PRESERVING THE CHARTER IN ADMINISTRATIVE LAW:
A CRITIQUE OF THE SUPREME COURT OF CANADA’S DECISION IN
LAW SOCIETY OF BRITISH COLUMBIA v. TRINITY WESTERN UNIVERSITY

by

Carmelle Dieleman

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

The Faculty of Graduate and Postdoctoral Studies

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

August 2019

© Carmelle Dieleman, 2019
The following individuals certify that they have read, and recommend to the Faculty of Graduate and Postdoctoral Studies for acceptance, a thesis entitled:

Preserving the Charter in Administrative Law: A Critique of the Supreme Court of Canada’s Decision in Law Society of British Columbia v. Trinity Western University

submitted by Carmelle Dieleman in partial fulfillment of the requirements for the degree of Master of Laws

In Law

Examining Committee:

Cristie Ford, Law Supervisor
Hoi Kong, Law Supervisory Committee Member
Abstract

This thesis explores the Doré/Loyola framework in light of the recent Supreme Court of Canada decision, Law Society of British Columbia v. Trinity Western University (“LSBC v. TWU”). Using primarily traditional legal research, along with critical legal, interdisciplinary, and social-legal elements, this research critiques the Doré/Loyola framework and advocates for stronger protection of minority rights in administrative justice.

While the Doré/Loyola framework purports to provide oversight to administrative decisions to ensure they do not run roughshod over the Charter, regrettably, as demonstrated by LSBC v. TWU, the framework does not provide this necessary protection. Instead, it expands the scope of discretion available to both administrators and judges through the Charter values framework. Further, the framework imagines a conflict of rights, which is both an incorrect and unhelpful formulation. Lastly, statutory objectives can too easily outweigh Charter rights, as Doré makes it possible to read a statutory objective as incorporating a Charter value or right. Recognition of other competing Charter rights, which are not recognized in the statutory language, is then compromised. This is particularly disadvantageous to minority rights as it leaves them subject to the changing views of the majority in society. In LSBC v. TWU, this risk was heightened through the use of a referendum which required voters to choose between the rights of two minority groups and give priority to one over the other. In order to ameliorate concerns with the Doré/Loyola framework, reasonable accommodation needs to be returned to the analysis. Instead of focusing primarily on how to balance statutory objectives and Charter protections, administrative decision-makers should be encouraged to find creative options to accommodate Charter protections where possible. In this way, the promises of the Charter, including minority rights, will be better preserved in administrative justice.
This paper is an important contribution to emerging research on the intersection of the *Charter* and administrative justice. The *Doré/Loyola* framework is a recent addition to administrative law, and *LSBC v. TWU* was released within a year of writing this thesis. Consequently, as there has yet to be a significant body of academic work addressing *LSBC v. TWU*, it is an opportune time to analyze the *Doré/Loyola* framework as utilized in this case.
Lay Summary

This thesis advocates for stronger protection of minority rights in administrative decision-making by critiquing the framework used by courts to review Charter-limiting administrative decisions, known as the Doré/Loyola framework. Incorporating primarily traditional legal research, this thesis focuses in particular on the Doré/Loyola framework as understood by the Supreme Court of Canada in its recent decision, Law Society of British Columbia v. Trinity Western University (“LSBC v. TWU”) and provides suggestions to improve the framework going forward. This paper is an important contribution to emerging research, as LSBC v. TWU was released within a year of writing this thesis. Consequently, it is an opportune time to analyze the Doré/Loyola framework as utilized in this case.
Preface

This thesis is the original, unpublished, independent work of Carmelle Dieleman.
Table of Contents

Abstract ........................................................................................................................................... iii
Lay Summary ................................................................................................................................. v
Preface ............................................................................................................................................ vi
Table of Contents ........................................................................................................................ vii
List of Tables .................................................................................................................................. vii
Acknowledgments ......................................................................................................................... ix
Dedication ....................................................................................................................................... xi

Chapter 1: Introduction .................................................................................................................. 1
  1.1 Research Overview .................................................................................................................. 1
  1.2 Significance of Topic ............................................................................................................... 3
  1.3 Research Questions and Thesis Overview ......................................................................... 4
  1.4 Methodology and Theoretical Framework ........................................................................ 5

Chapter 2: The Doré/Loyola Framework in light of LSBC v. TWU ........................................... 8
  2.1 Introduction .......................................................................................................................... 8
  2.2 Overview of Framework and Cases ................................................................................... 9
  2.3 Academic Discourse on the Doré/Loyola Framework .................................................. 17
  2.4 LSBC v. TWU: The Lost Opportunity ............................................................................... 21
  2.5 Objections to the Doré/Loyola Framework .................................................................... 28
  2.6 Conclusion .......................................................................................................................... 39

Chapter 3: Direct Democracy and Minority Rights: the LSBC Referendum ......................... 41
  3.1 Introduction .......................................................................................................................... 41
  3.2 LSBC v. TWU .................................................................................................................... 42
  3.3 A Purposive Approach to Fettering .................................................................................. 45
  3.4 The LSBC Referendum and Administrative Law .......................................................... 47
  3.5 Minority Rights in Constitutional Law ............................................................................. 53
  3.6 Conclusion .......................................................................................................................... 64

Chapter 4: Accommodating Rights in Administrative Law ...................................................... 66
  4.1 Introduction .......................................................................................................................... 66
  4.2 Minimal Impairment and Accommodation .................................................................... 69
  4.3 The Doré/Loyola framework ......................................................................................... 75
  4.4 Accommodation in Administrative Law ......................................................................... 84
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.5</td>
<td>How to Incorporate Accommodation</td>
<td>93</td>
</tr>
<tr>
<td>4.6</td>
<td>Accommodation in <em>LSBC v. TWU</em></td>
<td>97</td>
</tr>
<tr>
<td>4.7</td>
<td>Conclusion</td>
<td>99</td>
</tr>
<tr>
<td><strong>Chapter 5 : Conclusion</strong></td>
<td></td>
<td><strong>101</strong></td>
</tr>
<tr>
<td>5.1</td>
<td>Findings and Recommendation</td>
<td>101</td>
</tr>
<tr>
<td>5.2</td>
<td>Limitations of Research</td>
<td>102</td>
</tr>
<tr>
<td>5.3</td>
<td>Areas for Future Research</td>
<td>104</td>
</tr>
<tr>
<td>5.4</td>
<td>Contributions to the Literature</td>
<td>105</td>
</tr>
<tr>
<td>5.5</td>
<td>Looking Ahead</td>
<td>106</td>
</tr>
</tbody>
</table>

Bibliography | 107  |
List of Tables

Table 1............................................................................................................................................. 76
Table 2............................................................................................................................................. 78
Acknowledgments

I am deeply indebted to my Supervisor, Cristie Ford, for her unwavering support and patience through this endeavor and for her invaluable comments and suggestions. I am also grateful for the advice of Hoi Kong, my Supervisory Committee Member. Thank you to the faculty and staff at Peter A. Allard School of Law, especially Graduate Program Advisor, Joanne Chung, for answering my endless questions and encouraging me in this process, and Michelle LeBaron for providing me with a new outlook on legal research. I am grateful for my UBC comrades – Oludolapo Makinde, Alexandra Chapman, Shannon Russell, and Kaityln Cumming. I am also very thankful for the generous financial support provided by the Social Sciences and Humanities Research Council of Canada (SSHRC), Evelyn Lett Childcare Bursary, and the University of British Columbia Student Aid Bursary.

Thank you to my family and friends for their encouragement and support. To Megan, for being our Mary Poppins. To my mom, LaVonna, for being my first teacher, and to my dad, Barry, for being the inspiration I needed to tackle this project. To my husband, Michael, for believing in me every step of the way. To my children, Arianne, Jackson, and Westley for surviving and thriving through it all, and to Cosette for sharing me, typing away furiously, during the first few weeks of her life.

And most of all, to God who keeps and sustains me each day.
Dedication

For Arianne, Jackson, Westley, and Cosette.
And for Michael.
Always.
Chapter 1: Introduction

1.1 Research Overview

Minority rights are engrained into the fabric of Canadian society. There are many altruistic reasons for this, including a strong emphasis on human rights, a desire to promote peace over violence, and a recognition of the atrocities that have been committed against minorities around the world through the ages. Another reason is that, depending on how we define our identities, any one of us may, at some point in time, find ourselves part of a minority. The way we address minority rights, therefore, does not just reflect who we are as a society but also impacts how some day we ourselves may be treated.

The recent Supreme Court of Canada (“SCC”) decision Law Society of British Columbia v. Trinity Western University (“LSBC v. TWU”)\(^1\) is the latest in a line of cases seeking to define the contours of the *Charter*\(^2\) in administrative decision-making through the *Doré/Loyola* framework.\(^3\) The facts concerned a private evangelical Christian institution, Trinity Western University (“TWU”), which sought to open a law school. The Law Society of British Columbia (the “LSBC”), following a referendum of its membership, denied accreditation to the proposed law school based on TWU’s Community Covenant Agreement which restricted sexual activity to a married man and woman (the “Covenant”). On judicial review of the LSBC’s decision, the Majority of the SCC utilized the *Doré/Loyola* framework which requires a proportionate balance

---

\(^1\) Law Society of British Columbia v Trinity Western University, 2018 SCC 32 [LSBC v TWU]. This case was released on the same day as its companion case, Trinity Western University v Law Society of Upper Canada, 2018 SCC 33 [TWU v LSUC]. While most of the criticisms of the *Dore/Loyola* framework are the same for both cases, I focus on LSBC v TWU for the unique issues posed by the referendum, the subject of Chapter Three of this paper.


\(^3\) For a review of these cases, see: Mary Liston, “Administering the Charter, Proportioning Justice: Thirty-five Years of Development in a Nutshell” (2017) 30:2 Can J Admin L & Prac 211 [Liston].
between the infringed *Charter* protection and the state actor’s statutory objective. At issue in this case was TWU’s freedom of religion\(^4\) and the LSBC’s statutory objective to uphold the public interest in the administration of justice. The Majority of the SCC concluded that the LSBC’s decision limiting TWU’s freedom of religion was reasonable, finding that the LSBC had furthered its statutory mandate by preventing risk of significant harm to LGBTQ individuals.

While *LSBC v. TWU* brings to light several weaknesses of the *Doré/Loyola* framework, this thesis focuses on one particular failing – the framework creates the risk of administrative decision-makers prioritizing statutory objectives at the expense of adequately protecting *Charter* rights.\(^5\) There are three reasons for this which form my main objections to the framework. First, the *Doré/Loyola* expands the scope of discretion available to both administrators and judges through the *Charter* values framework. Second, the framework imagines a conflict of rights, which is both an incorrect and unhelpful formulation. Lastly, under the framework, statutory objectives can too easily outweigh *Charter* rights, as *Doré* makes it possible to read a statutory objective as incorporating a *Charter* value or right. Recognition of other competing *Charter* rights, which are not recognized in the statutory language, is then compromised. Taken together, these three failings enable decision-makers to undervalue *Charter* protections. This is particularly troubling from the perspective of minority rights, as it leaves them vulnerable to the changing views of society. If we wish to preserve the integrity of the *Charter*’s promises in administrative law, we must analyze *LSBC v. TWU* critically in order to decipher a better way going forward.

---

\(^4\) See *LSBC v TWU*, *supra* note 1 at para 61: The SCC did not determine whether TWU, as an institution, had a section 2(a) claim. The Majority held that it was TWU’s community members who had a freedom of religion claim. However, for simplicity’s sake, I refer to it as TWU’s freedom of religion throughout this paper.

\(^5\) While I advocate in this paper that the *Doré/Loyola* framework should only include *Charter* rights, and not the broader term “protections”, I continue to use the term “*Charter* protections” when discussing the interests covered under the framework as it currently stands.
1.2 **Significance of Topic**

My thesis finds its relevance in the centrality of the *Charter*. As the dominant feature of Canadian law guaranteeing our rights and freedoms, if the *Charter* does not adequately protect the rights it sets out to defend, the law ultimately fails to protect all Canadians. This is of particular importance in the administrative law context. Justice McLachlin, as she then was, eloquently wrote:

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-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.6

As the average person primarily sees her rights determined by the administrative justice system, it is of critical importance that the *Charter* adequately protects all individuals who interact with this system. In this vein, my thesis tackles judicial review of *Charter*-limiting administrative decisions through the *Doré/Loyola* framework. This is a multifaceted and evolving area of the law, as the framework was only recently created by the SCC in 2012.7 It is therefore a pertinent time to discuss the contours of the framework, including how the SCC is addressing early critiques of this approach, and to provide suggestions to improve the framework going forward.

---


7 *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].
1.3 Research Questions and Thesis Overview

The central question animating this thesis is whether the Doré/Loyola framework, as used in *LSBC v. TWU*, is effective at making the Charter meaningful in administrative justice from the perspective of minority rights. My conclusion is that it is not. Because the framework can prioritize statutory objectives at the expense of adequately protecting Charter rights, it enables state actors to devalue certain rights. If we are to preserve the promises of the Charter in administrative law, we must return to the language of reasonable accommodation. By attempting to first accommodate Charter rights before resorting to balancing, the rights of minorities – and consequently all of us – will be better protected.

My thesis is divided into five chapters, including the introduction and conclusion. Following the introduction, in Chapter Two, I set the background of both the Doré/Loyola framework and *LSBC v. TWU* and address various concerns academics raised with the framework. I contend that the Majority of the SCC in *LSBC v. TWU* largely ignored these concerns, resulting in the risk of decision-makers prioritizing statutory objectives and under-valuing Charter protections.

Turning to Chapter Three, I delve deeper into the way the Charter protections in *LSBC v. TWU* were pitted against each other. Not only did the LSBC sidestep the balancing process required under the Doré/Loyola framework, the way in which the Benchers made their decision evidenced a particularly egregious form of fettering of discretion. In light of the SCC’s decision in *Reference re Secession of Quebec* (“Secession Reference”), a referendum to determine minority rights runs contrary to Canadian constitutional norms. Consequently, the way in which

---

the Majority of the SCC utilized the *Doré/Loyola* framework in this case failed to provide necessary protection for minority rights.

In Chapter Four, I analyze whether the requirement in the *Doré/Loyola* framework that *Charter* protections be “affected as little as reasonably possible” is adequately recognized in the case law. I conclude that it is not and that the SCC has favoured the balancing component of the framework over finding less-infringing options, leading to “zero-sum” outcomes in administrative justice. This enables statutory objectives to take precedence even where less-infringing options may have been possible. In order to avoid this risk, I advocate for returning to the language of reasonable accommodation. Ultimately, I contend that the *Doré/Loyola* framework, as used in *LSBC v. TWU*, is not effective at importing the *Charter*’s protection into administrative law and indeed frustrates this very purpose for which it was created, particularly from the perspective of minority rights. In conclusion, I seek to advocate for an administrative justice system in which the rights of minorities are vigorously defended.

### 1.4 Methodology and Theoretical Framework

As Bal Sokhi-Bulley argues, methodology is derived from a personal viewpoint or attitude towards the law. This methodology influences our research, including our hypothesis, research questions, and method. All of these, in turn, influence the critical discussion, sources, argument and structure of the project.\(^9\) In this paper, I draw inspiration from several methodologies, outlined below.

---

First, this paper primarily contains a strong doctrinal element, anchoring my thesis in traditional legal research. As Douglas Vick claims, “[d]octrinalism remains the benchmark against which legal academics define themselves and their work”.

While this doctrinalism is evident throughout this paper, it is especially prevalent in Chapter Two, where I address a broad overview of concerns with the Doré/Loyola framework, and Chapter Four, where I advocate for returning to the language of reasonable accommodation. In both of these chapters, I seek to highlight internal inconsistencies in the law as it currently stands, which is a key element of doctrinalism.

In Chapter Three, I also engage with critical legal theories, defined as “theories of social critique that explain how power relationships, privilege, and social control shape social situations.” In particular, I argue that if we do not vigorously defend minority rights, they will be subordinated to the preferences of the majority. I also touch on interdisciplinary studies by exploring political science research and examples from current politics. In so doing, I hope to work towards Wendy Schrama’s goal to use interdisciplinary research to contribute to the increased effectiveness of the legal system.

Lastly, I draw from Carroll Seron and Susan Silbey’s exploration of “law in action”. They argue that rather than seeing law as derived solely from books, “law in action” views law as unfolding in the courtrooms, in lawyers’ offices, and while juries are deliberating. What may be unconventional and outside of the law from the standpoint of doctrinal law may, in fact, be normal from the viewpoint of “law in action”. Further, as Carrie Menkel Meadow argues, lawyers should consider various aspects to problems outside of the legal realm, including economic, social

---

psychological, political, and moral aspects. She explores tools used in negotiation theory and problem-solving to argue that legal scholars can use such tools to develop creative and workable solutions to legal problems. In this vein, in Chapter Four, I discuss the necessity of state actors using creative options to accommodate rights outside the parameters of the law. I turn now to address both the Doré/Loyola framework and LSBC v. TWU in greater detail.

---

Chapter 2: The Doré/Loyola Framework in light of LSBC v. TWU

2.1 Introduction

In the years following the creation of the Doré/Loyola framework, many scholars have proffered suggestions to improve its contours. The SCC decision in LSBC v. TWU\(^{15}\) had a critical opportunity to address these suggestions. However, in this chapter, I argue that rather than ameliorate the problems with the framework, the Majority in LSBC v. TWU regrettably ignored these concerns, leading to the risk of devaluing Charter rights in administrative law.

This chapter commences with an introduction to both the Doré/Loyola framework and its application in LSBC v. TWU. I then delve into the corresponding academic debate associated with the framework, including concerns surrounding the use of Charter values and the proportionality analysis. I highlight suggestions made by academics and judges to ameliorate the framework and point out how the Majority’s decision in LSBC v. TWU largely ignored these suggestions, to the detriment of the framework.

Next, I discuss my three main objections to the Doré/Loyola framework. First, I am concerned about the scope of discretion available to both administrators and judges in applying the Charter values framework. As there is “no doctrinal structure”\(^{16}\) in a Charter value analysis, decision-makers and judges can identify and apply values with little constraint, leading to inconsistency and unpredictability in how the Charter is protected in administrative law. On the other hand, a more precise framework, such as that used for a standard Charter violation, provides significantly more constraint: a) it limits which Charter interests can be invoked (rights); b) it

\(^{15}\) LSBC v TWU, supra note 1.

\(^{16}\) Gehl v Canada (Attorney General), 2017 ONCA 319 at para 79 [Gehl], as cited in LSBC v TWU, supra note 1 at para 171.
restrains how these rights are defined; and c) it narrows the application of these rights through tests which have been developed over decades of jurisprudence. This provides better assurance of consistent protection for Charter rights in administrative justice.

My second concern with the Doré/Loyola framework is that it imagines a conflict of rights, which is both an incorrect and unhelpful formulation. Rather than viewing it as a conflict of private rights, the framework should view the administrator as having conflicting duties towards multiple private parties. In this way, the disagreement should surround what “reasonable accommodation” looks like when various Charter rights are in play. I return to discuss reasonable accommodation in more detail in Chapter Four.

My final concern is that statutory objectives can too easily outweigh Charter rights, as Doré makes it possible to read a statutory objective as incorporating a Charter value or right. Recognition of other competing Charter rights, which are not recognized in the statutory language, is then compromised. Incorporating a Charter right or value into a statutory objective operates like a thumb on the scale, which effectively allows statutory objectives to trump other Charter rights.

