and the law.

### 5.2.4 Prescribed by law

The prescribed by law condition contained in s. 1 of the *Charter* protects fundamental rule of law values, such as non-arbitrariness, and predictability, accessibility, and certainty in law. As Hogg puts it:[877]

> The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.

The law must therefore also be sufficiently accessible and precise.[878] In a formal sense, the "prescribed by law" requirement furthers the rule of law by ensuring that state action

[877] Hogg, *supra* note 2 at 38.7(a).
[878] *Vancouver Transit*, *supra* note 7 at para 50.

infringing *Charter* rights must be grounded in some statutory authority, granted by a democratically legitimate institution. In a substantive sense, it furthers the rule of law by ensuring that the statutory authority cannot be drawn too widely or in such a manner as to expose citizens to its arbitrary exercise by state officials.[879]

In *Charter* jurisprudence, the Court has held that the prescribed by law condition is met as long as the law is sufficiently precise to offer an "intelligible" standard that provides sufficient guidance for legal debate.[880] The Court's jurisprudence reveals no clear consensus on how the courts should apply the condition of "prescribed by law" in the case of a limitation of *Charter* rights or freedoms caused by the exercise of administrative discretion. The approach taken in some cases is that a discretionary decision is prescribed by law for the purpose of s. 1 when the decision is statutorily authorized.[881] However, other cases suggest that discretionary decisions are, by definition, never prescribed by law.[882] In *Doré*, the Court suggested that this latter approach may be favoured:[883]

> Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply"…

Although the Court does not elaborate on this point, the implication that discretionary decisions are not "prescribed by law" and therefore do not fall within s. 1 is problematic. This viewpoint also ignores the fact that courts routinely apply a full *Charter* review, including the

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[879] See Daly, *supra* note 200 at 9.
[880] See *R v Nova Scotia Pharmaceutical Society*, *supra* note 605; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4; *Irwin Toy*, *supra* note 189 at 983.
[881] *Slaight*, *supra* note 7 at 1080–81; *Committee for the Commonwealth of Canada v Canada*, *supra* note 191 at 244, McLachlin J; *Ross*, *supra* note 7 at 133; *Multani*, *supra* note 7 at para 22.
[882] *Trinity Western*, *supra* note 9; *Chamberlain*, *supra* note 9; *Multani*, *supra* note 7 at paras 112–125, Abella and Deschamps JJ. In *Multani*, Abella and Deschamps JJ suggest that administrative tribunals, like the courts, cannot be treated as parties with an interest in a dispute, and a tribunal's decision "should not be subject to a justification process as if it were a party to a dispute" (at para 123).
[883] *Doré*, *supra* note 11 at para 37. (Quoting *Vancouver Transit*, *supra* note 7 at para 53.)

"prescribed by law" requirement, in cases dealing with discretion exercised by the police and Crown prosecutors.[884]

Susan Gratton expresses this dilemma as: "either legislative grants of discretion are prescribed by law, in which case the rule-of-law values underlying the prescribed by law condition are seemingly undermined; or they are not prescribed by law, in which case the government is required to forego the use of discretion in any state activity where *Charter* rights are conceivably at stake".[885] The *Slaight* approach (also adopted in *Multani*) is an example of the former, as any decision that falls within the authority granted by the statute would fulfil the prescribed by law condition despite any concerns that limitations on rights may be unforeseeable and unpredictable due to the broad scope of the grant of discretion.

The "prescribed by law" requirement in s. 1 of the *Charter* should further the rule of law by ensuring that state action in derogation of rights is authorized by law (to prevent arbitrary action),[886] and that the law is sufficiently accessible and precise (so as to allow people to understand when their rights may be limited).[887] I therefore propose that the courts should conduct a review of whether a discretionary decision is "prescribed by law" when that decision is challenged as being inconsistent with the *Charter*. This review should look to whether the legislative regime governing the exercise of the discretion is consistent with the rule of law values of predictability, accessibility, and precision. The prescribed by law analysis should therefore require that the rights-infringing discretionary decision was both authorized by the legislative regime and that the discretion is structured through some publicly-accessible guidelines (whether in the legislative scheme or in soft law).

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[884] See *R v Therens*, *supra* note 732; *R v Hufsky*, *supra* note 732; *R v Ladouceur*, *supra* note 732; *R v Suberu*, *supra* note 732; *R v Nixon*, 2011 SCC 34.
[885] Gratton, *supra* note 41 at 491.
[886] Hogg, *supra* note 2 at 38.7(a).
[887] *Vancouver Transit*, *supra* note 7 at para 50.