2.2 Overview of Framework and Cases

2.2.1 The Doré/Loyola Framework

The Doré/Loyola framework is used on judicial review of Charter-limiting administrative decisions. As laid out by the Majority in LSBC v. TWU, the reviewing court must determine:

1. Whether the administrative decision engages the Charter by limiting Charter protections – both rights and values;

2. If so…whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing
of the Charter protections at play...The extent of the impact on the Charter protection must be proportionate in light of the statutory objectives.\textsuperscript{17} There may be more than one outcome that strikes a proportionate balance,\textsuperscript{18} and if the administrative tribunal’s decision “falls within a range of possible, acceptable outcomes”, it will be reasonable.\textsuperscript{19} This process is highly contextual.\textsuperscript{20}

The above framework was developed in two SCC decisions, Doré v. Barreau du Québec\textsuperscript{21} ("Doré") and Loyola High School v. Quebec (Attorney General)\textsuperscript{22} ("Loyola") which will be briefly summarized below. Doré involved a Quebec lawyer who wrote a scathing private letter to a judge criticizing the judge’s conduct during proceedings in which Doré was counsel. This led to Doré’s discipline by the Disciplinary Council of the Barreau du Québec (the “Council”). The Court was tasked with balancing Doré’s freedom of expression and the Council’s statutory objective to ensure that lawyers behave with “objectivity, moderation and dignity” in accordance with art. 2.03 of the Code of ethics.\textsuperscript{23}

In the unanimous decision authored by Abella J., the SCC confirmed the line of cases that administrative decisions must be made in accordance with the Charter but also went further to mandate that administrative tribunals exercise their discretion in accordance with Charter values.\textsuperscript{24} With respect to judicial review, Abella J. found that a separate analysis was needed in administrative law from the one used in constitutional law. In the latter, after the claimant demonstrates that her right has been infringed, the state attempts to justify the infringement under

\textsuperscript{17} LSBC v TWU, supra note 1 at para 58.
\textsuperscript{18} Loyola High School v Quebec (Attorney General), 2015 SCC 12 [Loyola] at para 41, as cited in LSBC v TWU, supra note 1 at para 79.
\textsuperscript{19} Doré, supra note 7 at para 56, as cited in LSBC v TWU, supra note 1 at para 79.
\textsuperscript{20} LSBC v TWU, supra note 1 at para 81.
\textsuperscript{21} Doré, supra note 7.
\textsuperscript{22} Loyola, supra note 16.
\textsuperscript{23} Doré, supra note 7 at headnote.
section 1 of the Charter using the Oakes test.\textsuperscript{25} To justify the need for a separate framework in administrative law, Abella J. laid out the alleged awkwardness of fitting administrative law with the Oakes test as follows:

It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of Charter guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous Charter protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?\textsuperscript{26}

The SCC held that when applying Charter values in an exercise of statutory discretion, an administrative decision-maker must now balance Charter values with statutory objectives. If the decision disproportionately impairs the Charter guarantee, it will be unreasonable, whereas if it attains a proper balance of the statutory objectives with the Charter protection, it will be reasonable.\textsuperscript{27} On the facts of Doré, the SCC concluded that the Council’s decision to reprimand Doré represented a proportional balancing of his freedom of expression with the Council’s statutory objective.

In 2015, the Majority of the SCC further elaborated on the Doré framework in Loyola High School v. Quebec (Attorney General) ("Loyola").\textsuperscript{28} I return to discuss this case in further detail in Chapter Four but provide a brief outline here. Loyola is a private English-speaking Catholic high school for boys. The Quebec Minister of Education, Recreation and Sports required a Program on Ethics and Religious culture which was to be taught from a neutral and objective perspective.

\textsuperscript{25} I discuss the Oakes test in further detail in Chapter Four.
\textsuperscript{26} Doré, supra note 7 at paras 3-4.
\textsuperscript{27} Ibid at para 7.
\textsuperscript{28} Loyola, supra note 18.
Loyola requested an exemption which was denied. At issue was Loyola’s freedom of religion versus the Minister’s objectives of promoting tolerance and respect for differences.29

The Majority decision, written by Abella J., used the framework created in Doré. They found that the Minister’s decision requiring all aspects of the program be taught from a neutral perspective, including the teaching of Catholicism, limited Loyola’s freedom of religion more than was necessary given the statutory objectives and remitted the matter to the Minister for reconsideration. On the other hand, the Minority decision, written by McLachlin C.J. and Moldaver J., with Rothstein J. concurring, followed a constitutional analysis. They first looked at whether Loyola’s freedom of religion was infringed. Once they determined that it had been, they then analyzed whether the infringement was justified under section 1. They wrote that the “essential question” was whether the administrative decision limited the Charter right no more than was reasonably necessary.30 The Minority concluded that the infringement was not justified and that the appropriate remedy should have been to grant Loyola’s application for the exemption.31 They did not explain their analytical departure from the Majority’s decision, despite the fact that both McLachlin C.J. and Rothstein J. had formed part of the unanimous court in Doré.32 By contrast, in LSBC v. TWU, which was released three years after Loyola, the concurring and dissenting justices eloquently explained their disagreement with the contours of the Doré/Loyola framework. It is to that case which I now turn.

29 Loyola, supra note 18 at para 6.
30 Ibid at para 114.
31 Ibid at para 88.
32 Liston, supra note 3 at 233. Liston argues that there may have been several reasons for this departure, including: 1) partiality for the structure of the s. 1 test; 2) a preference for the remedy available using the s. 1 test; or 3) doubt that the Minister would comply with the Court’s decision. As will be outlined in the following section, the former Chief Justice’s reasoning in LSBC v. TWU suggests that at least her departure in Loyola resulted from the structure differences between the two frameworks.
2.2.2 **Overview of LSBC v. TWU**

TWU is a privately funded Christian university with approximately 4,000 students a year and over 24,000 alumni, located in Langley, British Columbia (“BC”). In 2012, TWU sought approval from BC’s Minister of Advanced Education (the “Minister”) to start a law school. However, significant controversy arose in relation to this proposal due to a contentious section of the Covenant which required community members to “voluntarily abstain” from “sexual intimacy that violates the sacredness of marriage between a man and a woman”.

This was not the first time the Covenant engendered controversy. A similar clause in what was then TWU’s “Community Standards” was the subject of a 2001 SCC ruling, *Trinity Western University v. British Columbia College of Teachers* ("TWU v. BCCT") regarding TWU’s proposed education program. In that case, the British Columbia College of Teachers (the “BCCT”) had rejected TWU’s application for approval of its education program, arguing that the program would follow discriminatory practices contrary to the BCCT’s public interest and public policy mandates. BCCT’s concern had been the “downstream” effects of the Covenant, and in particular, the potential intolerant attitudes by TWU graduate teachers towards LGBTQ students in public school classrooms. The SCC held that by considering the religious precepts of TWU instead of the actual impact of these beliefs on the school environment, the BCCT acted on the basis of irrelevant considerations and therefore acted unfairly.

---

33 *Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326 [TWU BCSC] at paras 3-4.
35 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 [TWU v BCCT].
36 *Ibid* at para 5.
37 *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 149 [TWU BCCA].
38 *TWU v BCCT, supra* note 35 at para 43.
Unlike *TWU v. BCCT*, the debate in *LSBC v. TWU* was not the “downstream” effects of the Covenant but rather access to the proposed law school by LGBTQ students in light of the LSBC’s public interest mandate as described in section 3 of the *Legal Profession Act* (“LPA”):

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
> (a) preserving and protecting the rights and freedoms of all persons,
> (b) ensuring the independence, integrity, honour and competence of lawyers,
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission, regulating the practice of law, and supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law[.]

In December of 2013, TWU’s proposed law school received preliminary approval from the Approval Committee of the Federation of Law Societies of Canada (the “FLS”), and subsequently, approval from the Minister and authorization to grant law degrees. As a result of the FLS’s preliminary approval, TWU’s proposed law school became an approved faculty of law under LSBC Rule 2-27, subject to any resolution adopted by the governing council of the LSBC, the Benchers, to the contrary.

On April 11, 2014, the Benchers defeated a motion which would have declared that the proposed law school was not an approved faculty of law (the “April Decision”). Subsequently, certain LSBC members requisitioned a Special General Meeting to consider a resolution declaring the proposed law school not approved on the basis that the school would not “promote and improve the standard of practice by lawyers”. On June 10, 2014, a majority of the members voted in favour of the resolution (the “SGM Resolution”). Following this, the Benchers voted to hold a binding referendum of the LSBC membership on whether to implement the SGM Resolution. In total, 74% voted in favour and 26% against the Resolution (the “LSBC Referendum”). On October 31, 2014,

---

39 *Legal Profession Act*, RSBC 1996, c 255, s 3 in part [LPA].
40 *TWU BCSC*, supra note 33 at paras 33-34.
41 *Ibid* at paras 37-42.
the Benchers voted to implement the SGM Resolution (the “October Decision”), and subsequently, the Minister withdrew approval for TWU’s proposed faculty of law.42

TWU applied to the British Columbia Supreme Court (the BCSC”) for judicial review of the October decision. The BCSC found in TWU’s favour, and the British Columbia Court of Appeal (the “BCCA”) unanimously upheld this decision. However, at the SCC, the Court fractured. The Majority decision was rendered by Abella, Moldaver, Karakatsanis, Wagner, and Gascon JJ., finding in favour of the LSBC. Two concurring opinions were written by McLachlin C.J. and Rowe J., concurring in the result but critiquing various aspects of the Majority’s analysis. Justices Côté and Brown penned a scathing dissent in favour of TWU. I discuss the reasoning behind these opinions at length throughout this paper.

2.2.3 Use of the Doré/Loyola framework in LSBC v. TWU

At the BCSC, Hinkson C.J. assessed the case as involving a collision of Charter rights, referring to “the collision of the relevant Charter rights”, 43 “consideration and balancing of the Charter rights at issue”, 44 and “weigh[ing] the competing Charter rights of freedom of religion and equality.” 45 He concluded that it was unnecessary for him to resolve this collision, as even if the LSBC had authority to delegate its decision to the membership of the LSBC, the decision was made without proper consideration and balancing of Charter rights. He concluded that there was no evidence that the membership considered, let alone balanced, the Charter rights.46 Ultimately,

42 TWU BCSC, supra note 33 at paras 46-49; TWU BCCA, supra note 37 at para 28.
43 TWU BCSC, supra note 33 at para 153. This collision of rights will be discussed at greater length throughout this paper.
44 Ibid at para 152.
46 Ibid at paras 150-153.
he found in favour of TWU on the basis that the LSBC had disabled its discretion *vis-à-vis* the LSBC Referendum. 47

Conversely, the BCCA highlighted that “this case does not involve a direct contest between Charter rights” 48 but rather required the LSBC to balance the objectives of the LPA with the Charter rights at stake. 49 The BCCA used the Doré/Loyola framework to conclude that TWU’s freedom of religion was limited in a significantly disproportionate way, significantly more than was reasonably necessary to further the LSBC’s public interest mandate. 50 They found that the impact on TWU’s freedom of religion was severe, 51 while the impact on access to law schools for LGBTQ students would be insignificant in practical terms. 52

At the SCC, the Majority disagreed with the results of the BCCA’s balancing under the framework. The Majority held that the LSBC’s decision reasonably balanced the severity of the interference with TWU’s Charter protection against the benefits to the LSBC’s statutory objectives, finding that the limitation of TWU’s Charter right was of “minor significance” and the decision against approving its law school significantly advanced the LSBC’s statutory objectives. Indeed, the Majority found that the only reasonable decision the LSBC could have made was not to approve TWU’s proposed law school. 53

On the other hand, both the concurring and the dissenting justices took issue with the Doré/Loyola framework itself. Two points of contention were held in common – Charter values and the burden of proof in justifying a Charter infringement, 54 both of which will be examined in

---

47 TWU BCSC, *supra* note 33 at paras 150-153.
49 *Ibid* at para 145.
50 *Ibid* at para 192.
51 *Ibid* at para 168.
52 *Ibid* at para 179.
53 *LSBC v TWU*, *supra* note 1 at paras 84-92.
the next section of this chapter. The Chief Justice held that the LSBC’s decision limited TWU’s Charter rights in a manner that was not of minor significance,55 but the infringement was justified under section 1 pursuant to the LSBC’s obligation to protect the public interest by refusing to condone discrimination.56 Justice Rowe found no infringement of TWU’s freedom of religion57 and held that the LSBC decision should have been reviewed under the usual principles of judicial review on a standard of reasonableness,58 which he found was met.59

Contrary to this, the Dissent concluded that the LSBC decision infringed TWU’s freedom of religion and that this infringement was not justified.60 In relation to the latter finding, they concluded that the objectives put forward by the LSBC to justify the infringement were not sourced in an actual grant of authority61 and found a profound interference with religious freedom.62 With respect to the LSBC’s public interest mandate, the Dissent stated: “accommodating religious diversity is in ‘the public interest’”.63 As mentioned above, despite the vastly different outcomes of their reasoning, the concurring and dissenting justices all strongly critiqued the Doré/Loyola framework. Their reasons for doing so largely trailed the criticisms which surfaced in academia following the Doré decision. It is to this debate which I now turn.

2.3 Academic Discourse on the Doré/Loyola Framework

In this section, I examine the discourse by both academics and the concurring and dissenting opinions in LSBC v. TWU surrounding the Doré/Loyola framework, focusing on two

---

55 LSBC v TWU, supra note 1 at paras 120 and 129.
56 Ibid at paras 137 and 146.
57 Ibid at para 157.
58 Ibid at para 254.
59 Ibid at para 258.
60 Ibid at paras 315-320.
61 Ibid at para 322.
62 Ibid at para 324.
63 Ibid at para 326.
key concerns: 1) the use of Charter values, and 2) the proportionality analysis. By way of summary, those opposed to the framework argue it erodes the promises of the Charter, and even those in favour of the framework nevertheless agree that more clarity needs to be given, as the framework leaves some confusion and risks of subjectivity. It is my position that the Majority in LSBC v. TWU failed to provide this necessary clarity, and in so doing, the risk remains of state actors giving precedence to statutory objectives at the expense of adequately protecting Charter rights.

2.3.1 Critiques of Charter Values

The Doré/Loyola framework focuses on Charter “protections”, defined as both rights and values. In so doing, it sets values on par with rights. While rights are clearly laid out in the Charter and have the benefit of decades of jurisprudence behind them, values are much less clear.

64 There are several other critiques of the framework, including its coherence and engagement in academic debate, as laid out in: Hoi L Kong, “Doré, Proportionality and the Virtues of Judicial Craft” (2013), 63 SCLR (2d) 501 [Kong].

65 See Audrey Macklin, “Charter Right or Charter-Lite?: Administrative Discretion and the Charter” (2014) 67 SCLR (2d) 561 [Macklin] at 576 where she argues that Doré developed a “Charter-lite methodology that is approximate, vague and incomplete”.

Also see Paul Daly, “Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms” (2013) Ottawa Faculty of Law Working Paper No 2013-13, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357453> [Daly] at 29 where he argues that “free-wheeling administrative discretion remains, and the only check on its exercise is whether the decision-maker arrived at a ‘proportionate balancing’ of Charter rights with its statutory objectives. Charron J.’s concern that Charter rights could be reduced to ‘mere administrative law principles’ seems all the more apt in light of Doré.”

66 See Lorne Sossin & Mark Friedman., “Charter Values and Administrative Justice” (2014) 67 SCLR: Osgoode’s Annual Constitutional Cases Conference (2d) 391 [Sossin & Friedman] at para 409 where they argue that clarity is needed in the scope of Charter values; at paras 423-249 where they argue that there needs to be a methodology of operationalizing Charter values; and at para 428 where they highlight the importance of reasons given the “inherently subjective aspect” of the balancing required by Doré.

Also see Liston, supra note 3 at 230 where she contends that there are “[f]ive sources of instability” in the cross-section of administrative justice and the Charter: “(a) the problem of recognizing Charter values; (b) continued confusion about which standard should be used to review the legal matter: Doré, Dunsmuir or Oakes; (c) disagreements about deference and interpretive expertise; (d) when reasons will be found unreasonable; and, (e) emerging obstacles in the path of getting a discretionary decision reviewed.”

67 See Doré supra note 7 at para 5 where Justice Abella referred to both Charter “protections” and Charter “guarantees”. She wrote that a Charter protection meant “its guarantees and values” (at para 5). However, see LSBC v TWU, supra note 1 at para 58 where the Majority defined a Charter protection as “both rights and values”. Consequently, it appears that a “guarantee” is synonymous with a “right”.

18
The Majority in *Loyola* described *Charter* values as the “values that underpin each right and give it meaning.”\(^{68}\) These values are said to “help determine the extent of any given infringement in the particular administrative context and, correlativey, when limitations on that right are proportionate in light of the applicable statutory objectives.”\(^{69}\) However, as Christopher Bredt and Ewa Krajewska contend, while the SCC made values central to its analysis in *Doré*, it “did not explore or elaborate upon the source of those values or their boundaries.”\(^{70}\) No exhaustive list was given of *Charter* values, nor were definitions given for those that are recognized.

Further, the SCC did not elucidate why it set values on par with rights, nor even why it resorted to a *Charter* value in *Doré* at all, as there was a clear implication of *Doré*’s *Charter right* to freedom of expression, as used by the lower courts.\(^{71}\) As Justice Rowe argued in *LSBC v. TWU*, *Doré*’s reliance on values as opposed to rights “muddled” *Charter* claims within administrative justice.\(^{72}\) He argued that while values can be helpful in supporting *Charter* litigation based on rights or in situations where a *Charter* right does not arise in order to bring the common law in line with the *Charter*,\(^{73}\) values should not be “a standalone basis” for *Charter* claims.\(^{74}\)

### 2.3.2 Critiques of the Proportionality Analysis

The second concern with the *Doré/Loyola* framework is the proportionality analysis. This component of the framework involves weighing the extent of the impact on the *Charter* protection against the statutory objectives in order to determine if the infringement is proportionate.

---

\(^{68}\) *Loyola*, *supra* note 18 at para 36.
\(^{69}\) *Ibid*.
\(^{71}\) *Ibid* at para 27.
\(^{72}\) *LSBC v TWU*, *supra* note 1 at para 166.
\(^{73}\) *Ibid* at paras 167 & 170.
\(^{74}\) *Ibid* at paras 170-171.
Academics and judges alike have leveled several criticisms against this analysis, explored below, which argue that it weakens Charter protections.

The first concern is the burden of proof, as the Doré/Loyola framework is silent as to which party bears the onus in the proportionality analysis. In LSBC v. TWU, the Dissent quipped: “A precedent of this Court should be strong enough to withstand clarification of who carries the burden of proof.” McLachlin C.J., Rowe J., and the Dissent all agreed that the burden of proof should be on the state actor. If not, they argued, the administrative law framework does not provide the same level of protection as the Oakes framework, where the state clearly does bear such burden.

Another significant concern is whether the proportionality analysis can be used effectively alongside Charter values, which – as argued above – are vague and undefined. As Bredt and Krajewska point out, if one does not know the scope of the Charter value itself, it is difficult to assess whether such value has been infringed. Therefore, any proportionality analysis which attempts to weigh statutory objectives against infringement of that Charter value will be next to impossible.

Further, while the Majority in Loyola stated that under both Oakes and Doré, the “Charter protections are affected as little as reasonably possible in light of the state’s particular objectives;” there is a lack of clarity as to how this plays out. As Paul Daly points out, under Doré, a decision-maker could incorrectly weigh the Charter protection and still arrive at a decision that is deemed reasonable, as long as she simply considered the Charter protection and arrived at

---

75 LSBC v TWU, supra note 1 at para 313.
76 Ibid at paras 119, 196-197, and 314.
77 Ibid at paras 196-197.
78 See Bredt & Krajewska, supra note 24 at para 51: “The extent of the infringement is informed by the scope of the right or, in the case of Doré, the value. Without knowing the scope of that value, the proportionality analysis is difficult if not impossible to apply.”
79 Loyola, supra note 18 at para 40.
an outcome within a reasonable range. He concludes that this does not provide the same level of protection as under the Oakes framework.\textsuperscript{80} I devote Chapter Four to exploring this problem in more detail.

### 2.4  \textit{LSBC v. TWU: The Lost Opportunity}

Prior to \textit{LSBC v. TWU}, both critics and supporters of the Doré/Loyola framework argued for at least three elements to be incorporated into the analysis to alleviate the above concerns: a) clear methodology, b) well-articulated reasons, and c) judicial oversight with the appropriate standard of review. The SCC in \textit{LSBC v. TWU} had a critical opportunity to address these suggestions. Unfortunately, rather than incorporating these important elements, the SCC swept them aside. In so doing, the Majority undermined the credibility of the Doré/Loyola framework.

#### 2.4.1  \textit{The Suggestions}

First, methodology could play a key role in improving the credibility of the framework, as it would ensure consistency in the procedure amongst tribunals. Sossin and Friedman suggest a four-step approach administrative decision-makers could follow:

1. Identify the nature and scope of the discretion;
2. Determine whether the discretion engaged a Charter value;
3. Balance the Charter value against the statutory objectives; and
4. Explain the process and results of the balancing exercise using clear reasons.\textsuperscript{81}

\textsuperscript{80} Daly, \textit{supra} note 65 at 28-29.
\textsuperscript{81} Sossin & Friedman, \textit{supra} note 66 at 425-428.
As part of the third step, Sossin and Friedman recognize that the balancing process is “inherently subjective,” and suggest decision-makers use the framework developed in Baker and applied in Suresh as part of the balancing process. Similarly, Matthew Lewans recognizes the concern that a decision might be found reasonable so long as decision-makers “formally acknowledge” Charter values. Correspondingly, he contends that principles underlying cases such as Baker and Dunsmuir should be used as part of the decision-making process.

Second, well-articulated reasons could alleviate concerns with the framework, as it would enable reviewing courts to accurately assess why the decision-maker arrived at her decision. As noted above, Sossin and Friedman’s proposed methodology includes clear reasons as the final step. They contend that reasons would lend “credibility and legitimacy” to Charter values as the values develop and provide accountability to administrative decisions. Indeed, they argue that, given the subjective nature of the balancing exercise, “[t]he importance of reasons in this context cannot be overstated.” Liston provides a similar argument, saying that if a Charter right is at stake, courts may “more anxiously scrutinize the balancing exercise and demand quality reasons.” Likewise, Lewans critiques the SCC’s lack of adequate reasoning in Doré, and argues:

If administrative decisions concerning Charter rights are sufficiently rigorous, in that their supporting rationales are transparent, intelligible, and justifiable as well as demonstrably ‘alert, alive, and sensitive’ to the interests of claimants, then the decision would seem to be on solid footing.

---

Note: All footnotes are included at the end of the document for clarity.
Finally, judicial oversight with the appropriate standard of review has a fundamental role to play in the perceived trustworthiness of the framework. Liston points out that in identifying Charter values, administrative decision-makers do not act in a void but are still subject to judges who can confirm or reject the principles they develop. In this light, Bredt and Krajewska argue for a bifurcated approach to the standard of review, where a correctness standard would be used to assess the administrative decision-maker’s decision identifying and defining the Charter value at issue, but a reasonableness review would be used to assess their decision applying the value to the facts and legal context at hand.

2.4.2 Ignoring the Suggestions

All of the above suggestions were made by academics following the Doré decision before LSBC v. TWU. The latter case, therefore, represented a key opportunity to legitimate the Doré/Loyola framework by expounding on the importance of methodology, a careful reasoning process, and the appropriate standard of review and judicial oversight. Unfortunately, rather than taking this opportunity, the Majority gave short shrift to the concerns underlying these suggestions. The Majority tersely concluded that “the Benchers were alive to the issues”, and therefore, for the

---

90 Liston, supra note 3 at 245.
91 Bredt & Krajewska, supra note 24 at 63. Also see: David Mullan, “Administrative Tribunals and Judicial Review of Charter Issues After Multani” (2006) 21 NJCL 127 [Mullan] at 149. While writing prior to the Doré decision, Mullan in this article addresses the standard of review in administrative decisions implicating the Charter. He argued that the standard of correctness is “too blunt”, but because there is a risk of devaluing Charter rights, the deference given to administrative decision-makers in such circumstances will “need to be different than in the case of judicial review of administrative action that does not affect Charter rights and freedoms.” Mullan argues for an earlier SCC approach in which the state actor must “show a heightened awareness of the constitutional rights at stake and a rational basis in terms of the parameters of those rights and the facts to justify the court exercising restraint.”
purpose of the reasonableness review, the Court was entitled to look at the reasons which could have been offered.\(^92\)

Certainly, inadequate reasons are not necessarily determinative. As the Majority pointed out, previous caselaw permits reviewing courts to look at reasons which could have been given.\(^93\) One such case is *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, where the SCC addressed an arbitrator’s calculation of vacation benefits. On judicial review, the trial judge had found that the arbitrator’s reasons were insufficient. However, this was overturned on appeal, and the SCC upheld the latter decision. The SCC found that a reviewing court is not required to separately analyze both the reasons and the result of an administrative decision. Further, reviewing courts cannot quash administrative decisions solely on the basis that the reasons were inadequate\(^94\) and should “supplement” deficient reasons before trying to “subvert” them.\(^95\)

Another SCC case addressing related points is *Alberta Information and Privacy Commissioner v. Alberta Teachers’ Association*. In that case, the issue surrounded an adjudicator’s implicit decision that an extension beyond the initial 90-day period did not result in an automatic termination of the inquiry.\(^96\) In upholding the administrator’s decision, the Majority noted that this issue had not been raised before the initial decision-maker. Consequently, it was “apposite” to look at the reasons which could have been offered.\(^97\) Nevertheless, this does not

\(^{92}\) *LSBC v TWU*, supra note 1 at para 56.
\(^{94}\) *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 14.
\(^{95}\) *Dyzenhaus*, supra note 93 at 304, as cited in *Newfoundland Nurses*, supra note 94 at 12.
\(^{96}\)*Alberta Information and Privacy Commissioner v Alberta Teachers’ Association*, 2011 SCC 61 [*Alberta Teachers*]
\(^{97}\) *Ibid* at para 53.
relieve reviewing courts of the requirement to give “due regard” to reasons given by the administrator, nor does it “dilute the importance of giving proper reasons for an administrative decision.”98 The Majority stated: “The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.”99

In 2013, the SCC revisited the issue of implied decisions in *Agraira v. Canada (Public Safety and Emergency Preparedness)*.100 In that case, the Minister of Public Safety and Emergency Preparedness denied an application for permanent residency after concluding that it was “not in the national interest” to admit persons with repeated contact with known terrorist organizations.101 However, even though it was central to the decision, the Minister did not explicitly define the term “national interest”. Nevertheless, the SCC found that the Minister’s interpretative decision regarding the term was implied in the final decision.102 The Court looked to the reasons which could have been offered for this implied interpretation and held that the Minister’s interpretation of the term, along with his decision as a whole, was reasonable.103

However, a key distinction exists between these cases and the LSBC’s October Decision. In each of the administrator’s decisions in the above cases, there was a deficiency in the reasons; however, reasons were provided. In *Newfoundland Nurses*, the reasons were not as robust as they could have been. In both *Alberta Teachers* and *Agraira*, important components of the ultimate decision had not been expressly decided. Nevertheless, in each case, there were reasons for the reviewing court to analyze. Where no reasons at all are provided, as in *LSBC v. TWU*, the reviewing

---

98 *Alberta Teachers, supra* note 96 at para 54.
100 *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [Agraira].
102 *Ibid* at para 58.
103 *Ibid* at paras 58, 64, & 103.
court has no basis on which to understand the tribunal’s decision, nor can it supplement deficient reasons. Further, unlike Alberta Teachers and Agraira, the reviewing court cannot look to the rest of the tribunal’s reasons to assess the reasonableness of an implied decision on one constituent part. This is certainly not to say that reasons are always required for administrative decisions; undoubtedly, there are some cases in which this is not so. However, given the balancing process under Doré and the importance of engaging meaningfully with the Charter in this process, it is implausible that reasons were optional for the LSBC’s decision. If they were, there would certainly be no assurance of robust protection for Charter rights in administrative law.

Ultimately in LSBC v. TWU, the Majority provided judicial oversight only over the outcome. They did not merely defer to the LSBC’s decision not to approve TWU, but declared, on the flip side, that approving TWU’s proposed law school would not have been reasonable. In so doing, the Majority implied that they would not have deferred to the results of the April Decision in which the LSBC had decided in favour of TWU. That meeting was the only time the LSBC had engaged in a balancing process. As the Dissent pointed out, this runs contrary to the SCC’s own decision in Delta Air Lines Inc. v. Lukács, 2018 SCC 2, as the Majority “replaces the (non-) reasons of the LSBC with its own, and makes the outcome the sole consideration.”

A 2018 Federal Court decision, Abdi v. Canada (Public Safety and Emergency Preparedness) (“Abdi”), illuminates the problems when reasons are not provided in an administrative decision implicating the Charter. In that case, the appellant, Abdoulkader Abdi,  

104 See Newfoundland Nurses, supra note 94 at para 20 where the Majority addressed this issue as follows: “Baker stands for the proposition that ‘in certain circumstances’, the duty of procedural fairness will require ‘some form of reasons’ for a decision (para. 43). It did not say that reasons were always required[.]”  
105 See Liston, supra note 3 at 245: As Liston argues, noted above, where a Charter right is at stake, it may be even more important for the courts to “demand quality reasons.”  
106 LSBC v TWU, supra note 1 at para 84.  
107 Ibid at para 300.  
108 Abdi v Canada (Public Safety and Emergency Preparedness), 2018 FC 733 [Abdi].
a Somalian refugee who had immigrated to Canada in 2000 at the age of six, was appealing a redetermination decision of a Ministerial Delegate ("MD") referring him to the Immigration Division for an admissibility hearing. Shortly after arriving in Canada, Abdi had been taken into custody by the Nova Scotia Department of Community Services (the “DCS”) and was subsequently placed in 31 different foster homes, never attaining higher than grade 6 education. Despite an aunt’s attempts to obtain citizenship for him, the DCS did not attempt to regularize his status in Canada until after he had developed a criminal record which jeopardized his admissibility.109

At issue in the case, through legal counsel, Abdi had raised Charter issues which were subsequently ignored by the MD in making her decision. The Federal Court found that without reasons, the MD’s decision was “not justifiable, transparent and intelligible,”110 saying: “In absence of any explicit or implicit reasons, and although Doré counsels deference, this Court cannot defer to nothing.”111 The Federal Court set aside the decision and the matter was remitted for redetermination by a different delegate.112

Turning back to LSBC v. TWU, the Majority’s sweeping acceptance of the non-reasons of the LSBC, rather than assuaging concerns associated with the Doré/Loyola framework, runs contrary even to those academics who argue in support of the framework. If reviewing courts are to defer to administrator’s decisions impacting Charter protections, the courts must know to what they defer through a well-reasoned administrative decision which follows a set methodology. As

---

109 Abdi, supra note 108 at paras 1-20.
110 Ibid at para 93.
111 See: Ibid at para 88 where the Federal Court distinguished LSBC v. TWU’s companion case, TWU v. LSUC, supra note 1. In the latter case, the SCC reviewed the Law Society of Upper Canada’s (“LSUC”) decision against TWU’s proposed law school. In spite of the Federal Court’s valiant attempts at distinguishing TWU v. LSUC in Abdi, there was simply no reasoning process to which the Majority could defer in either TWU v. LSUC or LSBC v. TWU.
112 Ibid at para 34.
the Federal Court found in Abdi, courts “cannot defer to nothing.” LSBC v. TWU illogically suggests that they can.

2.5 **Objections to the Doré/Loyola Framework**

2.5.1 **Scope of Discretion**

I have three main objections to the Doré/Loyola framework following LSBC v. TWU, to be discussed in the following sections. My first concern is the scope of discretion available to both administrators and judges in applying the Charter values framework. As there is “no doctrinal structure” in a Charter value analysis, decision-makers and judges can identify and apply values with little constraint, leading to inconsistency and unpredictability in how Charter rights are protected in administrative law.

On one hand, various academics have argued in favour of Charter values in administrative justice. For example, Lorne Sossin and Mark Friedman believe that values are useful in adapting the Charter to the broad landscape of administrative law. They argue that each individual tribunal can provide training and guidelines on which Charter values are relevant to that specific tribunal, and how such values should be balanced against its individual policy mandate.\(^{114}\) In this way, they believe that “variability may be part of the solution, not the problem,”\(^{115}\) as the Charter can be adapted for use within the extensive variations inherent to administrative law.

Contrary to this, however, Rowe J. in his concurring opinion in LSBC v. TWU highlighted the concern of subjectivity raised by invoking values. He quoted a 2017 ONCA decision, Gehl v. Canada (Attorney General) (“Gehl”), which counselled caution, as follows:

---

\(^{113}\) Gehl, supra note 16 at para 79, as cited in LSBC v TWU, supra note 1 at para 171.

\(^{114}\) Sossin & Friedman, supra note 66 at 422, 425-426.

\(^{115}\) Ibid at 422.
Charter values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective – and value laden – nature of selecting some Charter values from among others, and of assigning relative priority among Charter values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when Charter values are understood as competing with Charter rights.\textsuperscript{116}

In this vein, the Dissent in LSBC v. TWU critiqued values as the “idiosyncrasies of the judicial mind”,\textsuperscript{117} pointing out that Charter values are “amorphous”, “undefined”, and lack “the doctrinal structure” of the last 35 years of litigating Charter rights.\textsuperscript{118}

While perhaps more equivocal on the positive benefits of Charter values than Sossin and Friedman, Mary Liston argues that another benefit of Charter values is the ability to “recognize and elevate a new Charter value” without the formalities of amending the Constitution.\textsuperscript{119} This is especially important in light of the “near impossibility” of amending the Constitution.\textsuperscript{120} Presumably, this reasoning stems from the adage that our Constitution is a “living tree capable of growth and expansion within its natural limits.”\textsuperscript{121} In other words, Canadians should be able to bring the Constitution “in line with the times” without too much hassle.

However, Constitutions are historically difficult to amend in order to provide protection from erosion of the fundamental rights and freedoms undergirding societies. Unlike rights, Charter values are not expressly laid out in the Charter. Audrey Macklin argues that Canadians recognized the “normative primacy” of rights in denoting those interests as rights,\textsuperscript{122} and therefore, a “Charter right intrinsically ‘weighs’ more” than a value.\textsuperscript{123} Chief Justice McLachlin followed this

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{116} Gehl, supra note 16 at para 79, as cited in LSBC v TWU, supra note 1 at para 171.
\item \textsuperscript{117} LSBC v TWU, supra note 1 at para 309.
\item \textsuperscript{118} Ibid.
\item \textsuperscript{119} Liston, supra note 3 at 245.
\item \textsuperscript{120} Ibid at 245.
\item \textsuperscript{121} Edwards v Canada (Attorney General), [1930] 1 DLR 98; 1929 CanLII 438 (UK JCPC) at 106-107.
\item \textsuperscript{122} Macklin, supra note 65 at 572.
\item \textsuperscript{123} Ibid at 572-573.
\end{enumerate}
\end{footnotesize}
reasoning when she wrote in *LSBC v. TWU*: “*Charter* values may play a role in defining the scope of rights” but “it is the right itself…that receives protection under the *Charter*.”

Further, in relation to how *Charter* law develops, the Canadian judiciary has significant flexibility in using established *Charter* rights to bring Canadian law “in line with the times” without the formalities of Constitutional amendment by striking down, reading in, reading down or severing legislation. This is to be contrasted with the legal landscape of various sister countries such as Australia. The language of *Charter* values, however, takes us a significant step further. Rather than using rights as codified in the *Charter* itself, albeit fine-tuned by the judiciary, *Charter* values require judges to identify and define those very values which they can then use to strike down legislation. This enables the judiciary, with its own plethora of interests and biases, to fundamentally mold the evolution of the *Charter* in more substantial ways than previously allowed. Whether this is constitutionally legitimate, or even desirable, can be debated.

Even further constitutional legitimacy questions arise, as *Charter* values not only grant the judiciary greater leeway in developing *Charter* jurisprudence, but also opens a similar door for administrative decision-makers. As noted above, Sossin and Friedman argue that administrative tribunals should identify and define *Charter* values in their own specific context. Dan Moore contends that allowing administrative decision-makers to be part of this process would enable “a grassroots human rights culture” which “would open up human rights discourse and decision-making to a wider range of voices.” However, while the *Charter* certainly has a fundamental role to play in administrative justice, there is a substantial difference between requiring

---

124 *LSBC v TWU*, supra note 1 at para 115.
administrative decision-makers to apply Charter jurisprudence and inviting them to help create such jurisprudence. Administrative decision-makers range across multi-varied roles and disciplines, and many have no formal legal training. It is not even always clear who falls into an administrative decision-maker role in a given context.\textsuperscript{128} Allowing these state actors to identify and define Charter values in their own contexts enables them to fundamentally alter and develop Charter jurisprudence, a task for which they may arguably not be qualified. Credentials aside, the lack of doctrinal structure creates a risk of subjectivity and inconsistency for both administrators and judges when invoking Charter values.

On the other hand, a more precise framework, such as the one used for a standard Charter violation with a section 1 analysis, would provide significantly more constraint on both administrators and reviewing courts. This would grant more consistency and predictability in how Charter rights are protected. With respect to judicial review, first, it would limit which Charter interests judges could be invoked, as only rights would be considered. Second, both the text of the Charter and its corresponding case law would restrain the definitions judges could give for those Charter rights. Contrary to this, in relation to the value of equality, for example, the Dissent in \textit{LSBC v. TWU} pointed out that in its abstract form, equality can mean many different things, including: a) the rule of law principle that everyone is equal before and under the law, b) tolerance of difference, or c) as compatible in a totalitarian state where freedom is curtailed.\textsuperscript{129} There is no consistency in such interpretations. Lastly, under the standard Charter violation framework, the tests for infringement of rights have been well-developed over decades of jurisprudence, which would narrow the application judges could make of Charter rights in administrative law.

\textsuperscript{128}\textit{See: McKitty v Hayani}, 2018 ONSC 4015 at paras 208-244 where the court had to determine if a doctor determining death was a state actor in order to establish whether the Charter applied to his actions.

\textsuperscript{129}\textit{LSBC v TWU}, supra note 1 at para 310.
A more precise framework, together with a bifurcated standard of review, would also restrain administrators, further enhancing consistency and predictability. First, as with the judiciary, decision-makers would only be able to invoke defined rights. This would ensure administrators are not creating their own unique, and potentially conflicting, Charter value interpretations. Second, if a standard of correctness applied to the identification and definition of applicable Charter rights, the scope of the decision-maker’s discretion would be narrowed. Once again, this would create more predictability between decisions. Certainly, administrators would still be owed deference in how they applied those Charter rights. However, restricting their scope of discretion, as outlined here, would ensure stronger, more consistent protection for Charter rights throughout administrative law.

2.5.2 Conflict of Rights

As previously alluded to in the context of the BCCA’s decision in LSBC v. TWU, under the Doré/Loyola framework, the decision-maker is to assess the impact on the Charter protection in light of the statutory objectives, not weigh competing Charter claims. However, the wording of the framework stipulates that the decision-maker must also arrive at a proportionate balancing of all the Charter protections “at play.” This reframes the analysis, leading to my second and third concerns with the framework. Throughout the following sections, I will refer to a fictitious example provided by Angela Cameron and Paul Daly to illustrate these concerns. Cameron and Daly use their example to argue the very opposite position for which I advocate – that reliance on Charter values does not invite “opacity” or “palm-tree justice”.130 They believe the importance of

---

130 Angela Cameron & Paul Daly, “Furthering Substantive Equality Through Administrative Law: Charter Values in Education” (2013) 63 SCLR (2d) 169 at 186 [Cameron & Daly].
values does not “legitimate departures from appropriately rigorous decision-making.”\textsuperscript{131} However, I believe their example highlights the very risks they contend should not arise, as I seek to explain below.

Turning to my second concern, the framework allows scenarios to be mischaracterized as a conflict of Charter protections.\textsuperscript{132} While the framework specifies that the balancing exercise is to take place between statutory objectives and Charter protections, the framework also refers to all Charter protections “at play”, creating the danger of pitting protections against each other. This is the pitfall Chief Justice Hinkson of the BCSC fell into when he found there had been a “collision” of rights in LSBC v. TWU. This mischaracterization was later modified by the BCCA, which properly pointed out that there was no direct conflict, but rather a need to balance the statutory objectives with the Charter protections at issue. Nevertheless, the fictitious example given by Cameron and Daly further demonstrates the weakness of the Doré/Loyola framework in this respect.

The example given by Cameron and Daly is of a public school in Ontario where a Grade 2 teacher introduces materials into her classroom to discuss and normalize same-sex families. Several parents make a complaint about the introduction of the material to the principal and then to the Minister of Education.\textsuperscript{133} Cameron and Daly argue that following Doré, administrative decision-makers must now “engage in a proportional weighing of competing values,”\textsuperscript{134} and frame

\begin{flushright}
\textsuperscript{131} Cameron & Daly, \textit{supra} note 130 at 186.
\textsuperscript{132} This concern is exacerbated by the equivalence of Charter values and rights. As Justices Lauwers and Miller of the Ontario Court of Appeal highlighted in Gehl, \textit{supra} note 16 at para 82: “Unlike Charter rights, which are largely negative and will thus rarely conflict, multiple Charter values can simultaneously apply in a given dispute, and can easily be in conflict.”
\textsuperscript{133} Cameron & Daly, \textit{supra} note 130 at 171-174.
\textsuperscript{134} \textit{Ibid} at 198.
\end{flushright}
the issue as a potential conflict between the *Charter* values of freedom of religion and of promoting substantive equality. As previously noted, this is an inappropriate framing of the issues.

There may, undoubtedly, be a conflict between the state’s duty to uphold freedom of religion and to promote substantive equality in the above scenario; nevertheless, that is fundamentally different than framing the issue as one where the protections themselves collide. As the former President of the Supreme Court of Israel, Aharon Barak, writes, the general rule is that constitutional rights, both negative and positive, apply “vis-à-vis the state” and not other individuals. The constitutional rights “are ‘channeled’ towards the state” and it is the state who is tasked with protecting those rights. The state actor making the decision “ultimately makes the decision of preferring one person’s constitutional right vis-à-vis the state…over another person’s constitutional right vis-à-vis the state…”

By framing the issue as one where the state’s duties vis-à-vis multiple *Charter* protections conflict, it is incumbent on the state actor to fully assess the impact of its decision on all *Charter* protections involved. In mischaracterizing the issue as one where the protections themselves collide, there is less onus on the state actor – the decision-maker can simply acknowledge there is a conflict and then proceed with limiting one protection, without appropriately recognizing its duty towards the protection it is limiting. This enables one protection to be declared the “winner” and the other the “loser”, running the risk of devaluing the protection which “loses”. This is precisely what occurs in Cameron and Daly’s example. The inappropriate framing of the *Charter* protections

---

135 Cameron & Daly, *supra* note 130 at 191-192.
137 *Ibid* at 85.
138 *Ibid* at 90, emphasis mine.
enables the authors to state, “in the public school system in Ontario, freedom of religion is not quite as vital a concern as the promotion of substantive equality.”¹³⁹

Contrastingly, Barak argues that in preferring one individual’s rights vis-à-vis the state over another’s, this does not change the scope of the rights at issue but impacts the realization of those rights in the context at hand.¹⁴⁰ He contends:

[T]hese conflicts are unavoidable, reflecting a perfectly natural state of affairs and expressing the very nature of those constitutional principles aspiring for maximum realization. These aspirations lead those principles to clash with other constitutional principles also aspiring to be fully realized. Both constitutional rights, however, survive the clash unscathed at the constitutional level: both remain valid according to their original scope. They remain intact within the legal system’s boundaries.¹⁴¹

Contrary to Cameron and Daly’s argument, respectfully, both freedom of religion and the promotion of substantive equality are vital concerns to the state, as the state has a duty towards both. In a given context, the state’s duty vis-à-vis both may conflict, and the state may have to limit one over the other, but that is not because one is less important than the other. As I will argue in Chapter Four, the appropriate way for a state actor to address such a conflict is through reasonable accommodation.