Sujit Choudhry and Kent Roach have argued in favour of assessing any *Charter* limit arising from a discretionary decision with reference to the legislation under which the discretion was exercised.[888] They argue that *Charter* violations carried out by discretionary decision-makers should be remedied by striking down the enabling legislation rather than merely the decision. In their view, this is the only way that government can be forced to enact clear legislative provisions prohibiting discriminatory action on the part of its delegates. Their concern is to prevent a situation where governments may "go underground" and implement constitutionally controversial measures through discretionary decision-making, and therefore "out of sight of the democratic process".[889] To allow fundamental rights to be overridden by general or ambiguous statutory language entails too great a risk that the full implications of the provision may have passed unnoticed in the democratic process.[890]

The case of *Little Sisters* illustrates the potential for *Charter*-infringing discretionary decisions in the context of an ambiguous legislative provision.[891] *Little Sisters* was a freedom of expression challenge to the way in which customs officials were exercising their discretionary authority to confiscate allegedly obscene material being imported into Canada. It was claimed that the customs officials were violating s. 2(b) and s.15 of the *Charter* by their systematic seizure of gay and lesbian literature. Both the majority and the minority accepted that systematic violations of the importer's s. 2(b) rights had occurred, and that customs officials had breached the s. 15 *Charter* guarantee of equality by discriminating against the gay and lesbian communities. Binnie J, for the majority, concluded that the legislation itself was constitutional (interpreting the statutory definition of obscenity as "neutral" and not

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[888] Choudhry & Roach, *supra* note 824. Similarly, Barak argues that a statute delegating authority to limit a constitutional right to an administrative agency without determining the primary arrangements relating to the content of the limitation is invalid: Barak, *supra* note 70 at 113.
[889] Choudhry & Roach, *supra* note 824 at 7.
[890] *Secretary of State for the Home Department, Ex Parte Simms Secretary of State for the Home Department, Ex Parte O'Brien*, [2000] 2 AC 115 (UKHL) at 131, Lord Hoffman.
[891] *Little Sisters*, *supra* note 262.

differentiating between heterosexual and gay and lesbian erotica) and, if the customs officials applied it correctly, there should be no discrimination.[892] In dissent, Iacobucci J (with Arbour and LeBel JJ) argued that, "in the face of an extensive record of unconstitutional application", the Court should strike down the legislation for its failure to provide an adequate process to ensure that *Charter* rights are respected when the legislation is applied at the administrative level.[893] In their view, legislation authorizing the infringement of protected rights must contain safeguards to ensure that its administration will permit infringement only where infringement is justifiable; much clearer direction was needed for customs officials, and only a redrafted statute could provide that direction, so the legislative provision should be struck down. In contrast, the majority held that the problem was simply the application of the legislative provision in a manner that was not sufficiently respectful of the relevant *Charter* freedom, so a detailed declaration of the importer's rights was adequate.

The legal structures regulating administrative regimes are often complex, and governed by a range of legislation, regulations, policies, guidelines and discretion. Given the prevalence of administrative discretion and the fact that any delegation of discretion in a statute is inevitably made in vague language, it would be impractical for the courts to strike down legislation whenever the legislation has allowed for a *Charter*-violating discretionary decision. Nonetheless, the idea of adopting an unstructured discretionary administrative regime that may impact significantly on *Charter* rights, with no criteria guiding the exercise of that discretion, is concerning. This concern highlights the importance of the courts considering the legislative regime governing the administrative decision-maker when reviewing the impact of a decision on *Charter* guarantees. In some circumstances, when the regime does not contain sufficient

[892] *Ibid* at paras 150–154. The majority of the Court thus located the *Charter* limit in the discretionary decisions of customs officers.
[893] *Ibid* at paras 204–213. The minority would have located the *Charter* limit in the enabling customs legislation. Sossin suggests a different approach again, of locating the *Charter* limit in the guidelines: see Sossin, *supra* note 838 at 476–477.

safeguards to prevent arbitrary action and allow people to understand when their rights may be limited, the court should take action to ensure such safeguards are implemented.

Gratton suggests that a purposive approach should be taken to the prescribed by law condition, whereby the initial question to be asked in a *Charter* case is whether the law at issue was intended to be interpreted by the court, or whether it was intended to be interpreted and applied by an administrative agent (for example, where the legislation expressly designates an administrative official charged with applying the legislative scheme).[894] If the former, the law will meet the prescribed by law condition as long as it is not unconstitutionally vague according to the intelligible standard test. If the latter, then the prescribed by law condition operates to ensure that the decision-maker acted within the scope of his or her authority. However, as Gratton notes, identifying the relevant legislative intent may be problematic.[895] Furthermore, to rely on legislative choice as determinative pre-empts any meaningful review of the legislative scheme for compliance with rule of law principles in the cases where the legislative intention is ruled to require interpretation and application of the law by the administrative agent.

Gratton's argument is also based on an understanding of the purpose of administrative law as being "to hold decision-makers operating under delegated authority accountable to the legislature".[896] She suggests that the democratic values at play when a *Charter* limit is contained in a law are fundamentally different from those at play when a *Charter* limit arises from a discretionary decision, on the basis that administrative law exists for the very purpose of protecting democratic accountability.[897] In contrast, I prefer the "unity of public law" conception of administrative law, which views administrative law as a means of upholding the

[894] Gratton, *supra* note 41 at 488–489, 505.
[895] *Ibid* at 505. For example, *Suresh*, *supra* note 258; *Little Sisters*, *supra* note 262.
[896] Gratton, *supra* note 792 at 183.
[897] Gratton, *supra* note 41 at 513.

rule of law and as part of the dialogue between the legislative, judicial, and executive/administrative branches of government about the shared values of society (rather than as judges merely patrolling the legal limits of administrative action). On this conception, administrative law exists to achieve more than just democratic accountability of decision-makers.