2.5.3 The Thumb on the Scale

My final concern with the Doré/Loyola framework is that statutory objectives can too easily outweigh Charter rights, as Doré makes it possible to read a statutory objective as incorporating a Charter value or right. Recognition of other competing Charter rights, which are not recognized in the statutory language, is then compromised. As the Dissent argued, “when push

¹³⁹ Cameron & Daly, supra note 130 at 191-192, emphasis added.
¹⁴⁰ Barak, supra note 136 at 90.
¹⁴¹ Ibid at 88, emphasis added.
comes to shove, statutory objectives – including, presumably, unconstitutional statutory objectives – trump the right,” contrary to the Constitution.\textsuperscript{142} As Edward Cottrill eloquently argues:

\begin{quote}
Associating a state aim with a \textit{Charter} value for the purposes of a proportionality analysis may place a dispositive thumb on the scale. The effect may be seen as a form of Rousseauvian sleight of hand: the \textit{Charter} still functions to protect freedoms, but it does so by encouraging action according to an agreed set of values. Where these values are invoked to give 'Charter benediction' to state action, rather than allowing the legitimacy of the goal to be established in its own right, the state enters the analysis with an advantage.\textsuperscript{143}
\end{quote}

Once again, this risk can be highlighted using the fictitious example of Cameron and Daly. In that example, they outline the empirical evidence of bullying faced by LGBTQ children or children of LGBTQ parents\textsuperscript{144} and argue that the values underpinning section 7 and section 15 rights loom large on the side of substantive equality, regardless of whether the formal thresholds engaging these rights are met.\textsuperscript{145} In the context of section 7, Cameron and Daly additionally argue that the values underpinning section 7 “must be still more protective” than the rights protected by section 7 themselves.\textsuperscript{146} Consequently, the argument appears to be that even if an individual cannot meet the formal requirements of a \textit{Charter} right infringement, she can invoke the values underlying such right, which, at least in this case, are more protective than the right itself.

However, neither facts nor \textit{Charter} values are explored on the side of freedom of religion. Cameron and Daly do not explain whether there are students of religious or ethnic minority backgrounds, such as Muslims or Sikhs, in the fictitious classroom, nor whether statistics of bullying in Canadians schools against these, or other, religious or ethnic minorities exist. There is no discussion of values underpinning section 7 or section 15 in relation to these minorities. Further,

\begin{flushleft}
\textsuperscript{142} \textit{LSBC v TWU}, supra note 1 at para 305.
\textsuperscript{144} Cameron & Daly, supra note 130 at 177-181.
\textsuperscript{145} \textit{Ibid} at 188.
\textsuperscript{146} \textit{Ibid} at 194.
\end{flushleft}

36
Charter values underpinning the right to freedom of religion are not explored\textsuperscript{147} nor is the value of religious freedom itself addressed.\textsuperscript{148} Tied with the problematic nature of framing the issue as a collision of Charter protections, the promotion of substantive equality can be declared the “winner” against freedom of religion. There is little to no recognition that the state also has a duty to uphold the parents’ freedom of religion. Consequently, a thumb is placed on the scale, using substantive equality to give precedence to the statutory objective over the infringed Charter right.

2.5.4 Troubling Consequences

In the above example, the school board need only say it considered freedom of religion and made a decision that falls within a range of reasonable outcomes. The Charter values, as chosen by the decision-maker, are stacked on the side of the statutory objective, to be weighed against the Charter right. It does not matter whether the formal thresholds of sections 7 and 15 can be met. Indeed, the values underpinning those rights are argued to be more protective than the rights themselves. As under Doré, the rights and values weigh the same, the values and statutory objective together therefore inevitably tip the scales against the Charter right to freedom of religion.

Both the facts of LSBC v. TWU and those of Cameron and Daly’s fictitious example tip the scales against freedom of religion. However, it is important to recognize that reframing Charter analyses will not just implicate freedom of religion (which has its own cascade of effects if

\textsuperscript{147} See: Barry Bussey, “The Charter is Not a Blueprint for Moral Conformity” (2017) Religion, Liberty and the Jurisdictional Limits of Law 369, online: SSRN <https://ssrn.com/abstract=3032525> at 407 where he argues that “a plausible list would include equality, diversity, pluralism and multicultural ‘values.’”

\textsuperscript{148} The Charter value of religious freedom was identified within the Aboriginal context in Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2014 BCSC 568 [Ktunaxa].
marginalized). It will implicate all freedoms, and we may not be so complacent when those freedoms are likewise sacrificed in favour of Charter values. For example, what if in LSBC v. TWU, the issues were freedom of association and expression, and the LSBC had denied entry to individuals based on their political views and associations?

Indeed, we only need to look to history to see an example of this. In 1948, the LSBC denied entry to a communist named Gordon Martin for his political views. It did not matter that Martin produced statements, letters and statutory declarations which portrayed him as a man of good repute, and testified that he could, in good faith, swear the barristers’ and solicitors’ oaths. As W. Wesley Pue writes, “The Benchers accepted as common knowledge that communists are liars. Martin was an admitted communist. Hence, he was a liar and, ipso facto, not of good repute – matter disposed of.”

Martin lost his appeal at both the BCSC and the BCCA. Justice O’Halloran wrote: “For a Communist to talk about personal freedom of action, expression and thought is like the devil talking about the delights of Heaven.” He went on to contend:

> Freedom of expression cannot be given to Communists to permit them to use it to destroy our constitutional liberties, by first poisoning the minds of the young, the impressionable, and the irresponsible. Freedom of expression is not a freedom to destroy freedom…Likewise it must be recognized “freedom of thought” may become dangerous if it is translated into speech or writing aimed to destroy our free society.

We may seem far removed from the legal context that enabled all five justices of the BCCA, who each wrote their own decisions, to decide against Martin. In 1998, during the era of the Charter and our current understandings of freedom of expression and association, the LSBC issued an official apology regarding its treatment of Martin. However, in light of the

---

149 W Wesley Pue, “Banned from Lawyering: Gordon Martin, Communist” (2009) Faculty Publications, online: Peter A. Allard School of Law Allard Research Commons <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1281&context=fac_pubs> [Pue] at 4-5.
150 Ibid at 6.
152 Ibid at 183-184.
153 Pue, supra note 149 at 26.
Doré/Loyola framework and its interpretation in LSBC v. TWU, we are not as far removed from Martin’s scenario as we may like to think. One can hypothesize a scenario in which the LSBC could argue that its duty to uphold the public interest requires exclusion of individuals who exercise their freedoms of expression and association in ways deemed contrary to Charter values. Thus, the very reason for which the Doré/Loyola framework was created – to make the Charter meaningful in the context of administrative justice – would be frustrated, allowing the LSBC to devalue certain Charter protections it deems unworthy.

2.6 Conclusion

In this chapter, I argued that the Majority in LSBC v. TWU ignored various concerns with the Doré/Loyola framework expressed by academics and judges alike. I then addressed my three main objections to the framework following LSBC v. TWU. First, the scope of discretion granted to both the judiciary and administrative decision-makers through the language of Charter values is too broad. Second, the framework enables cases to be incorrectly formulated as conflicts of rights, rather than conflicting duties on the part of the state actor towards multiple private parties. Lastly, incorporating a Charter protection into a statutory objective operates as a thumb on the scale, allowing the objective to trump other Charter rights.

In the context of LSBC v. TWU, freedom of religion was weighed against the LSBC’s statutory objective, with equality added to the balance, and found wanting. In the words of Cameron and Daly in relation to their fictitious example, freedom of religion was simply “not as vital a concern”. Under the Doré/Loyola framework, the LSBC was regrettably allowed to ignore any duty it had to freedom of religion. However, the LSBC’s duty to uphold freedom of religion is as important as its duty to uphold equality. Certainly, as when the state’s duties vis-à-vis multiple
Charter protections conflict in any situation, the LSBC was entitled to give preference to one duty over the other. But in so doing, the LSBC should have looked to reasonable accommodation, which will be explored in Chapter Four. Further, in its decision, the LSBC should have followed a set methodology, with well-articulated reasons explaining why it arrived at the conclusion it reached. Whether or not this changed the outcome, it would have set the groundwork for intelligible, credible Charter jurisprudence within administrative justice in the future. Instead, the Benchers bound themselves to the results of the LSBC Referendum, a flawed decision to which I now turn.
Chapter 3: Direct Democracy and Minority Rights: the LSBC Referendum

3.1 Introduction

In the previous chapter, I outlined how the Doré/Loyola framework enables Charter protections to be incorporated into a statutory objective. This leads to competing Charter rights, which are not recognized in the objective, being compromised. In this chapter, I look specifically at how this played out in LSBC v. TWU. While the Benchers’ October Decision, which adopted the results of the LSBC Referendum, does not fit into a classic conception of fettering, a more purposive interpretation of fettering is warranted. The Benchers clearly fettered their discretion if one looks to the principles underlying fettering, including the preservation of the rule of law. This fettering of discretion was problematic for two reasons. First, it contradicted administrative law principles, as the Benchers enabled the LSBC membership to usurp the role of decision-maker and side-stepped the required balancing process under the Doré/Loyola framework. Second, and more importantly, it violated constitutional norms, as subjecting minority rights to a majority-rules vote through a referendum runs counter to the symbiotic relationship constitutional principles hold in Canada.

Indeed, given the minority rights implications of the LSBC Referendum, the Benchers fettered their discretion in a particularly egregious manner. The LSBC Referendum, and the Benchers’ decision to bind themselves to the result, evidenced a tyranny of the majority, and should serve as a warning against making the “will of the people” paramount, without proper regard for minorities. Only when we recognize the richer principle of democracy, one which
embraces other constitutional principles, including minority rights, will Canada truly be the diverse and welcoming country it purports to be.\textsuperscript{154}

### 3.2 \textit{LSBC v. TWU}

#### 3.2.1 \textit{The LSBC Referendum}

As noted in Chapter Two, the LSBC Referendum took place after months of deliberation at many institutional levels concerning TWU’s proposed law school. In the April Decision, the Benchers defeated a motion which would have denied accreditation to TWU’s proposed law school. The Benchers made this decision after review of legal opinions and submissions from numerous interested parties, along with debate amongst the Benchers themselves.\textsuperscript{155} However, following the LSBC Referendum, in the October Decision, the Benchers reversed their position and denied accreditation to TWU’s proposed law school without any further discussion.\textsuperscript{156}

#### 3.2.2 \textit{Fettering of Discretion as Argued before the Courts}

Before both the BCSC and the BCCA, fettering of discretion was a key issue. Typically, unlawful fettering of discretion is concerned with an administrative decision-maker binding “itself to policies or guidelines rather than exercising its discretion to decide the individual matter before

\textsuperscript{154} \textit{Secession Reference, supra} note 8 at para 76: “Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are ‘binding’ not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.”

\textsuperscript{155} \textit{TWU BCCA, supra} note 37 at paras 17 & 20.

\textsuperscript{156} \textit{Ibid} at para 28; \textit{TWU BCSC, supra} note 33 at paras 46-49.
it.”¹⁵⁷ The specific question in this case, according to the lower courts, was whether the Benchers had wrongly fettered their discretion by binding themselves to the results of the LSBC Referendum.¹⁵⁸ Both the BCSC and the BCCA found that the Benchers had wrongly fettered their discretion;¹⁵⁹ however, the courts disagreed on which scheme of administrative law applied. Chief Justice Hickson categorized fettering as a procedural fairness issue and consequently reviewable on the standard of correctness,¹⁶⁰ while the BCCA declared it better suited under a substantive review on a reasonableness standard.¹⁶¹

The LSBC’s arguments on fettering differed between the two lower courts. Before the BCSC, the LSBC argued that the Benchers were informed by the views of the membership but had nonetheless exercised their own independent judgment in making the October Decision.¹⁶² Chief Justice Hinkson disagreed and concluded that “the Benchers allowed the members to dictate the outcome of the matter”¹⁶³ and “disabled their discretion under the LPA by binding themselves to a fixed blanket policy set by LSBC members.”¹⁶⁴ Before the BCCA, the LSBC appealed from a different angle, arguing that the Benchers had decided that either result of the LSBC Referendum would have been a reasonable outcome of the balancing exercise.¹⁶⁵ In response, the BCCA examined the Doré/Loyola framework and concluded that “the Benchers failed to fulfill their function when they chose not to come to any conclusion as to how statutory objectives should be weighed against Charter values”¹⁶⁶ but instead “reach[ed] the decision by binding referendum”.¹⁶⁷

¹⁵⁸ TWU BCSC, supra note 33 at para 120 and TWU BCCA, supra note 37 at para 85.
¹⁵⁹ Ibid.
¹⁶⁰ Ibid.
¹⁶¹ Ibid at para 98.
¹⁶² Ibid at para 93.
¹⁶³ Ibid at para 113.
¹⁶⁴ Ibid at paras 119.
¹⁶⁵ Ibid at paras 120.
¹⁶⁶ TWU BCCA supra note 37 at para 86.
¹⁶⁷ Ibid at para 91.
¹⁶⁸ Ibid.
The BCCA pointed out that the Benchers had conflated the role of a reviewing court with their own. They declared that it is for the courts to decide whether a decision is reasonable or not; the administrative decision-maker is to make the right decision.

Despite the centrality of fettering in the lower court decisions, except for a heading in the Dissent’s judgment, none of the decisions at the SCC utilized the language of fettering. The Majority tersely concluded that the Benchers were authorized to decide if certain decisions would benefit from the guidance of the LSBC membership and that this was no less the case where a decision implicated the Charter. In the concurring decisions, the LSBC Referendum was not addressed by McLachlin C.J. but was briefly discussed by Rowe J. Although he agreed with the Majority that, procedurally, the Benchers were entitled to bind themselves to the results of a referendum, he went on to state that if he had found a Charter infringement, he would disagree with the Majority that the LSBC could achieve “a proportionate balancing of the Charter protections at play” “simply by saying that a majority of its members were in favour of denying accreditation.” Similarly, the Dissent agreed with the BCCA that the Benchers had abdicated their duty to properly balance their statutory objectives with the implicated Charter rights by simply “rubber stamping” the outcome of the LSBC Referendum. They found that the members of the LSBC could never, by referendum, “engage in the balancing process required by Doré.”

---

168 TWU BCCA, supra note 37 at paras 87-90.
169 Ibid at paras 87-90.
170 LSBC v TWU, supra note 1 at para 50.
171 Ibid at para 255.
172 Ibid at para 58.
173 Ibid at para 256.
174 Ibid at para 294.
175 Ibid at para 296.
176 Ibid at para 298.
3.3  A Purposive Approach to Fettering

While none of the justices at the SCC elaborated on this point, the LSBC Referendum does not fit neatly into the classic conception of fettering of discretion. First, as Mary Liston argues, the Benchers were acting on behalf of the membership of the LSBC, and the membership, as a whole, made its views known. Such a scenario cannot truly be equated with a decision-maker binding itself to guidelines or policy. Related to this, the second problem is that fettering of discretion is only concerned with unlawful fettering. Section 13 of the LPA, procedural issues aside, did permit the Benchers to be bound by referenda of its members.

However, LSBC v. TWU evidences a need for a more purposive interpretation of fettering of discretion. Administrative law poses unique challenges, as it applies across a vast range of decision-makers. Consequently, what may be fettering of one tribunal’s discretion may look different from fettering of another’s discretion. In order to address this variability, one must look to the principles underlying fettering of discretion. When these principles are taken into account, the argument can be made that fettering should apply to a broader range of circumstances, including those in LSBC v. TWU.

---

177 Mary Liston, “Self and Democratic Governance in TWU” (Faculty Roundtable Discussion on Law Society of British Columbia v. Trinity Western University at Peter A. Allard School of Law, University of British Columbia, Vancouver, 27 September 2018) [unpublished] [Liston Roundtable Discussion].
178 See: TWU BCCA, supra note 37 at paras 68 & 77: The first issue concerning the referendum, which is not relevant for our purposes, was whether the Benchers had the power to hold a binding referendum pursuant to s. 13 of the LPA. The BCCA assumed, without deciding, that the Benchers had the authority to call a binding referendum in the absence of a petition, despite the fact 12 months had not passed following the meeting, as indicated in the rules. Also see: LSBC v TWU, supra note 1 at para 49: The Majority of the SCC found that s. 13 didn’t limit the circumstances in which the Benchers themselves could choose to bind themselves to the results of a referendum. Consequently, neither of these decisions turned on this issue.
179 As the Honourable Thomas A. Cromwell quipped in a speech to the Canadian Institute for the Administration of Justice: “What, it may be asked, do the judicial roles in relation to the decisions of the dog licensing tribunal and to the CRTC have in common?”: Thomas A Cromwell, “What I think I’ve Learned About Administrative Law” (2017) 30:3 Can J Admin L & Prac 307 [Cromwell] at 311.
The rationale behind preventing fettering of discretion, taken to its broadest implication, is preservation of the rule of law. This fundamental precept of our nation, as explained by the SCC in *Secession Reference*, can be summarized as follows: “At its most basic level, the rule of law vouchsafes to the citizen 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.”

Because of the rule of law, as the SCC noted in *Dunsmuir*, “all exercises of public authority must find their source in law.”

Consequently, administrative discretion must operate within the boundaries the law has set. Justice Rand in *Roncarelli v. Duplessis*, the cornerstone case on arbitrary power, famously stated: “there is no such thing as absolute and untrammeled ‘discretion’”. This presents a two-fold requirement: administrative decision-makers must operate within the bounds of the law and, on the other side of the same coin, must not bind themselves to considerations outside of the law.

As the Federal Court of Appeal in *Stemijon Investments Ltd. v. Canada (Attorney General)* stated:

*Dunsmuir* reaffirms a longstanding, cardinal principle: “all exercises of public authority must find their source in law” (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must per se be unreasonable.

In looking to these principles, fettering of discretion can be applied to any situation in which the decision-maker binds herself to an instrument, other than the law, in making her...
decision. In this context, there is little distinction between a decision-maker binding herself to a referendum or to a policy statement, as neither are law. Consequently, if one looks to a purposive definition of fettering, namely where the decision-maker binds herself to an instrument other than the law, it is evident the Benchers fettered their discretion in the October Decision. The Benchers did not utilize their discretion but simply made a decision against TWU based solely on the views of the LSBC membership as expressed through the LSBC Referendum.

As noted above, pursuant to section 13 of the LPA, the Benchers were statutorily permitted to fetter their discretion by binding themselves to referenda of their members. However, there are two reasons why the LSBC Referendum was nevertheless improper. First, the Benchers’ decision to bind themselves to the LSBC Referendum countered administrative law principles. It allowed the LSBC membership to usurp the role of decision-maker, and it avoided the balancing process required under the Doré/Loyola framework. The second, and more problematic concern, is that the LSBC Referendum ran contrary to constitutional norms. As it engaged with minority rights, the LSBC Referendum prioritized democracy over those minority rights, contrary to the symbiotic relationship these two underlying constitutional principles hold in Canadian law. I will devote the remainder of this paper to exploring these issues.

3.4 The LSBC Referendum and Administrative Law

The first avenue to explore in relation to the Benchers’ October decision is administrative law principles. At its most basic level, administrative law is concerned with decision-makers acting according to the confines of their statutory regimes. This raises two issues with respect to the October Decision. First, the LSBC members became the ultimate decision-makers, usurping the

---

185 Dunsmuir, supra note 93 at para 29.
role of the Benchers. Second, the Benchers side-stepped the balancing process required under the *Doré/Loyola* framework, as such a process simply cannot take place in the context of a yes/no vote.

### 3.4.1 The Ultimate Decision-Maker

Sub-delegation occurs when a decision-making body delegates its authority derived under statute to someone else.\(^{186}\) While TWU had initially argued that the Benchers both sub-delegated and fettered their discretion by way of the LSBC Referendum, the BCCA concluded that sub-delegation did not apply. It held that the actual resolution not to approve TWU’s proposed faculty of law was passed by the Benchers. Consequently, “[t]he statutory power was exercised directly by the body empowered to exercise it.”\(^{187}\)

Nevertheless, while the Benchers may have technically exercised the statutory power themselves, they only did so as proxies of the members’ decision by way of the LSBC Referendum. Thus, even if the doctrine of sub-delegation does not apply in this case, when the Benchers fettered their discretion, they left the decision on whether or not to approve TWU’s proposed law school solely to the LSBC members, who are not the decision-makers appointed under statute. Not only did this transgress the rule of law as set out above,\(^ {188}\) but it created two other problems: 1) it removed the protections that are in place to reign in the exercise of administrative discretion, and 2) it removed the ability of the Benchers to exercise their own expertise.

First, the LSBC Referendum circumvented the duties held by administrative decision-makers, including the duty of fairness and the duty to set aside bias. The Benchers in this case also

---

\(^{186}\) *TWU BCCA, supra* note 37 at para 62.

\(^{187}\) *Ibid* at para 64.

\(^{188}\) *Dunsmuir, supra* note 93 at para 29.
held an additional duty – the duty to the public. As Alice Woolley and Amy Salyzyn point out, the
Benchers are elected by lawyers but are supposed to serve the public, creating a conflict where a
referendum is used:

Whatever the merits of referenda in democracies generally, they are in our view very hard to justify when a
law society has a legal and ethical duty to one group (the public) but the referenda is only voted on by another
group (lawyers), whose interests may conflict with the group to whom the duty is owed. Therefore, when the LSBC
members usurped the role of decision-maker, they did so without importing all of the necessary duties that are connected with being an administrator, as the
members are not bound by these duties. This circumvented the protections afforded under
administrative law principles.

Second, the LSBC Referendum removed the ability of the administrative body to exercise
its own expertise. Certainly, if the point of the LSBC Referendum was to determine values held
by the legal community, expertise would not have been relevant, as it does not take expertise to
determine or articulate such values. However, the referendum question was not simply a vehicle
expressing the community’s values. If it had been, the Benchers would have utilized the
referendum as simply one of multiple tools in making their decision. Instead, the LSBC
Referendum was determinative of the issue. This led to two main problems with expertise.

First, the referendum question only allowed “zero-sum” outcomes: approval or disapproval
of TWU’s proposed faculty of law. While I discuss “zero-sum” outcomes in further detail in

189 Alice Woolley & Amy Salyzyn, “Protecting the Public Interest: Law Society Decision-Making after Trinity
Western University” (2019) 97:1 Can Bar J 70 at 97.
190 See the actual referendum question: Notice to the Profession, “2014 Referendum: Whether the Law Society
should not approve TWU” 3 October 2014, online: The Law Society of British Columbia
society-should-no/>: “Resolved that the Benchers implement the resolution of the members passed at the special
general meeting of the Law Society held on June 10, 2014, and declare that the proposed law school at Trinity
Western University is not an approved faculty of law for the purpose of the Law Society's admissions program. Yes
__________ No __________ (the ‘Resolution’) For clarity, a ‘Yes’ vote supports disapproval, and a ‘No’ vote
supports approval of Trinity Western University’s proposed School of Law as an accredited faculty of law for the
purpose of the Law Society’s admissions program.”
Chapter Four, suffice it to say for our purpose here, such a formulation distorted the nature of the decision, as other outcomes were potentially available. In putting a “zero-sum” question to a vote, the LSBC Referendum removed the scope for the Benchers to deploy their expertise to come up with a more nuanced, minimally impairing solution.

Second, the Doré/Loyola framework required that a proportionate balance be found. This involved balancing freedom of religion with the statutory mandate of the LSBC in a way that affected the right no more than was reasonably necessary. This necessitated expertise in both the statutory scheme and how it relates with the Charter, expertise the Benchers alone had. Indeed, the Doré/Loyola framework is premised on the very notion that the administrative decision-maker is in the best position to apply the Charter within its scope of expertise. The SCC in Doré stated that administrative decision-makers are required “to consider Charter values within their scope of expertise.”

The SCC went on to state:

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. As the Court explained in Douglas/Kwantlen Faculty Assn. v. Douglas College, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:

[TRANSLATION] . . . administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts…

This case, among others, reflected 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 (see Conway, at paras. 79-80). As Major J. noted in dissent in Mooring v. Canada (National Parole Board), 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, tailoring the Charter to a specific situation “is more suited to a tribunal’s special role in determining rights on a case by case basis in the tribunal’s area of expertise” (para. 64; see also C.U.P.E., at pp. 235-36).

However, any expertise the Benchers may have had in tailoring the Charter to their statutory mandate does not extend to its membership body. The members do not make decisions on a regular

---

191 Doré, supra note 7 at para 35.
192 Ibid at paras 47-48.
basis concerning the statutory mandate, and they therefore do not engage with the *Charter* in such context in any meaningful way in order to develop that expertise.

A possible argument could be made that because the LSBC members were lawyers, they did have expertise in *Charter* rights. However, it is critical to point out that lawyers do not practice every area of law and many do not practice *Charter* litigation. Additionally, lawyers do not always agree on the law within the areas they do practice – if they did, there would certainly be a lot less litigation. Thus, it cannot be said that the LSBC members correctly engaged the *Charter* in this case simply because they may make *Charter* arguments in the course of their practices. This aside, however, the primary reason the LSBC membership did not have expertise within the meaning of *Doré*, is that members do not have experience engaging with the *Charter* in the context of the LSBC’s enabling legislation. Thus, the reasons for deference to an administrative decision-maker in applying the *Charter* within its statutory mandate, as outlined in *Doré*, simply did not apply to the LSBC members.

3.4.2 **Balancing Process**

The second concern involving administrative law principles is with respect to the balancing process required under the *Doré/Loyola* framework. As previously noted, once it is determined that a *Charter* protection is engaged, an administrative body must achieve a proportionate balancing of its statutory mandate with the *Charter* protection.\(^{193}\) However, as outlined in the preceding chapter, there are numerous concerns with the proportionality analysis. In *LSBC v. TWU*, the problems went even further, as the Benchers’ decision to bind themselves to the results of the

\(^{193}\) *LSBC v TWU*, *supra* note 1 at 79.
LSBC Referendum side-stepped any actual balancing process between freedom of religion and the LSBC’s statutory mandate.

In Doré, the SCC stated that the balancing process occurs as follows. First, the decision-maker should consider the statutory objectives, followed by how the implicated Charter value can best be protected in light of those statutory objectives. The SCC referred to this second step as “the core of the proportionality exercise”, as it requires balancing the severity of the interference of the Charter protection with the statutory objectives. Contrary to this process, however, a referendum only allows for a yes/no response to a given question. As laid out by the Dissent in LSBC v TWU: “the LSBC membership could never, through means of a referendum, engage in the balancing process required by Doré.”

Mary Liston proposes a potential solution to this problem. She argues that if the LSBC members had participated in debates prior to the vote, these debates could have formed the balancing process and provided the reasons for the LSBC’s decision. However, even if this had occurred, this implicates the issue, as expressed above, that the members were not the appropriate decision-makers in this context. Thus, even if the balancing exercise could have occurred by way of referendum, it was the Benchers who were required to engage with such balancing, which they failed to do.

While the Majority of the SCC were satisfied with the Benchers’ decision based on reasons which could have been offered, the Dissent pointed out that the lack of reasons was nonetheless a fundamental flaw, as addressed in Chapter Two. Without reasons, there was no basis for finding the Benchers had proportionately balanced the interests at stake:

---

194 Doré, supra note 7 at para 55-56.
195 LSBC v TWU, supra note 1 at para 298.
196 Liston Roundtable Discussion, supra note 177.
Still, the majority, even without the benefit of reasons or a relevant record, assures us that “the Benchers came to a decision that reflects a proportionate balancing”. But, and with respect, the majority simply cannot point to any basis whatsoever for suggesting that the Benchers conducted any balancing at all, let alone proportionate balancing.\footnote{LSBC v TWU, supra note 1 at para 301.}

Further evidencing the Benchers lack of balancing in the October Decision, when the Benchers had engaged in a fulsome balancing process, they arrived at the opposite conclusion in favour of TWU. Between the April Decision and the October Decision, nothing changed concerning the severity of the infringement of freedom of religion in light of the Benchers’ statutory mandate. The only difference between the two was the LSBC Referendum.

Without proportionate balancing between an infringed Charter protection and statutory objectives, there is simply no way to ensure proper safeguards are in place for Charter protections. A statutory objective can always trump a Charter protection, regardless of the severity of the infringement, particularly if another Charter protection is weighed on the side of the statutory objective. Consequently, when the Benchers failed to undertake the required balancing process under the Doré/Loyola framework, they failed to provide assurance of a meaningful Charter within administrative law, contrary to administrative law principles.

3.5 Minority Rights in Constitutional Law

Not only did the October Decision violate administrative law principles, however, it also ran contrary to constitutional norms. In Canada, democracy does not operate simply on a majority-rules basis, and a concern for minority rights is vital. A referendum in the context of minority rights improperly makes democracy paramount. Binding themselves to such a referendum was therefore a particularly egregious form of fettering of discretion by the Benchers.
While the Canadian constitutional framers believed democracy had a place, a fear of the majority was embedded into the Canadian Constitution. This can be seen, for example, through the protections for minority language rights and educational institutions, as well as the appointed, as opposed to elected, senate.\textsuperscript{198} Paul Romney argues that the Canadian framers were trying to avoid the problems they saw inherent in the U.S. form of democracy and hoped to avoid ruling by “the will of the mob.”\textsuperscript{199} He concludes by stating: “[Democracy] was not a good but an unavoidable evil, and they did what they could to keep it in its place.”\textsuperscript{200}

While the fear of democracy held in the 1860s may no longer permeate Canadian society, the \textit{Secession Reference} nonetheless establishes that democracy is not paramount in Canada. In that case, the SCC discussed four underlying constitutional principles – federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.\textsuperscript{201} The Court stated that these are symbiotic principles which form the lifeblood of the Constitution, and no one principle can trump any other.\textsuperscript{202} Specifically in relation to democracy, the SCC stated that the Canadian principle of democracy is richer than simple majority rule. Minority interests must be taken into account, and the constitutional rights of all parties are “to be respected and reconciled.”\textsuperscript{203}

Contrary to this, a referendum in the context of minority rights prioritizes democracy over other principles. It enables the majority to subject minority rights to its rule, without any

\textsuperscript{198} Paul Romney, “Was Canada meant to be a democracy” (2000) 80:2 The Beaver 6 [Romney] at 6. Romney illustrates his points from historical quotes, stating: “John A. Macdonald dwelt on one virtue of the British system in particular: ‘In all countries the rights of the majority take care of themselves, but it is only in countries like England, enjoying constitutional liberty, and safe from the tyranny of a single despot or an unbridled democracy, that the rights of minorities are regarded.’ Richard John Cartwright, scion of a leading Loyalist family from Macdonald’s hometown of Kingston, saw democracy as the chief peril to liberty in North America: ‘Our chiefest care must be to train the majority to respect the rights of the minority, to prevent the claims of the few from being trampled under foot by the caprice or passion of the many. For myself, sir, I own frankly that I prefer British liberty to American equality. I had rather uphold the majesty of the law than the majesty of Judge Lynch.’”

\textsuperscript{199} \textit{Ibid} at 6.

\textsuperscript{200} \textit{Ibid}.

\textsuperscript{201} \textit{Secession Reference, supra} note 8 at para 49.

\textsuperscript{202} \textit{Ibid}.

\textsuperscript{203} \textit{Ibid} at para 76.
counterbalance. Below, I provide a brief introduction to direct democracy, followed by examples of popular democracy trampling minority rights. Even when minority rights may succeed in a particular direct democracy, however, I argue that the symbiotic relationship of the constitutional principles are still undermined. Simply put, any direct democratic measure, including a referendum, used to determine minority rights in Canada is contrary to constitutional norms. In binding themselves to such a referendum, the Benchers fettered their discretion in a particularly egregious fashion.

3.5.1 Minority Rights and Direct Democracy

Referenda fall under the umbrella term direct democracy, along with other procedures such as initiatives and recall. As John Matsusaka contends, direct democracy is growing in popularity and favour, as it allows the average citizen to participate more fully in the democratic process and arguably improves government. However, whatever the benefits direct democracy may provide to general political discourse, concerning issues arise when these tools are used in the context of minority rights. Safeguards for minorities must exist beyond simply the “will of the people”.

The pitfalls of utilizing direct democracy measures in the context of minority rights can be seen in the BC Indigenous Treaty Referendum (the “Treaty Referendum”) which took place in 2002. In that instance, British Columbians voted on principles to be used by the BC government in treaty negotiations with First Nations, engendering significant controversy. Angus Reid, founder and chairman of the Angus Reid Institute, called the Treaty Referendum “one of the most...

---

204 Shaun Bowler et al, “Popular Attitudes towards Direct Democracy” (Paper prepared for American Political Science Association Meeting, Philadelphia, 28-31 August 2003) [unpublished] [Bowler et al]. I do not explore the differences between the various direct democratic processes, but it is worth noting that in Daniel Bochsler & Simon Hug, “How minorities fare under referendums: A cross-national study” (2015) 38 Electoral Studies 206 [Bochsler & Hug] at 213, the authors argue that “Further research might be done in order to differentiate between different institutions of direct democracy”.

amateurish, one-sided attempts to gauge the public will that I have seen in my professional
career.” 206

One of the first concerns with the Treaty Referendum surrounded the wording of the
questions. Critics argued that the principles were presented in such a way that a “yes” response
was almost guaranteed. 207 Another concern was that the Treaty Referendum was simply a political
ploy, a way to give the government the upper hand in negotiations with First Nations
communities. 208 Finally, it was argued that the Treaty Referendum would spark racism towards
indigenous peoples. 209

Ultimately, First Nations communities were not as damaged as they could have been by
the Treaty Referendum, as the government never acted on the results. 210 However, through the

206 “B.C. treaty referendum” (2 July 2004), online: CBC News
207 Ibid. The questions were:
1. Private property should not be expropriated for treaty settlements.
2. The terms and conditions of leases and licenses should be respected; fair compensation for unavoidable
disruption of commercial interests should be ensured.
3. Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.
4. Parks and protected areas should be maintained for the use and benefit of all British Columbians.
5. Province-wide standards of resource management and environmental protection should continue to apply.
6. Aboriginal self-government should have the characteristics of a local government, with powers delegated from
Canada and British Columbia.
7. Treaties should include mechanisms for harmonizing land-use planning between Aboriginal governments and
neighbouring local governments.
8. The existing tax exemptions for Aboriginal people should be phased out.

As one Globe and Mail article wittily described it: “Rather than the exercise in democracy trumpeted by the
Liberals, the questions are so loaded one might liken them to a choice between a comfy cup of hot chocolate on a
chilly evening and an attack by leeches”: see “Bulling ahead with B.C.’s referendum” (5 April 2002), online: The
209 Also see: Ken Macqueen, “BC Referendum Controversy” 17 March 2003, online: The Canadian Encyclopedia
concerned about discrimination, the website for the group B.C. White Pride stated that the referendum “will go
down in Canadian history as enabling the most fundamental symbolic expression of White unity since racial pride
went out of style almost 40 years ago.”
210 Fetzer, supra note 208 at 163-164.
Also see: David Rossiter & Patricia K Wood, “Fantastic topographies: neo-liberal responses to Aboriginal land
claims in British Columbia” (2005) 49:4 Canadian Geographer 352 at 360-361 and Fetzer, supra note 208 at 159:
While the BC government claimed the referendum indicated overwhelming support from British Columbians, as
84.5-94.5% of the responses to the questions indicated a “yes” response, only 763,480 ballots were returned to
process, indigenous rights were nonetheless devalued, as these rights were simply left to the preferences and biases of the majority of British Columbians. In other words, the Treaty Referendum promoted democracy over minority rights, contrary to the symbiotic relationship these principles are to hold according to the *Secession Reference*. It should serve as a warning of the dangers involved in utilizing majority-rule procedures to limit minority rights.

Significant research demonstrates that the Treaty Referendum is not an outlier when it comes to direct democracy trampling minority rights. These studies largely focus on the United States (particularly California) and Switzerland, as these locations use such procedures more often than other political regions.211 This research demonstrates that minority rights suffer, both through direct and indirect effects, in the context of popular democracy.

For example, in the context of same-sex marriage bans in the United States in 2011, Daniel Lewis concluded that states with direct democracy were “significantly more likely” to adopt same-sex marriage bans than states without direct democracy.212 In the Swiss context, Anna Christmann

---

211 Bowler et al, *supra* note 204 at 13. Also see: Anna Christmann, “Anti-minority votes and judicial review” (2013) 48:4 Act Politica 429 [Christmann] at 433: between 1990 and 2010, there were 14 initiatives in California and 10 in Switzerland trying to restrict civil rights. Also see: Todd Donovan & Caroline Tolbert, “Do Popular Votes on Rights Create Animosity Toward Minorities?” (2013) 66:4 Political Research Quarterly 910 [Donovan & Tolbert] at 910: In the United States alone, in the early 20th century, using direct democratic measures, California prohibited Asians from owning land, Arizona prohibited immigrants from being employed, and Oklahoma removed voting rights from African Americans. In the later 20th century, through direct democracy, Colorado refused to extend anti-discrimination protections to homosexuals, California removed fair access to housing and banned illegal immigrants from public services, and various states repealed school desegregation and affirmative action based on race and ethnicity.

212 Daniel C Lewis, “Direct Democracy and Minority Rights: Same-Sex Marriage Bans in the U.S. States” (2011) 92:2 Social Science Quarterly 364 [Lewis] at 364-378. As part of his research, Lewis looked at all initial state same-sex marriage bans in both direct and non-direct democracy states. He also explored legislative outcomes in order to assess the indirect impacts of direct democracy. In relation to direct effects, Lewis concluded that even though only a few ballot initiatives took place to ban same-sex marriage, they were “enormously successful when employed” (at 370). Concerning indirect effects, Lewis found that even where initiatives were not used, the odds were higher of legislatures adopting same-sex marriage bans in states where legislators felt more pressure because initiatives often do take place. Lewis also compared direct-democracy states versus non-direct-democracy states, as well as high
and Deniz Danaci examined 34 popular votes aimed at extending rights of religious minorities between 1963 and 2007. They concluded that direct democracy has negative effects on out-group minority rights.

In addition to the direct and indirect effects on minority rights, various studies have found a risk of direct democracy perpetuating negative attitudes towards minorities. Researchers contend that more harassment and violence occur against minorities during public votes implicating their rights. Todd Donovan and Caroline Tolbert, in particular, explored whether a popular vote on minority rights makes the public less sympathetic to that minority in the context of same-sex marriage debates in the United States between 2002 and 2004. They found that while most people were not affected, “there was a relatively large number of individuals who may have been exposed to (and receptive of) themes that caused them to view lesbians and gays less favorably in 2004.” They argued that campaign messages can position minorities as a threat and perpetuate negative attitudes towards them. They concluded that it is “important for scholars to...consider

---

impact direct-democracy states versus low impact direct-democracy states (i.e. states that use direct democratic measures more often). He found that the odds of adopting same-sex marriage bans were almost four times higher for direct-democracy states than non-direct democracy states. With respect to high versus low impact direct democracy, the odds of high impact direct-democracy states, such as California, adopting same-sex marriage bans were more than seven times higher than low impact direct-democracy states, such as Wyoming.

Anna Christmann & Deniz Danaci, “Direct Democracy and Minority Rights: Direct and Indirect Effects on Religious Minorities in Switzerland” (2012) 5:1 Politics and Religion 133 [Christmann & Danaci] at 142-155. As only five out of the 34 votes were rejected, the researchers concluded that the direct negative effect was relatively low. However, nuances existed in this. Twenty-three of the votes implicitly included an extension of “out-group” minority rights. Five of these were rejected. In three of the five rejected votes, populist right-wing parties had heavily mobilized – in two cases, against Muslims, and in the other, against immigrants. The other two rejected votes were rejected for reasons unrelated to minority rights. In relation to indirect effects, the researchers found that parliamentarians leaned towards more restrictive minority rights when they feared a popular vote and held a debate about Muslim minorities.

Ibid at 155.


Donovan & Tolbert, supra note 211 at 911, 913-914: The researchers looked at American National Election Study panel data from 797 individuals in states where same-sex marriage was on the ballot in 2004 and compared it with the responses of those same individuals in 2002.

Ibid at 918.

Ibid at 911-912.
how subjecting a minority group to public judgment may in itself have pernicious effects by stigmatizing perceptions that some people have about the targeted group.”

3.5.2 Self-Serving and Changing Views of the Majority

On the other hand, some scholars argue that the negative effects of direct democracy are overstated. They argue that the majority of initiatives are not racially targeted and point out that many ethnic groups are indeed on the “winning side” of such measures. For example, Simon Geissbühler highlights that majorities and minorities change depending on the issues in direct democratic procedures, and direct democracy can actually give minorities a platform.

However, even though minority rights may at times benefit from particular direct democratic measures, whether or not this is the case is solely dependent on the majority choosing to uphold those rights. As Daniel Bochsler and Simon Hug observed, after examining several minority rights issues around the world, whether popular democracy negatively or positively impacts minorities “depends on the preferences of the median voter.” Therefore, the fundamental concern remains – the majority’s views take precedence, contrary to the symbiotic relationship of underlying constitutional principles we have in Canada.