Review of the source of the discretion is already an established part of administrative law judicial review. The court checks the decision-maker's reasoning against the statutory scheme and circumstances of the case to ensure the reasoning is rationally grounded in the statutory mandate.[898] Further, techniques exist within administrative law that allow for consideration of whether administrative action is authorized by law and that the action was sufficiently foreseeable. In this vein, Paul Daly suggests that the *Slaight* framework (that the s. 1 "prescribed by law" condition is met where the administrative decision falls within the authority conferred by statute)[899] offers a good solution, "as long as an important addition is made: employing the general principles of administrative law to further the functions of the "prescribed by law" requirement".[900] In particular, the courts should ensure administrative action is authorized by statute and look to any guidelines (or other "soft law") in determining whether an exercise of discretion was reasonable in the circumstances. When assessing reasonableness with reference to the relevant legislation, the courts could therefore inquire into whether the relevant legislative framework ensures the fundamental rule of law requirements of certainty and accessibility are met.

Guidelines can be helpful in both assisting decision-makers with balancing *Charter* values and in informing individuals of how their rights may be limited, and may therefore address the concerns raised in Section 4.3 about statutory vagueness. *Baker* makes clear that

[898] Wildeman, *supra* note 23 at 372.
[899] See above, Section 2.2.1.2.
[900] Daly, *supra* note 200 at 6.

guidelines play a key role in determining whether an exercise of discretion was reasonable in the circumstances. Guidelines also arguably give rise to legitimate expectations that they be followed, which in turn can enhance the degree of procedural fairness provided to affected parties.[901] Daly suggests that failure by government actors to put in place "soft law" protections (such as guidelines) that confine, structure, and check broad discretionary powers used to infringe *Charter* guarantees should be considered unreasonable, as a decision-making process without such guidelines would lack the justification, intelligibility, and transparency required. Such a decision would therefore not meet the definition of "prescribed by law".[902]

Soft law also has significant potential to serve as a conduit for judicial-executive dialogue concerning the nature and scope of discretionary authority.[903] The courts have the ability to set general guidelines for administrative decision-makers responsible for discretionary decisions, such as they have done in the area of extradition (with the *Cotroni* factors),[904] and parole board decision-making.[905] The courts can therefore assist in the development of guidelines to structure such decisions, by articulating the relevant factors to be taken into account and indicating the weight that should be accorded to *Charter* rights.

While Abella and Deschamps JJ suggested in *Multani* that it would be inappropriate to begin every review by assessing the validity of the statutory or regulatory provision on which the decision is based,[906] a full "prescribed by law" analysis would not have to be carried out in most cases. There would be no need to in cases where there is no dispute as to the validity of the discretion-granting legislation or rule (as was the case in *Multani*), but only in those cases

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[901] *Baker*, *supra* note 9 at para 26.
[902] Daly, *supra* note 200 at 38.
[903] Lorne Sossin, "The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada" in M L M Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 129 at 159.
[904] See *Lake*, *supra* note 9.
[905] See *Pinet*, *supra* note 9.
[906] *Multani*, *supra* note 7 at para 118.

in which the legislation or legislative grant of discretion is challenged (such as in *Canada v PHS*). In the latter cases, the courts must scrutinize the statutory scheme under which the rights-infringing decision has been issued to ensure it meets the "prescribed by law" requirement.

In doing so, however, the courts should bear in mind that discretion allows the administrative state the flexibility needed to make individual decisions adapted to particular situations, and to adopt general norms (or non-binding rules) to structure the way in which a legislative scheme is implemented.[907] Discretion can therefore allow for, and even encourage, *Charter*-consistent decisions. As the Court stated in *R v Nova Scotia Pharmaceutical Society*:[908]

> One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. …
>
> What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled.

The prescribed by law analysis should therefore respect that discretion is inherently and necessarily imprecise and cannot be circumscribed to the point where it ceases to exist. However, it should require that the rights-infringing discretionary decision was both authorized by the legislative regime and that the discretion is structured through the legislative regime or some publicly-accessible guidelines.[909]

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[907] Cartier, *supra* note 162 at 403.
[908] *R v Nova Scotia Pharmaceutical Society*, *supra* note 605 at 642. See also *R v Beare; R v Higgins*, [1988] 2 SCR 387 at para 51.
[909] I note that the context in which the discretionary decision is made may require that some secrecy is retained, so detailed and publicly accessible guidelines may not be desirable. Therefore in some cases, where no guidelines exist or the guidelines have been kept secret, a decision-maker might still be able to justify its decision-making process by showing that, for example, security concerns justify some secrecy: see Daly, *supra* note 200 at 40–42.

### 5.2.5 Reasonable and demonstrably justified: a structured proportionality framework

As set out in Section 4.2, the justificatory standard applied in *Doré* is deficient in several regards. These deficiencies mean that the *Doré* approach fails to respect the fundamental requirement set out in s. 1 that *Charter* rights and freedoms are subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.[910] In particular, the minimal requirement on an administrative decision-maker to justify its limitation of an individual's *Charter* right means that the *Charter* infringement will not necessarily be shown to be "demonstrably justified". The rejection of a structured approach to assessing the administrative decision for compliance with the *Charter* also risks an approach that fails to fully justify *Charter* infringements.

The challenge of constitutionalization is "to retain (and enhance) those aspects of administrative law doctrine and methodology that have served us well".[911] The benefits of an administrative law approach cited by the Court in *Doré* could also be preserved through the use of a methodology for judicial review of *Charter*-impacting decisions that rigorously scrutinizes the decision-maker's reasoning and justification for the infringement. The importance of the interests at stake in decisions impacting on *Charter* rights justifies more intense scrutiny of these decisions by the courts than traditionally exercised through reasonableness review. To ensure the effective protection of *Charter* guarantees, the exercise of all public power should be subjected to a rigorous process of public justification of the reasons for that decision.[912] Further, as required by s. 1, the *Charter* right should be given the status of a factor that has to be demonstrably outweighed by a sufficiently important countervailing right or public interest.

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[910] *Charter*, *supra* note 1, s 1.
[911] Dyzenhaus, Hunt & Taggart, *supra* note 801 at 31.
[912] See Hunt, *supra* note 688 at 359.

Ensuring that discretionary powers are exercised in accordance with human rights norms therefore requires a different methodology than that traditionally used by administrative law. What is needed is a structured, transparent, and context-sensitive methodology for assessing the adequacy of that justification.[913] A structured proportionality analysis would better ensure that any limitation on *Charter* rights is in fact "reasonable" and "demonstrably justified in a free and democratic society".

#### 5.2.5.1 Structured proportionality analysis

A structured proportionality analysis is a methodology that is designed to ensure that the means used to limit a constitutional right is reasonable, rational and justified. It is a methodology for judicial review of *Charter*-impacting decisions that rigorously scrutinizes the decision-maker's reasoning and justification for the infringement. As outlined in Section 1.3.1.1, a proportionality analysis can present a challenge to a judge's ideological views and reduce the likelihood of arbitrary decisions. It accords priority to the constitutional right and requires that any infringement be justified in a rational and transparent manner. A proportionality framework such as that set out in the *Oakes* test is therefore a helpful analytical tool to resolve the issue of whether a rights-limiting measure is reasonable and demonstrably justified in a free and democratic society (as required by s. 1 of the *Charter*).

In *Multani*, LeBel J proposed that the courts take a hybrid approach to the review of administrative decisions impacting on *Charter* rights.[914] LeBel J pointed out that there is flexibility in the manner in which s. 1 of the *Charter* can be applied, making it possible to apply the *Charter* to a wide range of administrative acts (without adopting a differing approach to review of norms/laws and decisions).[915] He suggested that, when applying s. 1 of

[913] Hunt, *supra* note 171 at 121.
[914] *Multani*, *supra* note 7 at para 144.
[915] *Ibid* at para 151.

the *Charter*, the analytical approach established in *Oakes* need not be followed in its entirety. In particular, there is no need to review the objectives of the decision where the statutory authority for the decision is not itself challenged.[916]

As noted above,[917] the rejection of the first step of the *Oakes* test (justifying the importance of the objective) is ultimately immaterial in light of the fact that the rest of the test requires that some objective be identified anyway. Administrative grants of power are statutory in origin, so the objective of the decision will presumably be found in the administrative decision-maker's governing statutes. The proportionality analysis portion of the *Oakes* test could then be directly applied to the administrative decision to justify an infringement of an individual's *Charter* right. In past cases, the Court has applied the *Oakes* proportionality test to discretionary administrative decisions.[918] In these cases, the Court has not run into difficulty with applying the three proportionality steps of the *Oakes* test. Considering this, and the benefits of a structured proportionality analysis, I propose that the courts should adopt a methodology based on the *Oakes* proportionality test to determine whether the administrative decision-maker's rights-limiting decision is justified.

There is no reason why the methodology used by the courts should differ in any substantive sense from the *Oakes* proportionality test. The courts would thus ensure that: the decision is rationally connected to the objective in question; the decision impairs the right as minimally as possible; and there is proportionality between the objective of the decision and the effect of the decision. The approach taken on review should, however, accord with the modern conception of administrative law review, which aspires to respect relative institutional expertise and an institutional dialogue based on a culture of justification. The protection of human rights should be seen as a co-operative enterprise on the part of all institutions of

[916] *Ibid* at para 155.
[917] See Section 3.4.5.5.
[918] See Section 3.4.2.2.

government. Decisions on the interpretation and application of the *Charter* are thus best reached through a dialogue between the institutions of government based on justification (as this leads to a more inclusive, richer debate about important societal values). While the judiciary has a significant role to play in the interpretation and application of *Charter* rights, this approach minimizes the risk that judges will simply impose judicial standards of rationality on the administrative agency.

The Court's adoption of the administrative approach in *Doré* demonstrates a commitment to respecting administrative decision-makers' reasoning and expertise,[919] as well as the inherent discretion involved in interpreting and applying the *Charter*. However, true commitment to institutional dialogue and a culture of justification necessitates engagement by the judge with the reasoning of the decision-maker to assess whether the decision is intelligible and justified. As outlined above (see Section 4.2.2), the Court does not demonstrate this commitment in the *Doré* decision, by inadequately engaging with the decision-maker's rationale for the rights-limiting decision and providing scant reasons justifying its conclusion that the decision was reasonable.