---

219 Donovan & Tolbert, supra note 211 at 918-919. Donovan and Tolbert point out that there are some caveats to their research, as attitudes towards homosexuals might not be the same as towards other minorities, attitudes towards homosexuals in the United States largely changed after 2010, and opposition campaigns could neutralize negative effects of the ballot measures.

220 Ibid at 911.


222 Ibid at 91.

223 Bochsler & Hug, supra note 204 at 209, 212-213. The researchers looked at all democracies across North America, Europe, East Asia, Australia, and Latin America for which they could obtain the needed voter preference measures from the World Values Survey. With respect to women’s social rights, freedom of assembly, freedom of speech, and abortion rights, they found that direct democracy moved the results towards the position of the average voter; however, with freedom of speech and abortion rights, the effects were insignificant. Arguably, Bochsler and Hug’s research strengthens Matsusaka’s position (see Matsusaka, supra note 205 at 191-191) that direct democracy often moves policy in line with the views of the average voter.
The problematic nature of this is apparent in at least two ways. First, majority views can change. As Alexandra Orlova argues, protections that are premised on “fluid public consensus” are “limited and unstable, since public consensus can change, and not only for the better”.\footnote{224} Thus, a minority that is protected by the majority today may not be so protected tomorrow. Second, as mentioned above, several studies have concluded that “out-group” minorities suffer far more than “in-group” minorities at the hands of the majority. In other words, minorities that are not seen as a threat to the majority generally receive better treatment than do minorities feared by the majority. Consequently, the reasons why the majority may choose to vote against a minority group may be the very reasons that minority group needs its rights protected. As Christmann and Danaci argue:

> Direct democracy has negative effects on minority rights. However, these effects are limited to out-group minorities. Ironically, those are the social groups that are most in need of support by the state, because they suffer from (latent) intolerance by the majority.\footnote{225}

In relation to this, Adrian Vatter \textit{et al}, writing from the Swiss context and comparing their research with a study from the United States, concluded:

> We can therefore assume that this specific form of political intolerance concerning Muslims, foreigners, and asylum seekers (from outside of the EU) in Switzerland as well as Latinos in the US results from the perceived cultural and political threats that these emerging and growing out-groups pose. This seems to be a particularly disturbing trend, as it is precisely these groups of minorities whose civil rights are in need of the most protection by courts and other state authorities due to the fact that the vast majority have little political or economic power to defend their rights.\footnote{226}

\footnote{224} Alexandra V Orlova, “Public Interest, Judicial Reasoning and Violence of the Law: Constructing Boundaries of the Morally Acceptable” (2017) 9 Contemp Readings L & Soc Just 51 [Orlova] at 66. Her argument is in the context of protections for gay identities, as she believes that equality is now a “supreme right.” Her full quote is as follows:

> “Even if equality is positioned as a ‘supreme right’ within the public domain, if the legitimacy of this constitutional norm is grounded in fluid public consensus and what amounts to equality then, therefore, what is ‘in the public interest’ is reflective of changing norms, attitudes and principles – such a conceptualization has serious implications. Even if gay identities, conduct and feelings are ‘written into’ this social and judicial construct, such protections are limited and unstable, since public consensus can change, and not only for the better, leaving this ‘universal minority’ group struggling for inclusion.”

\footnote{225} Christmann & Danaci, \textit{supra} note 213 at 155.

\footnote{226} Adrian Vatter \textit{et al}, “Who supports minority rights in popular votes? Empirical evidence from Switzerland” (2014) 36 Electoral Studies 1 [Vatter] at 9. Also see p 1 & 4: They defined out-group minorities as those posing a perceived cultural or economic threat to the majority, such as Muslims and foreigners, and defined in-group minorities as those who do not pose such a threat, such as women and disabled individuals. This research accords with Christmann and Danaci’s findings that the negative impact of direct democracy was only seen on “out-group” minorities. See: Christmann & Danaci, \textit{supra} note 213 at 138 & 155. They defined out-group minorities as those without a Swiss passport, limited in this case to Muslims.
Ultimately, subjecting minority rights to the self-serving and changing views of the majority provides little assurance of a robust, enduring protection for such rights.

3.5.3 Where Two Minority Groups are Implicated

In the context of *LSBC v. TWU*, all of the above was further complicated by the fact that two minority groups were implicated. As argued in Chapter Two, the LSBC holds a duty to both minorities, regardless of how the majority views these groups. Because of this, the Benchers could not reasonably rely solely on the views of the average lawyer, without more, to make a decision which appropriately balanced all of the interests at stake. However, the only information the LSBC Referendum provided to the Benchers was the exact break-down of how many members fell on which side of the debate. Thus, it can be argued that the Benchers resorted to a popularity vote to determine which minority group was favoured by the majority and simply declared that group the “winner.”

As critical legal theorists point out, when the law remains neutral, it can enable discrimination against a minority group. This was a prominent argument in *LSBC v. TWU* and featured in the Majority’s reasoning that the LSBC should not be complicit in discrimination against the LGBTQ community.227 Orlova, in discussing the Nova Scotia Superior Court decision in favour of TWU, argued:

> While the decision of the Nova Scotia Superior Court seems to rely on “neutral” legal principles, such as state tolerance of different values in the multicultural society, such “neutral” legal principles have the capacity to reinforce and provide support to oppressive social hierarchies.228

However, while the above can certainly be true, unique concerns are raised when there are two minority groups implicated. Orlova contends that where there is “competition between various

---

227 *LSBC v TWU*, *supra* note 1 at para 95.
228 Orlova, *supra* note 224 at 63.
minority rights”, the courts are “required to balance and ultimately determine which minority rights should win and under what circumstances.” In other words, the law is to declare one group the “winner” over the other. This is problematic. Unlike a situation in which only one minority group is implicated, and the law takes a proactive stance to avoid being complicit in discrimination against that group, where multiple minority groups are at issue, if the law actively steps in on the side of one minority group, it directly discriminates against the other. This is particularly concerning when the decision about who should “win” is made by referendum, as it arguably becomes a popularity contest between the minority groups. Simply put, this runs contrary to the protection of minority rights highlighted by the SCC in the Secession Reference.

3.5.4 Judicial Review

The above discussion would not be complete without analyzing the role of judicial review. Indeed, various academics contend that courts provide the necessary oversight to address any anti-minority effects of popular votes. It must therefore be considered whether the potential anti-minority effects of the LSBC Referendum were, in essence, washed away when the courts judicially reviewed the Benchers’ decision. However, as outlined below, the concerns addressed in Chapter Two demonstrate that the deference owed to the LSBC prevented the adequate protection of freedom of religion in this case.

---

229 Orlova, supra note 224 at 55, emphasis added.
230 J N Eule, “Judicial review of direct democracy” (1990) 99:7 Yale LJ 1503, as cited in Christmann, supra note 211 at 432. Also see P M Sniderman et al, The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy (New Haven: Yale University Press, 1996) at 22, as cited in Christmann, supra note 211 at 448. Sniderman claimed that 85% of judges, as compared to only 35% of voters, support protection of civil rights for disliked groups, the implication being that judges are more impartial towards minorities.
Pursuant to *Dunsmuir*, while a standard of correctness exists for jurisdictional and various other questions of law, deference is largely to administrative decisions through a reasonableness standard of review.\(^{231}\) In addressing this deference, the SCC in *Dunsmuir* stated:

> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, 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”: D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.\(^{232}\)

In *LSBC v. TWU*, the Majority stated that the deference owed to the LSBC “properly reflects legislative intent, acknowledges the law society’s institutional expertise, follows from the breadth of the ‘public interest’, and promotes the independence of the bar.”\(^{233}\)

However, as previously discussed, the Benchers did not follow a set methodology, nor did they provide reasons for the October Decision. As a result, the Majority looked solely at the outcome of the Benchers’ decision.\(^{234}\) In *Delta Air Lines*, the SCC explained that this enables the reviewing court to create the justification for the decision.\(^{235}\) Thus, the Majority’s decision in *LSBC v. TWU* suggested that even if a referendum has anti-minority effects, it is acceptable provided the reviewing court can come up with a justification for the outcome of the decision. This minimizes or ignores the potential anti-minority effects of that decision.

Further, in looking only to the outcome of the decision, the Majority deferred to the decision of the LSBC membership through the LSBC Referendum. As noted above, while *Doré* provides that administrative decision-makers have expertise to apply the *Charter* within their own

\(^{231}\) *Dunsmuir*, supra note 93 at paras 48-50.

\(^{232}\) Ibid at para 49.

\(^{233}\) *LSBC v TWU*, supra note 1 at para 38.

\(^{234}\) Ibid at para 300.

\(^{235}\) *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 27 [*Delta Air Lines*].
statutory mandates, the LSBC members do not have such expertise. No deference should therefore have been provided to their decision through the LSBC Referendum.

Lastly, in a broad sense, deference should arguably never be provided to a referendum which determines minority rights, as such a decision-making tool is contrary to Canadian constitutional norms. If deference is given, it lends credence to the view that the will of the majority should prevail, regardless of the consequences to minority rights. There was simply insufficient oversight of the referendum’s anti-minority effects when deference in administrative law applied.

3.6 Conclusion

In this chapter, I explored the way the Doré/Loyola framework pitted the Charter protections at issue in LSBC v. TWU against each other. Further to this, the Benchers sidestepped the balancing process required under the Doré/Loyola framework and fettered their discretion in a particularly egregious manner, as a referendum to determine minority rights runs against constitutional norms. The Majority of the SCC, in deferring to the Benchers’ October Decision under the Doré/Loyola framework, failed to provide necessary protection for minority rights.

Democracy is not a trump card in Canada, and it must function within a symbiotic relationship with other underlying constitutional principles, including minority rights. Such rights are of vital importance in Canada, made more evident following the passage of the Charter. The LSBC Referendum inappropriately prioritized democracy over minority rights. Therefore, in binding themselves to such a referendum, the Benchers fettered their discretion in a particularly egregious manner. As a society, Canada must vigorously uphold its protections of minority rights,

236 Doré, supra note 7 at paras 47-48.
237 Secession Reference, supra note 8 at para 81: “The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities.”
even – especially – of those minorities with whom we disagree. Only when we recognize a rich principle of democracy which embraces minority rights will Canada truly be the diverse and welcoming country it purports to be. In the next chapter, I advocate for ways these minority rights can be embraced within administrative law.
Chapter 4: Accommodating Rights in Administrative Law

4.1 Introduction

As noted in the previous chapters, *LSBC v. TWU* was viewed as a case where only “zero-sum” outcomes were possible – either the LSBC could uphold TWU’s freedom of religion, on one hand, or their statutory objective (with equality weighed on its side) on the other. There was no exploration of whether there was a way to uphold both. Instead, the issues were put to a vote to decide between the two polarized outcomes. As I argue in this chapter, the *Doré/Loyola* framework facilitates this polarization by inexplicably disregarding accommodation, a concept which had previously been used in administrative law cases. In order to achieve the flexibility necessary for administrative law, accommodation must be incorporated into the analysis. Rather than asking how to balance the infringed right with the statutory objective, the *Doré/Loyola* framework should lead to the question: how can the state actor *accommodate* the infringed Charter right in light of its statutory objective?

In *LSBC v. TWU*, the narrative of polarization led to several problems. First, it enabled the Benchers to evade responsibility for their decision.238 Because the Benchers saw themselves as stuck between a rock and a hard place, with only two options open to them, they were able to put the decision up for a vote. However, if accommodation was part of the consideration, the Benchers would have been forced to take responsibility, as a referendum is not conducive to engaging with questions such as *how to accommodate*. Even if attempts at accommodation had failed, the Benchers would have had to justify to the reviewing courts why accommodation was not

---

238 This was addressed in Chapter Three as fettering of discretion.
reasonably possible. As the Benchers, and not the members, are the administrative body tasked with such decisions, this would have maintained the integrity of the administrative process.

Related to this, the narrative of polarization allowed the Majority of the SCC to side with the LSBC simply because the outcome chosen by the Benchers was the only one the Majority would approve:

The LSBC was faced with only two options — to approve or reject TWU’s proposed law school. Given the LSBC’s interpretation of its statutory mandate, approving TWU’s proposed law school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to Charter protections more fully in light of the statutory objectives.239

When a case is viewed as only having two possible outcomes, it is tempting for the reviewing court to ignore how the administrative actor arrived at its decision if the court supports the outcome. This undermines the procedural protections of administrative law. If, on the other hand, accommodation had been required, the SCC would have considered whether the Benchers’ attempts at accommodation had been appropriate, including how the Benchers arrived at their conclusion. This would have required the Court to looked beyond the two “zero-sum” outcomes.

Arguably, however, the largest problem with the narrative of polarization is that it enabled TWU and the LGBTQ community to be pitted against each other – only one could win, and the other would lose. As discussed in Chapter Three, this devalued the Charter, as it forced the LSBC to choose between the interests of two minority groups. Accommodation could have opened the doors to a better way – a way which upheld the rights of all.

In what follows below, I first explore what is meant by the terms minimal impairment and accommodation and analyze how these terms relate to each other. Next, I discuss a proportionate balance, as used in the Doré/Loyola framework, and its requirement to affect the Charter protection “as little as reasonably possible”. I argue that both Abella J. and McLachlin J.’s

---

239 LSBC v TWU, supra note 1 at para 84.
approaches to the *Doré/Loyola* framework favour balancing as opposed to seeking less-infringing options. This runs the risk of polarized outcomes in administrative law, as there is little to no incentive to consider whether less-infringing options may simultaneously uphold the statutory objective. I contend that if we are to move away from “zero-sum” outcomes in administrative law, we must return to the language of accommodation in two ways. First, administrators should actively consider whether they can reasonably accommodate *Charter* rights implicated by their decisions. Second, on judicial review, when considering whether the *Charter* protection was affected as little as reasonably possible, reviewing courts should ask whether the state actor attempted reasonable accommodation, with the state actor bearing the burden of proof.

I conclude by arguing that if reasonable accommodation had been considered by the Benchers in *LSBC v. TWU*, the outcome in that case may have looked vastly different. Instead of asking how to balance TWU’s freedom of religion with their statutory objective, the Benchers should have explored accommodation of TWU’s freedom of religion in light of their statutory objective, including the *Charter* value of equality. In this way, instead of only zero-sum options, the Benchers could have found creative solutions to accommodate TWU’s freedom of religion while simultaneously maintaining its own statutory objectives. In doing so, the Benchers would have better preserved the *Charter*’s promises in administrative justice, as they could have upheld the rights of both minority groups.

Throughout this chapter, I focus on accommodation of freedom of religion. While equality was also at stake in *LSBC v. TWU*, I believe it is appropriate to focus on freedom of religion as this was the *Charter* right which ultimately lost. It is therefore a good place from which to question whether less-infringing alternatives were possible. It is also currently an area of tension in
Canadian society. Religious freedom is of fundamental importance; however, it is seen to collide with principles such as tolerance and diversity. As the Majority in Loyola stated: “Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.” It is this collision between freedom of religion and a diverse society which lies at the heart of many of the cases to which I will turn in the following discussion.

4.2 Minimal Impairment and Accommodation

4.2.1 Minimal Impairment

Following the passage of the Charter in 1982, the courts developed a framework for alleging state infringement of a Charter right. Under this framework, once an individual establishes an infringement, the onus shifts to the state to justify the impairment as “a reasonable limit that is both prescribed by law and demonstrably justified in a free and democratic society.” In order to do this, the state must satisfy the Oakes test:

1. The objective of the law must be of sufficient importance to warrant overriding the infringed Charter right; and
2. The infringement must pass the proportionality test:
   a. The infringing measure must be rationally connected to the identified objective of the law;
   b. The infringement must be minimally impairing; and
   c. There must be a balance between the effects of the infringement and the importance of the objective.

---

241 Loyola, supra note 18 at para 47.
242 LSBC v TWU, supra note 1 at para 162.
243 Ibid at para 200, emphasis added.
For the purposes of this chapter, the relevant considerations are the last two: *minimal impairment* and *balancing of effects*.

Under the minimal impairment step, the reviewing court assesses whether the right was infringed “as little as reasonably necessary”. The SCC in *RJR MacDonald Inc. v. Canada (Attorney General)* explained this as follows:

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... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

*Multani v. Commission scolaire Marguerite-Bourgeouys*, a 2006 SCC decision, was a case which turned on minimal impairment. The issue was whether a Sikh student could wear a *kirpan* at school. Initially, the student and his school had agreed to a list of restrictions in wearing the *kirpan*. However, the school board rejected these restrictions and imposed an absolute prohibition on the *kirpan*. The SCC Majority decision, written by Charron J., concluded that the evidence did not support the board’s position that an absolute prohibition was necessary to maintain safety in schools. Consequently, the board could not meet the minimal impairment step of the *Oakes* test, as there were other options which would have been less-infringing on the student’s freedom of religion while nonetheless maintaining the board’s safety concerns.

Turning to balancing of effects, under this step, the reviewing court is to balance the deleterious and salutary effects of the infringing law. In *Oakes*, Dickson C.J. explained that “[e]ven
if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.”

*Alberta v. Hutterian Brethren of Wilson Colony (“Hutterian Brethren”)* was an SCC decision which turned on this step of the analysis. In that case, the issue surrounded Alberta’s requirement that all driver’s licenses bear a photograph of the license holder. Members of the Hutterian Brethren community argued that this infringed their freedom of religion and right to equality, as they believed that having their picture taken violated the Second Commandment. The Majority of the SCC, whose decision was written by McLachlin C.J., found that the case turned on “whether the deleterious effects are out of proportion to the public good achieved by the infringing measure.” They concluded that the impact on the Hutterites’ freedom of religion was proportionate in light of the province’s goal of minimizing the risk of fraud.

Marcus Moore notes that the minimal impairment step has been lauded “as the ‘central element’ of the test, the ‘heart and soul of s. 1 justification’ in the courts.” However, he explains that the two steps – minimal impairment and balancing of effects (which he refers to as proportionality of effects) – have often been conflated, leading to considerations which should have been dealt with under the last step being addressed, instead, under minimal impairment.

---

251 *Hutterian Brethren*, *supra* note 244.
252 *Ibid* at para 78.
253 *Ibid* at para 103. However, it should be noted that there were three dissenting justices who each wrote their own opinion, concluding the opposite.
255 Also see *Hutterian Brethren*, *supra* note 244 at para 76: This concern was addressed by the Majority decision, written by McLachlin C.J. They noted that conflating the two steps of the test can lead to an improper reading down of the government’s objective under minimal impairment as opposed to weighing the effects of the rights infringement.
Moore argues that this is now changing following Hutterian Brethren,256 noted above, and R. v. K.R.J., a 2016 SCC decision.257 These cases, he argues, moves the focus from minimal impairment to balancing of effects as the key factor in the analysis.258 The significance of this change in connection to the Doré/Loyola framework will be discussed below.

4.2.2 Accommodation

Turning to reasonable accommodation, it is a “duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public”259 and extends to the point of undue hardship.260 As former SCC Justice Ian Binnie noted, speaking extrajudicially, reasonable accommodation has been a critical component of our public policy since at least the seventeenth century when “major communities…were thrown together to form Canada.”261 Indeed, it is a key component of minority rights,262 and as noted in Chapter Three, the Secession Reference found that the protection of minorities is an unwritten constitutional principle in this country. While the case law on reasonable accommodation largely developed in the context of provincial human rights legislation,263 accommodation has also arisen in noteworthy Charter cases, including Multani and R v. N.S., both of which will be discussed in further detail below.264

256 Hutterian Brethren, supra note 244.
257 R v KRI, 2016 SCC 31. This case considered the constitutionality of applying certain changes to the Criminal Code retrospectively.
258 Marcus Moore, supra note 254 at 143-144. Moore argues that the SCC in R. v. K.R.J. signaled a shift from minimal impairment to proportional effects as the central element of the Oakes test.
260 Multani, supra note 246 at para 53: “In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it.”
261 Ian Binnie, “Putting Reasonable Accommodation in Historical Perspective” (Lecture delivered at the CIAJ Conference, Quebec City, 25 September 2008) [Binnie] at 1 & 8.
262 Ibid at 5.
263 See Multani, supra note 246 at para 130.
264 Multani, supra note 246; R v NS, 2012 SCC 72 [R v NS].
Minimal impairment and reasonable accommodation are similar, as in either case, the reviewing court questions whether a less infringing option was reasonably available. Under both accommodation and the historic approach to minimal impairment, this question is often determinative. In other words, if an option was available which would have impaired the right less, courts will generally hold that the approach taken was not appropriate. However, while minimal impairment and accommodation are similar, they exist under two different frameworks. I now turn to consider how these frameworks relate to each other.

4.2.3 The Relationship between Minimal Impairment and Accommodation

As noted above, courts consider minimal impairment when reviewing whether a Charter infringement is justified. On the other hand, reasonable accommodation is a duty, and in the context of administrative law, I argue that this duty should rest on the administrator. However, accommodation also plays a role on judicial review, where reviewing courts determine whether an

A significant amount of discussion on accommodation has arisen out of Quebec. As Binnie noted, accommodation of minorities is highly controversial in that province (see Binnie, supra note 261 at 1). Another important case arising out of Quebec is Syndicat Northcrest v Amselem, 2004 SCC 47 [Amselem]. However, Amselem was decided under the Charter of Human Rights and Freedoms, RSQ, c C-12 [Québec Charter]. Therefore, it is not as useful for our purposes, but I will outline it briefly below.

In Amselem, the appellants were Orthodox Jews who owned units in building complexes in Montreal. The appellants set up succahs on their balconies during the Jewish festival of Succot. The respondent claimed the succahs violated the by-laws of the co-ownership and offered for the appellants to set up a communal succah, which was turned down. The respondent filed an application for a permanent injunction to prohibit the appellants from setting up individual succahs which was granted by the Quebec Superior Court and the Quebec Court of Appeal. This was overturned by the Majority of the SCC, who held that the appellants’ freedom of religion was infringed and the offer of a communal succah did not remedy this infringement (at para 81). Justice Bastarache, writing for himself and LeBel and Deschamps JJ. noted that reconciling rights under s. 9.1 of the Quebec Charter is different from the duty to accommodate under s. 10 (at para 154). Nevertheless, he found the respondent’s offer of accommodation relevant in assessing the reconciliation of rights (at paras 176-177). He ultimately determined that there was no violation of freedom of religion (at para 181). Similarly, Binnie J., writing his own dissenting opinion, noted that while s. 9.1 does not impose a duty to accommodate, “the appellants have not demonstrated that their insistence on a personal succah and their rejection of the accommodation of a group succah show proper regard for the legal rights of others within the protection of s. 9.1” (at paras 197 & 208).
administrative decision-maker has made an acceptable attempt to reasonably accommodate. I return to discuss this distinction in more detail below.

The relationship between minimal impairment and accommodation was addressed by the SCC in both Multani and Hutterian Brethren, leading to a split in judicial opinion. On one side of the debate, the Minority opinion in Multani, written by Abella and Deschamps J.J., indicated that while the concepts of accommodation and minimal impairment have similarities, accommodation belongs in the realm of administrative law and human rights, while minimal impairment exists within a constitutional analysis. They provided several reasons for this. First, the processes involved are different and may lead to a consideration of different values. Accommodation looks at the specific circumstances of the parties and allows them to “reconcile their positions and find common ground tailored to their own needs”, whereas minimal impairment is concerned with societal interests, not the circumstances of individual parties. In other words: “An administrative law analysis is microcosmic, whereas a constitutional law analysis is generally macrocosmic.” Related to this, the evidence used in the two analyses may differ. Under minimal impairment, the evidence includes social facts or consequences of applying the law at issue, whereas under accommodation, the evidence concerns the one particular case at issue.

On the other side of the debate, the Majority decision in Hutterian Brethren, written by McLachlin C.J., drew a more nuanced line between accommodation and minimal impairment. On one hand, McLachlin C.J. agreed that “reasonable accommodation is not an appropriate substitute

---

265 Multani, supra note 246 at paras 129-132.
266 Ibid at para 131.
267 Ibid at para 132.
268 Ibid at para 132.
269 Ibid at para 133.
for a proper s. 1 analysis"²²⁰ because of the different interests at stake.²²¹ However, rather than limiting minimal impairment to constitutional challenges, McLachlin C.J. maintained, in obiter, that where a government action or practice impacts a particular individual, minimal impairment still applies but noted that the duty to accommodate is relevant to understanding the burden imposed by this step of the analysis.²²²

In summary, Justices Abella and Deschamps J.J. in Multani, would keep minimal impairment and accommodation separate – the former to play a role in constitutional law alone, and the latter to apply in both human rights and administrative law. However, McLachlin C.J.’s Majority opinion in Hutterian Brethren inferred that while the duty to accommodate is helpful in administrative cases which pertain to a particular individual, minimal impairment applies in both constitutional and administrative law. This difference carried forward into Abella J. and McLachlin C.J.’s approaches to the Doré/Loyola framework, as will be discussed at length below.

4.3  The Doré/Loyola framework

4.3.1  The Abella and McLachlin Approaches

In this section, I refer to the “Abella Approach” and the “McLachlin Approach” to the Doré/Loyola framework. While other SCC justices participated in writing several of the decisions, it is Abella J. and McLachlin C.J. who primarily feature within this debate, elaborating on the

²²⁰ Hutterian Brethren, supra note 244 at para 71.
²²¹ Ibid at para 69: As with the Minority in Multani, the Majority in Hutterian Brethren were concerned with the broad, societal interests in a section 1 analysis and the unique circumstances of individuals in the case of reasonable accommodation.
²²² Ibid at para 67. In making this finding, the Majority in Hutterian Brethren relied on the Majority opinion in Multani, supra note 246 at para 53: “[T]he analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar.”
disagreement as noted above in *Multani* and *Hutterian Brethren*. Table 1 briefly summarizes the salient points from the relevant cases for our discussion, and Table 2 outlines the Abella and McLachlin Approaches.

### Table 1

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Majority</th>
<th>Minority</th>
</tr>
</thead>
</table>
| *Multani*          | 2006 | - Charron J. (McLachlin C.J. and Bastarache, Binnie and Fish JJ. concurring): The duty to accommodate is a corollary of minimal impairment and is a helpful analogy to explain the burden resulting from the minimal impairment test | - Concurring: Deschamps and Abella JJ: While accommodation and minimal impairment have similarities, they belong to two different analytical categories: accommodation belongs in the realm of administrative law and human rights, while minimal impairment exists within a constitutional analysis  
-Concurring: LeBel J. |
| *Hutterian Brethren* | 2009 | - McLachlin C.J. (Binnie, Deschamps and Rothstein JJ. concurring): Reasonable accommodation is not a substitute for a proper s. 1 analysis: there is a very different relationship between a legislature and the people subject to its laws and between parties, such as an employer and employee. The duty to accommodate may, however, be helpful in explaining the burden resulting from minimal impairment with respect to a government action or administrative practice which affects a particular individual | - Dissenting: Abella J.  
- Dissenting: LeBel J.  
- Dissenting: Fish J. |
<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Decision</th>
<th>Concurring</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doré</td>
<td>2012</td>
<td>Abella J. (McLachlin C.J. and Binnie, LeBel, Fish, Rothstein and Cromwell JJ. concurring):</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>To determine whether administrative decision-makers exercised their discretion in accordance with Charter protections, an administrative law approach should be used, not a s. 1 Oakes analysis.</td>
<td></td>
</tr>
<tr>
<td>Loyola</td>
<td>2015</td>
<td>Abella J. (LeBel, Cromwell, and Karakatsanis JJ. concurring): Used the Abella Approach to the framework (outlined in Table “B”); Proportionate balancing requires Charter protections to be affected as little as reasonably possible in light of the state’s particular objectives</td>
<td>Concurring: McLachlin C.J. and Moldaver J. (Rothstein J. concurring): Two issues: (1) Whether a right was infringed by the decision (2) Whether the decision is justified by section 1. The essential question is whether decision limits freedom more than reasonably necessary to achieve objective; burden of proof on the state</td>
</tr>
<tr>
<td>LSBC v. TWU</td>
<td>2018</td>
<td>Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ.: Used the Abella Approach to the framework (outlined in Table “B”)</td>
<td>Concurring: McLachlin C.J.: The Doré/Loyola framework needs clarification: used the McLachlin Approach to the framework (outlined in Table “B”). Minimal impairment in this context is whether an alternative less-infringing decision was possible. Onus is on the state actor. Concurring: Rowe J. Dissenting: Côté and Brown JJ.</td>
</tr>
</tbody>
</table>
Table 2

<table>
<thead>
<tr>
<th>The “Abella Approach”</th>
<th>The “McLachlin Approach”</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Whether the administrative decision limits <em>Charter</em> protections; and</td>
<td></td>
</tr>
<tr>
<td>2) if yes, whether the impact on the <em>Charter</em> protection is proportionate in light of the statutory objectives.</td>
<td></td>
</tr>
<tr>
<td>1) Whether the administrative decision limits a <em>Charter</em> right; and</td>
<td></td>
</tr>
<tr>
<td>2) Whether the limitation of the right is proportionate in light of the state’s objective, and therefore justified as a reasonable measure in a free and democratic society under s. 1 of the <em>Charter</em>. Onus of proof on the state actor.</td>
<td></td>
</tr>
</tbody>
</table>

From the foregoing, three important differences can be noted between the Abella and McLachlin Approaches. First, the McLachlin Approach uses the language of *Charter* rights, as opposed to protections (which includes values). Second, the McLachlin Approach places the onus of proof on the state actor. And finally, while the McLachlin Approach does not utilize the *Oakes* test in its entirety, it views section 1 of the *Charter* as continuing to play a fundamental role in the analysis. It is this latter difference which echoes the disagreement between Abella J. in *Multani* and McLachlin C.J. in *Hutterian Brethren*, where McLachlin C.J. viewed section 1 as important within administrative law, whereas Abella J. argued it should be relegated to constitutional law.

---

273 *LSBC v TWU*, supra note 1 at para 58.
274 *Ibid* at paras 112 & 117.
275 *Ibid* at para 58.
276 The disagreement concerning *Charter* values and onus of proof is discussed in Chapter Two.
277 An interesting debate, which is outside the scope of this paper, is the extent to which the SCC addresses modified or partial, as opposed to full or strict, section 1 analyses in the context of the *Doré/Loyola* framework. See Kong, *supra* note 64 at 507-508.
However, missing from both the Abella and McLachlin Approaches is the discussion on accommodation which existed in Multani and Hutterian Brethren. Indeed, in justifying the creation of the Doré/Loyola framework, Abella J. reiterated similar concerns to those she had outlined in Multani, stating that administrative decisions do not fit within a section 1 analysis:

> When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts...When a particular ‘law’ is being assessed for Charter compliance, on the other hand, we are dealing with principles of general application.  

While in Multani, Abella J. used these concerns to argue for accommodation in the realm of administrative law, she did not discuss this accommodation in Doré, but instead, introduced a new term – proportionate balance.

Similarly, while McLachlin J. in Hutterian Brethren noted that accommodation is relevant in administrative decisions affecting a particular individual, she also did not discuss accommodation following the creation of the Doré/Loyola framework. Given the centrality of accommodation in the discussion in both of Multani and Hutterian Brethren, its absence in either the McLachlin or Abella Approaches to the Doré/Loyola framework is notable. I will return to discuss accommodation in administrative law further below.

---

278 Doré, supra note 7 at para 36. However, see Kong, supra note 64 at 507 where he argues that administrative decisions implicating groups, as opposed to particular individuals, arguably invoke similar considerations to statutes affecting broader society.

279 See Doré, supra note 7 at para 36 and Mullan, supra note 91. The SCC in Doré used academic commentary, including David Mullan, to argue that a new approach to the standard of review was needed in administrative law as opposed to the one used in Multani. However, see Kong, supra note 64 at 516 where Kong points out that the SCC “presented a false dichotomy” and did not engage in a careful analysis of Mullan’s reasoning. He concludes that when the SCC in Doré “engaged academic debates, it did so with insufficient rigour and with a lack of attention to the arguments of the authorities it invoked.” Nevertheless, while fascinating, this debate is outside the scope of this chapter, as neither Mullan’s article, nor the Doré decision, addressed issues with Multani’s use of accommodation.

280 Hutterian Brethren, supra note 244 at para 67.
4.3.2 A Proportionate Balance

While the Abella Approach views the Doré/Loyola framework as separate from a section 1 analysis, it nevertheless bears many similarities. In order to be a proportionate balance, “the Charter protection must be ‘affected as little as reasonably possible’ in light of the applicable statutory objectives”.

In Loyola, Abella J. held that this standard is conceptually similar to the last two steps of the Oakes test:

A Doré proportionality analysis finds analytical harmony with the final stages of the Oakes framework used to assess the reasonableness of a limit on a Charter right under s. 1: minimal impairment and balancing. Both R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, and Doré require that Charter protections are affected as little as reasonably possible in light of the state’s particular objectives.

More specifically, the phrase affected as little as reasonably possible mirrors minimal impairment, and the balancing of the Charter protection with the statutory objective echoes the balancing of effects under the Oakes test.

However, while the Doré/Loyola framework purports to search for less-infringing options, it evidences a similar trend to the one previously addressed with the Oakes test – a preference towards balancing. As noted above, Moore argues that the SCC is leaning towards balancing as opposed to minimal impairment under the Oakes test. Similarly, as will be argued below, the balancing component of the Doré/Loyola framework does the heavy lifting in the Abella

---

281 For a helpful comparison between the Oakes and Doré frameworks, see Liston, supra note 3 at 222-224.
282 LSBC v TWU, supra note 1 at para 80.
283 Loyola, supra note 18 at para 40.
284 Also see LSBC v TWU, supra note 1 at para 81 where the Majority further explained that while the decision-maker does not have to choose the option which limits the Charter protection the least, “if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes”. Also see Hutterian Brethren, supra note 244 at para 194 where LeBel J. (in dissent, but not on this point) stated that, under the minimal impairment analysis, the question is “whether the right was infringed ‘as little as is reasonably possible’, within a range of reasonable options”.
285 But see LSBC v TWU, supra note 1 at para 305 where the Dissent criticizes this phrasing in the Doré/Loyola framework, as they contend it gives the statutory objective a “trump card”, contrary to sections 52 and 1 of the Charter.
Approach. Further to this, while the McLachlin Approach initially in *Loyola* focused on searching for less-infringing options, it also turned towards balancing in *LSBC v. TWU*. While the implications of this in constitutional litigation is outside the scope of this paper, I address the significance of it in administrative law below.

The first concern with a balancing process is the risk of subjectivity. As Matthew Harrington argues: “[W]hile many judges today describe the definitional and balancing processes in a way that gives the impression of neutral lawmaking, the reality is that the entire exercise is rather instrumentalist in nature and gives free reign to judges to advance their own policy preferences.”\(^{286}\) Marcus Moore, on the other hand, presents the contrasting argument that subjective value judgments are inevitable, and a balancing analysis simply brings this to the forefront, making the process more transparent.\(^{287}\) However, as this debate is beyond the scope of this chapter, and I previously addressed risks of subjectivity in Chapter Two, I will proceed to the next concern.

Focusing on balancing in administrative law creates a higher risk of polarized outcomes. The state actor can simply choose whether to uphold its statutory objective, on one hand, or the infringed *Charter* protection on the other, without considering less-infringing alternatives. Consequently, instead of statutory objectives taking precedence over rights only when reasonably necessary, rights can be subordinated even when other less-infringing measures were possible, devaluing the *Charter*. This risk is further heightened under the Abella Approach, as there is a lack of clear onus on either of the parties. Thus, even if a reviewing court turns its mind to whether less-infringing options existed, *the state actor does not bear the burden of justifying its chosen*


\(^{287}\) Marcus Moore, *supra* note 254 at 158-165.
approach. This provides little to no incentive for the state actor to actively seek out less-infringing options.

This risk can be seen in *Loyola*. As mentioned in Chapter Two, the facts of this case concerned a private, English-speaking Catholic high school for boys in Quebec.\(^{288}\) The Quebec government created a secular study of religion and ethics, called Ethics and Religious Culture (“ERC”) Program, and made it mandatory for both public and private schools.\(^{289}\) Loyola requested an exemption from teaching the ERC Program, which was denied. Loyola then sent a follow-up request seeking to demonstrate how its proposed alternate program met the ERC Program but was to be taught from a Catholic perspective. This was also denied.\(^{290}\)

Justice Abella wrote the SCC Majority decision, utilizing the framework she had created in *Doré*.\(^{291}\) While she noted that the Charter protection was to be “affected as little as reasonably possible in light of the state’s particular objectives”,\(^{292}\) she did not actively consider whether less-infringing options were possible and ultimately made the decision based on balancing the Charter protection and the statutory objective. The Majority made two conclusions: a) preventing Loyola from teaching Catholicism from its own perspective seriously interfered with the values underlying religious freedom and did little to further the statutory objectives; but b) Loyola must teach other religions and their ethical beliefs as objectively as possible.\(^{293}\) In other words, in terms of teaching Catholicism, freedom of religion trumped the statutory objective, but with respect to teaching other belief systems, the statutory objective was more important than Loyola’s freedom of religion. There was no exploration as to whether both could be maintained.

---

\(^{288}\) *Loyola*, supra note 18 at para 7.
\(^{289}\) *Ibid* at para 11.
\(^{290}\) *Ibid* at paras 26-28.
\(^{291}\) *Ibid* at para 39.
\(^{292}\) *Ibid* at para 40.
\(^{293}\) *Ibid* at para 80.
On the other hand, the McLachlin Approach, as used by the Minority, actively considered whether the decision was affected as little as reasonably possible by looking at whether less-infringing options were available. As the McLachlin Approach incorporates a modified section 1 analysis, they held that the decision was not minimally impairing, and developed a list of stipulations which could have better protected Loyola’s freedom of religion. In so doing, they found a way that would have upheld both the implicated Charter right and the statutory objective without resorting to prioritizing one over the other.

While the McLachlin Approach as used in Loyola placed significant weight on the affected as little as reasonably possible component, McLachlin J. shifted her approach in LSBC v. TWU to favour balancing. In Loyola, the Minority wrote that the “essential question” was whether the administrative decision limited the Charter right no more than was reasonably necessary. On the other hand, in LSBC v. TWU, McLachlin C.J. held that the “ultimate question” was whether the administrative decision “balances the negative effects on the right against the benefits derived from the decision in a proportionate way.” In other words, the McLachlin Approach in LSBC v. TWU presents the same failing as the Abella Approach – they both concentrate on balancing as opposed to looking for less-infringing options. In so doing, in LSBC v. TWU, McLachlin J. prioritized the statutory objective over TWU’s freedom of religion and did not explore whether both could be upheld. In what follows below, I argue that the best way to minimize this risk of polarized outcomes is to return to accommodation.

294 The Minority decision was written by McLachlin C.J. and Moldaver J., with Rothstein J. concurring.
295 Loyola, supra note 18 at paras 88 & 146.
296 Ibid at para 88.
297 Ibid at paras 151 & 162.
298 Ibid at para 114.
299 LSBC v TWU, supra note 1 at para 119. Also see para 114 where McLachlin C.J. outlined that minimal impairment is easily met in cases with only two possible outcomes.
4.4 **Accommodation in Administrative Law**

In order to preserve the promises of the *Charter* within administrative justice, we need to return to the language of accommodation. This is because accommodation allows for flexibility and is the appropriate way in which to deal with the conundrum of conflicting rights. Further, accommodating rights is dependent on dialogue, and administrative justice is conducive to facilitating this dialogue. Finally, accommodation enables administrative decision-makers to deploy their expertise to come up with more nuanced, minimally impairing solutions.

#### 4.4.1 Flexibility

Working from the reasons expressed by both the Minority in *Multani* and the Majority in *Hutterian Brethren*, as previously discussed, administrative law is a unique regime which impacts the circumstances of particular individuals or groups, as opposed to society at large. Consequently, any framework purporting to address *Charter* issues within this area of the law needs to be flexible, as it must operate within many varied factual scenarios. Accommodation brings this flexibility to the table because, as noted by McLachlin C.J. in *Hutterian Brethren*, accommodation enables outcomes to be tailored to the claimant’s unique needs.

*Multani* is a leading example of this. As previously mentioned, prior to litigation, Multani and his school had agreed upon a list of stipulations for wearing the kirpan to maintain the security interests at stake. Another student with differing views may have arrived at a different list of

---

300 See: Kong, *supra* note 64 at 508. As noted in footnote 278, Kong argues that administrative decisions implicating groups, as opposed to individuals, arguably invoke similar considerations to statutes affecting broader society.

301 *Hutterian Brethren, supra* note 244 at para 69.

302 See *Multani, supra* note 246 at paras 8 & 82: As noted in footnote 247, by the time of the SCC decision, the student was no longer attending the school at issue, and the Majority declared the decision prohibiting him from wearing his kirpan to be null. However, it appears that the accommodation agreed upon by the student and the school would have satisfied the Court.
restrictions, but this particular list was acceptable to this particular student. Similarly, while they did not use the language of accommodation, the Minority in *Loyola* developed a list of stipulations to accommodate Loyola’s freedom of religion in a manner resembling *Multani*. Once again, a different claimant could have resulted in a different set of restrictions, as the outcome could be custom-made to fit particular circumstances.

4.4.2 *Conflicting Rights*

Another reason accommodation is well-suited to administrative law is because there are many apparent conflicts of rights within the administrative justice system. Administrative law frequently implicates the *Charter* rights of multiple private actors in areas such as human rights, labour law, and tenancy, amongst many others.  It is therefore inevitable that, at times, the rights of these private actors will clash. However, as argued in Chapter Two, it is the decision-maker’s conflicting duties towards these *Charter* rights which are at issue. While the *Doré/Loyola* framework is wrong to pit *Charter* protections against each other and require the state actor to choose between them, there nevertheless needs to be a way for the state actor to make an appropriate determination given its conflicting duties. Outside of the administrative law context, accommodation is the SCC’s favoured approach in determining cases of conflicting rights. It therefore would be an appropriate method to incorporate into instances where rights appear to clash in the administrative justice system as well and would allow administrative law to benefit from prior jurisprudence on conflicting rights.