Accordingly, I argue that in conducting a review of a rights-infringing decision the courts should certify that the decision-maker has reached a decision that is reasonable and demonstrably justified. Given the importance of the guarantees set out in the *Charter* in Canadian society, the courts must undertake some assessment of the balance the decision-maker has struck. A structured proportionality analysis provides a transparent and relatively objective method to assess this balance. Properly applied, the proportionality analysis will

[919] The Court stated: "An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values": *Doré*, *supra* note 11 at para 47. "Even where *Charter* values are involved, the administrative decisionmaker will generally be in the best position to consider the impact of the relevant Charter values on the specific facts of the case": *Ibid* at para 54.

generally allow scope for a number of approaches to be taken by the decision-maker.[920] When this is the case, the courts should only interfere with the initial decision-maker's decision where the decision cannot be logically and rationally justified (such as where the "line of analysis" within the reasons could not reasonably have led the decision-maker from the evidence to the conclusion at which it arrived).[921] The courts should therefore demand reasons from the decision-maker and scrutinize whether those reasons demonstrate that any limit on an individual's *Charter* guarantees is justified. Such an approach is consistent with the wording of s. 1 of the *Charter* requiring that rights-limitations be "demonstrably justified".

5.2.5.1.1 Burden of proof

The phrase "demonstrably justified" in s. 1 also reflects concerns that the burden of proof of limiting rights should properly rest on the government.[922] As the Court stated in *Oakes*:[923]

> It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the *Charter* are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit.

As argued in Section 4.2.1, the onus of proving that the limit on an individual's *Charter* right or freedom is justified should lie with the administrative decision-maker.

In particular, the information and evidence justifying the limitation can only be provided by the administrative decision-maker. In most cases, the individuals directly harmed by the limitation will not have the appropriate tools to gather that information and to present it to

[920] The exception to this would be a case such as *Canada v PHS*, in which the evidence clearly does not justify the decision made and instead supports the opposite conclusion.
[921] See *Law Society of New Brunswick v Ryan*, *supra* note 393 at para 55; *Dunsmuir*, *supra* note 10 at para 47.
[922] Robert Sheppard & Michael Valpy, *The National Deal: the Fight for a Canadian Constitution* (Toronto: Van Nostrand Reinhold, 1982) at 149–150.
[923] *Oakes*, *supra* note 8 at 137.

court.[924] In addition, the only way to show that a decision has adequately taken into account relevant factors, including *Charter* values, is through the provision of reasons for that decision.[925]

5.2.5.1.2 Provision of reasons

The Court's acceptance in *Doré* that the Disciplinary Council being "conscious" that its decision may constitute a restriction on Mr. Doré's expressive rights was sufficient does not explain the basis on which the Council determined that this restriction was justified in the circumstances.[926] As argued above (see Section 4.2.2), on this approach the decision-maker has only a very minimal obligation to consider and justify the right-limiting decision. Given the importance of a decision impacting on an individual's *Charter* guarantees to that individual, I suggest that a decision-maker should always be required to provide reasons for any *Charter* right-limiting decision. Effective protection of *Charter* rights requires that we subject the exercise of all public power to "a rigorous process of public justification of the reasons for that decision".[927] Administrative decision-makers must therefore provide transparent justifications for their rights-limiting decisions. The Court should then take a "deference as respect" approach to review, respecting the initial decision-maker's rationale for limiting the constitutional right or freedom and intervening only where this reasoning is flawed.

5.2.5.1.3 Deference

In applying a proportionality methodological framework for assessing the adequacy of justification in the administrative law context, it is important that the courts demonstrate

[924] Barak, *supra* note 550 at 443–444.
[925] See Liston, *supra* note 23 at 80.
[926] See *Doré*, *supra* note 11 at para 70.
[927] Hunt, *supra* note 688 at 359.

deference to the administrative decision-maker in the sense that the justificatory reasons provided by the decision-maker are respected. The administrative decision-maker's experience and understanding of the subject-matter of their mandate means that their reasons for making a particular decision should be respected and given weight by the court. The *Oakes* test is flexible enough to allow for deference to administrative decision-makers' expertise and knowledge of the facts of the case. The Court has held repeatedly that the balancing process involved under s. 1 must be flexible and responsive to context.

When a judge takes a deferential approach based on the type (or complexity) of a case, however, questions may be raised about whether there is a principled basis for this deference. Accounts of deference based on institutional competence, or the fact that initial decision-makers will generally be in the best position to consider the specific facts of the case, do not give any role to the quality of the reasons relied upon to justify the decision and therefore may pre-empt serious consideration being given to the quality of the justificatory reasons (because the stage of scrutiny may never be reached if the court decides to defer).[928] Murray Hunt has argued in support of a judicial approach that displays deference to the extent to which the primary decision-maker "has conscientiously conducted a thorough compatibility inquiry".[929] Although this factor should not be determinative (as to do so would risk reducing the requirement that the decision-maker consider the *Charter* to a 'box-ticking' requirement), the seriousness of the engagement with the proportionality question by the primary decision-maker should influence the degree of respect the court accords the decision. The court should therefore defer to the administrative decision-maker's expertise only to the extent that such

[928] Hunt, *supra* note 171 at 114.
[929] Hunt, *supra* note 688 at 354.

expertise is demonstrated by the provision of evidence or argument that stands up to scrutiny by the court.[930]

The proportionality test must also incorporate a deferential approach by the courts in which there is the possibility that there may be more than one *Charter*-compliant decision. Otherwise, the court's proportionality analysis is likely to collapse into correctness review.[931] As with the traditional *Oakes* test, the court's deference to the initial decision-maker is likely to be most visible in considering the minimal impairment step of the test, where the court asks whether the measure "falls within a range of reasonable alternatives".[932] However, that deference should also play a role in assessing whether the decision is rationally connected to the statutory objectives,[933] and whether the measure has a disproportionate effect.[934]

### 5.3 Application of the recommended approach

Examples drawn from previous cases illustrate that the recommended framework for analysis may have beneficial outcomes. For example, applying the recommended approach to the facts of the *Multani* case shows how the revised approach would protect the *Charter* right and also address many of the concerns raised by the majority about the use of an administrative law approach and those raised by the dissent about the use of the *Charter* approach.

In *Multani*, the majority held that a rights-limiting administrative decision is "prescribed by law" within the meaning of s. 1 of the *Charter* when the delegated power is exercised in

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[930] Allan, *supra* note 99 at 51–52. Deference may also be "a rational strategy for dealing with uncertainty about what the balance of reasons requires": Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 184 at 185.
[931] Hunt, *supra* note 171 at 111.
[932] See above, Section 3.3.3.2.1.
[933] As in *JTI-Macdonald*, *supra* note 372 at para 41.
[934] See, for example, *Hutterian Brethren*, *supra* note 8 at para 85.

accordance with the enabling legislation.[935] As discussed above, taking this approach risks overlooking concerns that the legislative scheme allows for unforeseeable and unpredictable decisions that limit *Charter* rights. While the dissent was concerned about assessing the validity of the statutory or regulatory provision on which the decision is based in every case,[936] applying the recommended approach shows that only a brief inquiry into the relevant legislative framework is necessary. An assessment of the legislative scheme governing the administrative decision in *Multani* reveals that the limitation imposed by the school board on the student's right to freedom of religion was authorized by law, publically accessible, and intelligible.[937] As both the majority and dissent concluded, the problem was with the school board's reasons for limiting the student's right.

Although the Court in *Multani* was unanimous in concluding that the school board's decision was invalid (which I agree is the appropriate conclusion), I suggest that applying my recommended methodological approach would better explain how the board's decision was neither reasonable nor demonstrably justified. The primary issue with the majority's approach in *Multani* is that it did not show any deference to the school board's decision in the administrative law sense.[938] The dissenting judgment did recognize the school board's expertise[939] but also failed to fully engage with the board's reasoning and provided even less guidance on how the board's decision failed to meet the required standard.[940] A better approach would have been to explicitly recognize the school board's expertise, and engage

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[935] *Multani*, *supra* note 7 at 22.
[936] *Ibid* at para 118.
[937] The school board's decision was authorized by a delegation of powers under the *Education Act*, RSQ, c I 13-3 (Québec) [*Education Act*], s 76. Section 76 of the *Education Act* granted the board the power to approve any safety measure proposed by a school principal, and required that "the rules and measures shall be transmitted to all students at the school and their parents". The board exercised this power by implementing an article in the school's *Code de vie* (code of conduct) prohibiting the carrying of weapons and dangerous objects at the school.
[938] See *Multani*, *supra* note 7 at paras 50–51.
[939] *Ibid* at para 96.
[940] The dissent concluded that the board's decision was unreasonable because it "did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed by the father and the student": *Ibid* at para 99.

with the decision-maker's reasoning. Under my recommended approach, the proportionality analysis would be carried out in a similar manner to the majority's application of the *Oakes* test but would use the board's reasoning as the basis for the analysis.[941] Utilizing the board's reasons for why the limit was justified would result in a better methodological engagement with the content of the decision. As the Court ignored the board's reasoning, we cannot ascertain exactly where the reasoning of the Court departed from that of the school board. However, it seems that the Court saw no issue with the board's reasoning in terms of rational connection,[942] but considered that the board had failed to demonstrate that it was reasonable to conclude that an absolute prohibition against wearing a kirpan minimally impairs the student's right (this conclusion was not "within a range of reasonable alternatives").[943] Applying the recommended approach would provide a much clearer ruling as to how the Court considered that the board's decision was an unjustified infringement of the student's right, in a manner that respects the initial decision-maker's expertise and reasoning. The transparency of the resulting judgment, particularly in specifying exactly where the Court considered that the initial decision-maker departed from a reasonable justification, would also allow for a more informed societal debate about the validity of the rights-infringement.

The recommended approach would also improve the legitimacy of judicial decisions such as that in *Doré*. As argued in Chapter 4, the methodology employed by the Court in *Doré* was flawed. The Court did not undertake any review of the legislative provision (an

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[941] Note that the dissent's concern about placing the burden of proof onto the administrative bodies to adduce evidence to justify its decision under s. 1 (see *ibid* at para 132) was not an issue, as demonstrated by the evidence produced by the school board and relied upon in the majority decision.

[942] As the kirpan has the characteristics of a bladed weapon and could therefore cause injury, the board's decision has a rational connection with the legislative objective of ensuring a reasonable level of safety in schools: *Multani*, *supra* note 7 at para 49.

[943] *Ibid* at para 51. The Court concluded that allowing the student to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The Court also held that the deleterious effects of a total prohibition (particularly the message sent that some religious practices do not merit the same protection as others) outweigh its salutary effects: *Ibid* at para 79.

article of the Québec *Code of ethics of advocates*)[944] that, in its application, infringed on Mr. Doré's freedom of expression. This meant that there was no assessment of whether the legislative scheme governing the Council's decision met key rule of law conditions such as non-arbitrariness and intelligibility. Application of the recommended prescribed by law analysis outlined above would require the courts to enquire into whether the discretionary decision was both authorized by the legislative regime and structured through some publicly-accessible guidelines (whether in the legislative scheme or in soft law). This analysis would ensure that any undue vagueness in the legislative grant of discretion is remedied. Arguably, the relevant provision (which provided that lawyers must behave with "objectivity, moderation and dignity") was too vague and unstructured to be used to cover the situation of a lawyer (privately) insulting a judge. On the other hand, it is important that professional disciplinary councils are granted sufficient discretion to deal with the numerous and complex situations they are expected to investigate and remedy. Whatever the Court concluded after undertaking this analysis, however, the Court's reasoning would be instructive as to how the Council's decision was guided by the legislative regime or other publicly-accessible "non-law" sources. The Court's analysis would therefore result in the legislative provision being more intelligible to the public (and, in particular, lawyers) and provide guidance for the future exercise of the Council's discretion.

As outlined in Section 4.2, the Court's approach in *Doré* also failed to fully justify the conclusion that the limitation on Mr. Doré's right to freedom of expression was reasonable. Applying the recommended approach would require that the Council provide full reasons for the rights-infringing decision, and those reasons would be used as a basis for carrying out a structured proportionality analysis. The structured proportionality analysis would require the

[944] *Code of Ethics*, *supra* note 16, art 2.03.

reviewing court to assess the balance that the decision-maker struck and to examine the relative weight accorded to the right and any competing interests or considerations. The Court would consider whether there is a rational connection between limiting a lawyer's freedom of expression (by reprimanding him for an immoderate communication to a judge) and the statutory objective of ensuring that lawyers behave with "objectivity, moderation and dignity". The Court would then consider whether the decision interferes with the relevant *Charter* right no more than is necessary given the statutory objectives. In doing so, the Court would assess the Council's reasons for why a formal reprimand was in fact necessary to achieve the statutory objectives. Relevant reasons (which were canvassed in the lower court decisions) would include Mr. Doré's failure to show remorse (and therefore the potential for similar conduct in the future) and the range of alternative disciplinary actions available to the Council. The final step in the proportionality analysis is for the Court to review whether the salutary effects outweigh the deleterious effects. The Court would thus explore the balance between freedom of expression (in the form of criticism of the judiciary or public institutions) and the objective of maintaining civility within the legal profession.[945] In doing so, the Court would consider the relevance of the private nature of Mr. Doré's communication, the context in which the letter was written, and assess the appropriateness of alternative disciplinary options available in the circumstances. As in *Charter* jurisprudence, the rigour with which the Court applies this proportionality analysis would also depend on the extent to which the type of expression furthers the three purposes underlying the right to freedom of expression.[946] The Court may well reach the same conclusion (that the Council's decision was a justified limitation on Mr. Doré's *Charter* right) but taking this recommended approach would result in

[945] *Doré*, *supra* note 11 at para 66.
[946] The three purposes underlying freedom of expression are the promotion of truth, the enabling of democratic discourse, and self-fulfillment and human flourishing: see, for example, *Irwin Toy*, *supra* note 189; *RJR-MacDonald*, *supra* note 77; *JTI-Macdonald*, *supra* note 372.

a more transparent and intelligible ruling that clearly sets out the rationale for why the rights infringement is (or is not) reasonable and justified in a free and democratic society.

### 5.4 Benefits of the recommended approach

Particularly in the realm of fundamental values to society such as human rights, the courts have an important role to play in articulating the competing considerations and their normative significance for the determination of the outcome. The way in which the courts reach decisions is important, however, both for ensuring that judges reach transparent and logical decisions and for providing guidance to administrative decision-makers considering the *Charter* in future decisions. Judicial decisions and reasoning have educative content. Administrative decision-making and judicial review are inter-related: the fear of judicial review, and the need to comply with relevant judicial decisions, impacts on administrative decision-making. Judicial decisions can therefore have a significant systemic impact on the process and outcome of administrative decisions.

While the methodology adopted by the courts to review administrative decisions may not result in differing outcomes, in some cases it will. As explored in Chapter 3, reasonableness review looks at whether the decision falls within a range of possible outcomes which are defensible in respect of the facts and law,[947] whereas a proportionality analysis involves scrutinizing the balance struck by the decision-maker and assessing the relative weight accorded by the decision-maker to identified rights or interests. Review utilizing a proportionality test also focuses on the substantive human rights outcome of the administrative decision. Accordingly, even if a structured proportionality analysis will affect the outcome of a case only in some cases, there is good reason for adopting such an approach. A structured proportionality test applied in this way would enhance the intelligibility, transparency, and

[947] *Dunsmuir*, *supra* note 10 at para 47.

justification of the judicial decision, offer a principled approach to exposing unreasonable action, and assist judges in articulating the real principles and concerns underlying their decisions. The requirements that the court consider whether the decision minimally impairs the individual's rights and that the effect of the decision is not disproportionate would also heighten sensitivity to the impact of the decision on the individual. Utilizing a structured proportionality test based on the *Oakes* test would also allow the courts to draw on the invaluable guidance in *Charter* jurisprudence on the interpretation and limitation of rights and freedoms in a free and democratic society. This approach ensures that, even within an administrative law framework, *Charter* guarantees are accorded the status of a factor that has to be demonstrably outweighed by a sufficiently important countervailing right or public interest.

# 6 CONCLUSION

Over time, there has been a devolution of authority from the legislature and executive to administrative decision-makers in terms of regulation-making and policy-making (which has the force of law).[948] Legislative schemes are often merely frameworks, with the detail of the legal regime contained in regulations, rules, or broad grants of statutory discretion to administrative decision-makers. This has resulted in administrative bodies wielding a significant amount of influence on the legal regimes regulating the lives of individuals. Administrative decision-makers therefore play an integral role in the lives of every Canadian.

The reliance on administrative decision-making in developing and applying the law, as well as the emphasis on ensuring that proposed legislation complies with the *Charter*, means that *Charter* issues are increasingly likely to surface as a result of administrative decisions rather than from legislation. Therefore the way that administrative agencies and decision-makers consider and decide on *Charter* issues is likely to only increase in terms of significance for the protection of fundamental rights and freedoms. The administrative state is thus where "the rubber meets the road for constitutionalism".[949] However, it may also be said that the administrative state is where "predictability and curbs on arbitrariness are least likely to be noticed but most likely to affect large numbers of citizens".[950]

The *Doré* decision raises a number of uncertainties and questions about how the approach outlined by the Court will operate to curb arbitrariness and how it will impact on the protection of *Charter* guarantees. The fact that the *Doré* decision suggests that administrative decision-makers' rights-limiting decisions will not be lightly interfered with by the courts

[948] Michael Taggart, "From Parliamentary Powers to Privatization: The Chequered History of Delegate Legislation in the Twentieth Century" (2005) 55 UTLJ 575 at 627.
[949] Ginsburg, *supra* note 860 at 118.
[950] *Ibid*.

should cause us to reflect on the checks and balances operating on these decision-makers. Judicial review provides a valuable measure of accountability for discretionary decision-making,[951] and the message conveyed by judicial review decisions should not be underestimated. It is therefore concerning that the *Doré* decision does not provide clear guidance on the methodology courts should apply when reviewing rights-limiting administrative decisions. The Court's adoption of a loose reasonableness standard and the rejection of a structured proportionality analysis also raises concerns that adoption of the *Doré* approach will not ensure adequate justification for decisions impacting on *Charter* values. Furthermore, the approach taken in *Doré* risks disregard for key rule of law values such as certainty, accessibility and predictability of law, in particular through insufficient constraints on broad grants of discretion allowing for rights-limitation.

The *Doré* approach therefore does not guarantee that administrative decisions infringing on *Charter* rights and freedoms will be governed by s. 1's requirement that those rights and freedoms are to be subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Accordingly, modification of the methodological approach to judicial review of administrative decisions impacting on *Charter* guarantees is necessary to ensure consistency with the *Charter*. I have proposed an analytical framework for judicial review of rights-limiting administrative decisions based on a proportionality analysis that incorporates the spirit of the s. 1 *Oakes* test but is conducted within an administrative law framework. This approach builds on the *Doré* "proportionate balancing" approach to create a review framework that provides greater assurance that such decisions will only be justified if the limit is imposed by a statutory scheme that meets the rule of law principles underlying the s. 1 "prescribed by law" requirement. It also scrutinizes the

[951] Lorne Sossin, "The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada" in M L M Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 129 at 156.

decision in a more rigorous manner than the review the Court undertook in *Doré*, while adhering to a model of deference as respect. This approach offers a more coherent and unified conception of the relationship between administrative law and the *Charter* and better respects the requirements in s. 1 of the *Charter* that any limits on *Charter* guarantees are "prescribed by law", "reasonable" and "demonstrably justified in a free and democratic society". The recommended approach also ensures that decision-makers are accountable to the fundamental values contained in the *Charter* without eliminating the scope for the exercise of discretion. It utilizes the judiciary's expertise in balancing *Charter* values to assess whether the decision is justifiable, while respecting the reasoning provided by the administrative decision-maker. Ultimately, this modified approach will enhance the protection of individual rights and freedoms within Canada.

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