A leading case in this area is the 2012 SCC decision, *R v. N.S*. In that case, the complainant, alleging she had been sexually abused by her cousin and uncle, claimed her religious beliefs

---

303 Cottrill, *supra* note 193 at 94.
required her to wear a niqab while testifying. In response, the accused argued that the claimant’s freedom of religion clashed with principles of a fair trial, as they would not be able to see her face during testimony. In its decision, the Majority utilized accommodation through the Dagenais/Mentuck approach\(^\text{304}\) and stated: “[O]ur jurisprudence teaches that clashes between rights should be approached by reconciling the rights through accommodation if possible, and in the end, if a conflict cannot be avoided, by case-by-case balancing[.]”\(^\text{305}\) If a conflict can be resolved by accommodation, the Majority in \(R\ v.\ N.S.\) noted: “We find a way to go forward that satisfies each right and each party. Both rights are respected, and the conflict is averted.”\(^\text{306}\)

The salient point from \(R\ v.\ N.S.\) is that an attempt at accommodation is to take place prior to balancing conflicting rights. This is similar to both the Oakes test and the Doré/Loyola framework where balancing is the last consideration in the analysis. Consequently, it would not be onerous to adapt this approach to cases of conflicting rights in administrative law. Incorporating

\(^{304}\) The Dagenais/Mentuck approach arose from the following cases: Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 1994 CanLII 39 (SCC) [Dagenais]; \(R\ v\ Mentuck\) 2001 SCC 76 [Mentuck]. In Dagenais, the SCC set out the framework for identifying and resolving rights conflicts arising at common law, which was later refined in Mentuck. While both Dagenais and Mentuck were criminal cases involving publication bans, the Majority in \(R\ v.\ NS\) held that broader principles from these cases applied: See \(R\ v\ NS,\ supra\) note 262 at paras 7-9 & 30.

\(^{305}\) \(R\ v\ NS,\ supra\) note 264 at para 52. Also see: Frank Iacobucci, “‘Reconciling Rights’ the Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 SCLR (2d) 137 [Iacobucci] at 141: While reconciling harmonizes “seemingly contradictory things so as to render them compatible”, balancing, on the other hand, occurs when one interest is subordinated to another. Therefore, according to the approach in \(R\ v.\ N.S.\), rights should be read in harmony with each other where possible, and only when they cannot be, should one right be given preeminence over the other.

\(^{306}\) \(R\ v\ NS,\ supra\) note 264 at para 32. Ultimately, the Majority returned the case to the preliminary inquiry judge, stating that the parties should bring evidence as to whether possible options for accommodation existed (at para 13). In the inquiry which eventually took place, the complainant was required to remove her niqab, but the public was relegated to a separate room where the camera feed only showed the back of her head (see Alyshah Hasham, “Sex-assault case that led to Supreme Court niqab ruling ends abruptly” 17 July 2014, online: The Star <https://www.thestar.com/news/gta/2014/07/17/sexassault_case_that_led_to_supreme_court_niqab_ruling_ends_abruptly.html>).
accommodation would enable administrative law to benefit from jurisprudence on conflicting rights without reinventing the wheel, so to speak, with regards to the analytical framework. 307

While importing accommodation into administrative law is desirable in cases of apparent conflict, two cautionary points should be made. First, it is important that courts do not too readily assume a genuine conflict. Many cases with apparent clashes of rights can be resolved by either framing the case such that both rights are not implicated, 308 or delineating the rights in a way that avoids the conflict. 309 This is of primary importance in administrative law, where instead of only private actors at play, a state actor is making the decision at issue. 310 The state should not be in the position of using a Charter right to bolster its position unless there is actually a genuine rights conflict.

Second, proper accommodation of the infringed right may completely remove the apparent rights conflict. This can be seen, for example, in LeBel J.’s concurring opinion in Multani. While he noted that the section 7 security of the person rights of other students could have been implicated, he found that they were not. He wrote: “[w]rapped as it would be, the kirpan does not

307 Elsewhere, I have argued that review of administrative decisions involving conflicting rights should follow a modified approach to the framework as laid out in R v. N.S: Carmelle Dieleman, “Balancing or Reconciling Charter Rights: the Doré/Loyola Framework” (2019) [unpublished] at 13-14:
   a. Does the administrative decision infringe the complainant’s Charter right?
   b. Does the administrative decision prevent the infringement of another Charter right?
   c. Is there a way to accommodate both rights?
   d. If the rights cannot be accommodated, do the salutary effects of infringing the complainant’s Charter right outweigh the deleterious effects?

308 For an example of framing a case to avoid implicating two rights, see LSBC v TWU, supra note 1 at para 289: The Dissent drew a distinction between equal access to and equality within the legal profession on one hand, and a duty to ensure competent practice on the other. They found that the LSBC’s jurisdiction was limited to the latter and held that the LSBC had no jurisdiction to look at inequitable barriers to law school entry. In so doing, they were arguing that only freedom of religion, and not equality, was not implicated.

309 Harrington, supra note 286 at 308; also see TWU v BCCT, supra note 35 at para 29 where the Majority stated: “In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case.”

310 As noted in Chapter Two, even though the Doré/Loyola framework seeks to balance a statutory objective with an infringed Charter right, its wording allows Charter protections to be weighed on the side of the statutory objective.
According to LeBel J., proper accommodation of the Multani’s freedom of religion – i.e. allowing him to wear the kirpan if sewn within his clothing – removed any conflict with the section 7 rights of other students.

4.4.3 Dialogue

Accommodation relies on dialogue, and the diverse and flexible world of administrative justice is conducive to facilitating this dialogue. As the Minority in Multani noted:

The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs.312

Administrative law, unlike constitutional law, enables parties to sit down and participate in this dialogue. While an individual cannot dialogue with the legislature which passed an infringing law,313 students can dialogue with school boards, foster parents with Children’s Aid Societies, and universities with law societies.

311 Multani, supra note 246 at paras 147 & 153.
312 Ibid at para 131.
313 Although beyond the scope of this paper, dialogue is a critical component of civic republicanism, albeit in a different fashion than the dialogue for which I advocate in this chapter. In republicanism, individual freedom is linked to civic participation and the advancement of the common good (John Maynor, “Civic republicanism: social and political science”, online: Britannica <https://www.britannica.com/topic/civic-republicanism>). Consequently, unlike liberal thought, which sees rights as transcendent and pre-existing, republicanism views rights as the result of political agreement (Guy Aitchison, “Three Models of Republican Rights: Juridical, Parliamentary and Populist” (2017) 65:2 Political Studies 339 [Aitchison] at 342). As Frank Michelman argues, civic republicanism is “deeply…reconciliatory” and evidences “dialogic possibility” (Frank I Michelman, “The Supreme Court: 1985 Term – Foreward” (1986) 100:1 Harv L Rev 1 [Michelman] at 36). The question then becomes how such dialogue, leading to political agreement, should take place. This leads to a split in republican thought. As Guy Aitchison points out, juridical republicanism looks to the judiciary and other decision-makers to hold the majority in check (Aitchison, supra note 311 at 352). Theorists in this vein notably include Philip Pettit (Aitchison, supra note 311 at 344; also see Michelman, supra note 311 at 74 where Michelman contends that the judiciary plays a key role in pursuing “practical reason through normative dialogue”). Parliamentary republicans, on the other hand, including Richard Bellamy, believe our rights should primarily be formed by elected representatives, rather than by arbitrary court decisions (Aitchison, supra note 311 at 346). For his part, Aitchison ascribes to a populist approach, where citizens should not relinquish their “critical moral thought and judgement to lawyers, judges and political officials” (Aitchison, supra note 311 at 352). To engage with these concepts in a fulsome way, particularly in relation to the issues raised in Chapter Three concerning the Referendum, would be outside the limits of this paper, but is nonetheless a topic which hopefully others may delve into at a later time.
It is important to note, however, that this process of dialogue places additional responsibilities on the claimant. While the onus is on the party providing accommodation to show that it accommodated to the point of undue hardship, as former SCC Justice Ian Binnie noted, speaking extrajudicially, “reasonable accommodation is a two-way street.” Binnie referred to Central Okanagan School District No. 23 v. Renaud where the SCC stated: “To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation.” The Court noted that this does not mean that the complainant must “originate the solution”. Nevertheless, where the party providing accommodation (in that case, the employer) proposes a solution which would fulfill its duty to accommodate, the complainant has an obligation to accept the accommodation and facilitate the implementation of the proposal.

In addition to these duties, I would also add that the complainant should bear an overall duty to engage in good faith dialogue. The party providing accommodation can only accommodate in so far as it has all of the relevant considerations and input from the affected individual. Consequently, before a proposal for accommodation can be made, the complainant must exchange information with the party providing the accommodation. This will only be successful if the complainant engages in dialogue in good faith.

---

314 Stewart v Elk Valley Coal Corp, 2017 SCC 30 at para 23. This case addressed discrimination in the context of employment.
315 Binnie, supra note 261 at 15.
317 Ibid.
318 Ibid.
319 See: “A Manager’s Guide to Reasonable Accommodation” 13 June 2008, online: BC Public Service Agency <https://www2.gov.bc.ca/assets/gov/careers/for-hiring-managers/resources-for-hiring-managers/a_managers_guide_to_reasonable_accommodation_2016.pdf> at 6: In the employment law context, the BC Public Service Agency notes that the employee’s responsibilities, in addition to taking actions reasonably necessary to achieve accommodation, also include providing relevant information and facilitating and participating in the process in good faith.
Some might argue that a duty to engage in good faith dialogue places too high of a burden on the claimant. In response to this critique, it is important to note that the goal of dialogue is to arrive at a satisfactory outcome without resorting to litigation. Nevertheless, litigation is always an option if the parties cannot agree on what constitutes reasonable accommodation in a given situation. In such cases, the burden of proof continues to lie with the party providing accommodation. That party, and not the complainant, will have to satisfy the reviewing court that the accommodation provided to the claimant was reasonable, or if no accommodation was provided, that this decision was justified.

Another critique of a duty to engage in good faith dialogue is that it results in compromise. Specifically, in the context of religion, compromise is often seen as antithetical. As Barry Bussey notes, “Religious conviction, therefore, is obstinate; it does not lend itself to political compromise.” However, in response to this critique, accommodation should not be seen as compromise – it is neither both parties acquiescing and meeting in the middle, nor is it a “magic bullet” to make everyone happy with the outcome. Dialogue leading to accommodation should result in something new and creative – a way in which the implicated right can be upheld while simultaneously maintaining the interests on the other side.

Related to this, David Bohm describes dialogue as a “stream of meaning” flowing among and through people, enabling “shared meaning” to develop. Bohm contrasts this with discussion, where ideas are bounced back and forth. In discussion, the goal to win the game. The point of

320 Bussey, supra note 147 at 383. But see: p 383 at footnote 79 where Bussey notes that there are times when a compromise “of sorts” is acceptable. He gives the example of pacifist religious communities agreeing to conscription during World War II, provided their members did not have to bear arms.
321 As I have argued elsewhere, this is part of the dialogic approach to conflict resolution: see Carmelle Dieleman, “Creative Conflict Engagement in the LSBC v. TWU Decision” (2019) [unpublished] at 11-12 [Dieleman, “Creative Conflict Engagement”].
dialogue, on the other hand, is for everyone to win.\textsuperscript{322} Bohm contends that dialogue allows people to “\textit{think together.}”\textsuperscript{323} He writes:

\begin{quote}
It’s not like a mob where the collective mind takes over – not at all. It is something \textit{between} the individual and the collective. It can move between them. It’s a harmony of the individual and the collective, in which the \textit{whole} constantly moves toward coherence. So there is both a collective mind and an individual mind, and like a stream, the flow moves between them. The opinions, therefore, don’t matter so much. Eventually we may be somewhere between all these opinions, and we start to move beyond them in another direction – a tangential direction – into something new and \textit{creative}.\textsuperscript{324}
\end{quote}

Accommodation through dialogue, therefore, can lead to outcomes which simultaneously meet the needs of individual claimants while also upholding statutory objectives.

In the cases previously addressed, the applicants recognized, at least to some extent, that they held responsibilities in relation to their accommodation requests. In \textit{Multani}, the student agreed to keep his \textit{kirpan} sewn within his clothing.\textsuperscript{325} In \textit{Loyola}, the school agreed to teach about other religions objectively.\textsuperscript{326} In \textit{Baars}, a case which will be discussed below, the foster parents decided to help their foster children celebrate both Christmas and Easter, and when their beliefs interfered with the children’s celebration, they offered for the children to celebrate at another foster parents’ home or with their birth mother.\textsuperscript{327} All of these cases emphasize the importance of engaging with the state actor about accommodation and recognizing one’s own responsibilities in such context. The end result can lead to something beyond compromise – innovative options which accommodate the rights at issue while nonetheless maintaining statutory objectives.

\begin{flushright}
\begin{footnotesize}
\begin{enumerate}
\item[323] \textit{Ibid} at 7.
\item[324] \textit{Ibid} at 8.
\item[325] \textit{Multani, supra} note 246 at para 3.
\item[326] \textit{Loyola, supra} note 18 at para 31.
\item[327] \textit{Baars v Children’s Aid Society of Hamilton, 2018 ONSC 1487 [Baars]} at paras 194-199.
\end{enumerate}
\end{footnotesize}
\end{flushright}
4.4.4 Expertise

Accommodation enables decision-makers to utilize their particular expertise in order to craft more nuanced, minimally impairing solutions. As Danielle Pinard writes in relation to administrators, translated and quoted with approval in Doré: “Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms …”328 Options which may not be apparent to the judiciary, may be obvious, or at the very least, discernable, to a decision-maker who only works within that specific area of law.

For example, this expertise could have played an important role in the Ontario Superior Court (the “ONSC”) 2018 decision, Baars v. Children’s Aid Society of Hamilton (“Baars”).329 In that case, the Baars were foster parents who did not celebrate Christmas or Easter. While they sought to help their foster children celebrate these holidays, they nonetheless would not lie about the existence of Santa Claus or the Easter Bunny. Because of this refusal, the Children’s Aid Society of Hamilton (the “Society”) removed the children, closed the foster home, and hindered the Baars’ ability to adopt in the future.330

In its decision, the ONSC looked at whether the Society had accommodated the Baars and found that no attempt at accommodation had been made, even though several options appeared to have been available.331 First, the Baars had offered to let the children celebrate Easter with another foster family or to allow them to celebrate with their birth mother (as they successfully had done at Christmas).332 Second, even if the children could no longer remain with them, the Baars had also

---

329 Baars, supra note 327.
330 Ibid.
331 Ibid at para 200.
332 Ibid at paras 194-197.
asked to be able to foster either newborns or Christian children who did not believe in Santa or the Easter Bunny. The ONSC stated:

The Society has not explained why it was unreasonable to grant the Baars’ request. Not then and not before me. Despite advising the Baars to write their concerns in a letter, the Society did not even have the courtesy to respond to Frances’ letter. The Society’s actions to shut the foster home were entirely arbitrary and without justification.\textsuperscript{333}

While these suggestions for accommodation were made by the Baars, the Society had the expertise to craft these solutions on its own, or to come up with other more feasible options. The Society was in the best position to know, for example, whether there was another foster family who could have taken the children at Easter, or whether there were newborns the Baars could have fostered instead. These are not considerations a reviewing court would know, but are key relevant facts of which the administrator, in its particular role of expertise, should be aware. If reasonable accommodation was required of decision-makers, it would empower them to utilize this expertise to develop more minimally impairing solutions.

\section*{4.5 \textbf{How to Incorporate Accommodation}}

While I have made a case for returning to accommodation in administrative law, the next question is \textit{how} to implement these changes. As previously noted, accommodation exists within both the administrative and judicial spheres. At the administrative level, decision-makers should consider whether they can reasonably accommodate rights which are implicated in their decisions, necessitating dialogue between the parties. Specifically, in the context of conflicting statutory objectives and rights, administrators should be conscious of potential options which may meet the needs of individual claimants as well as upholding objectives.

\textsuperscript{333} \textit{Baars, supra} note 327 at para 199.
Turning to judicial review, one option to incorporate reasonable accommodation would be for the SCC to overhaul the *Doré/Loyola* framework, making accommodation part of the articulated analysis. While this is preferable, there is another option which lower courts could use within the current framework. Simply put, when considering whether the *Charter* protection was affected as little as reasonably possible, courts could ask whether the state actor attempted reasonable accommodation. With respect to this question, the state actor would bear the burden of demonstrating that it attempted reasonable accommodation.

The Minority in the 2017 SCC decision, *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, followed this approach.\(^\text{334}\) However, in that case, the attempts at accommodation did not result from a duty under administrative law but from the Minister’s duty to consult and accommodate under section 35 of the *Charter*.\(^\text{335}\) The issue surrounded a private corporation which sought to build a ski resort on Crown land. The Ktunaxa Nation argued that the approval given by the Minister of Forests, Lands and Natural Resource Operations violated their freedom of religion, as the construction of a ski resort would desecrate the land, destroying their spiritual connection with the Grizzly Bear Spirit. The Majority decision of the SCC, written by McLachlin C.J. and Rowe J., held that the Ktunaxa Nation’s freedom of religion was not infringed, as it fell outside the scope of section 2(a).\(^\text{336}\) On the other hand, the Minority opinion, written by Moldaver J., with Côté J. concurring, held that section 2(a) was infringed. In determining whether the Minister’s decision was justified, the Minority looked at the Minister’s efforts to accommodate. While the Minority ultimately concluded that the Minister’s

\(^{334}\) *Ktunaxa, supra* note 148 at para 146.

\(^{335}\) *Ibid* at para 147.

\(^{336}\) *Ibid* at para 72: “[T]he appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a).”

94
decision limiting freedom of religion was reasonable, the analysis on accommodation arguably provides a more solid basis upon which to reach that conclusion.

In *Baars*, addressed above, the ONSC also looked at accommodation as part of its analysis. In utilizing the *Doré/Loyola* framework to find a violation of freedom of religion and expression, the ONSC followed the Minority’s approach in *Loyola*, placing the onus on the state actor and actively considering whether the *Charter* rights were affected as little as reasonably possible. The trial judge held that there were several methods by which the Society could have accommodated the claimants, several of which were outlined above. Ultimately, the ONSC found that the Society failed to discharge its onus because the Society’s actions both limited the Baars’ *Charter* rights more than was reasonably necessary and did not further a statutory objective. As the trial judge stated: “There were ways of promoting the statutory objective of providing culturally sensitive care to the children that would have had a much less serious impact, if any, on the Baars’ rights to freedom of religion and expression.” Therefore, even though this case was decided within the confines of the *Doré/Loyola* framework, the ONSC avoided the pitfalls of a polarized outcome by considering accommodation.

As a counter example, a 2016 ONSC decision, *E.T. v. Hamilton-Wentworth District School Board* (“*E.T.*”), demonstrates the dangers of not including accommodation within the

---

337 *Ibid* at para 149: The Minority concluded that the Ktunaxa Nation’s position allowed for no middle ground, and the Minister only had two options: “approve the development or permit the Ktunaxa to veto the development”. They found that the latter would “significantly undermine, if not completely compromise” the Minister’s statutory mandate.

338 See: *Baars, supra* note 327 at para 122, and *Loyola, supra* note 18 at para 146.

339 *Baars, supra* note 327 at para 123. Given the ONSC’s finding that the Society was not acting in accordance with a statutory objective, this case did not ultimately involve a conflict between an objective and a *Charter* right. Thus, in *Baars*, the decision in favour of the claimants may have been easier to reach than in cases where the state actor is clearly furthering a statutory mandate. Nevertheless, *Baars* still provides a helpful template for incorporating accommodation within the *Doré/Loyola* framework.

analysis.  In that case, E.T., a member of the Greek Orthodox Church, sought an order that the Hamilton-Wentworth District School Board (the “Board”) accommodate him by informing him in advance when certain material would be taught and allowing him to withdraw his children when material went against his religious beliefs. In finding against E.T., the ONSC focused solely on balancing the Charter protections at stake, stating: “The Board prefers to support the values of inclusion and equality over individual religious accommodation, in this instance. In doing so, the Board has proportionally balanced the competing Charter protections.”

While the ONSC gave lip service to infringing freedom of religion as minimally as possible, the only accommodation examined by either the Board or the reviewing court was the accommodation requested by the applicant. As the trial judge stated:

Given that there are a variety of engaged Charter values, it is not possible to say that the accommodation requests by the applicant, which was calculated to protect his and his children’s freedom of religion, should trump the other values at play in the circumstances. The applicant has not established on a balance of probabilities that the administrative decision of the principal and the Board was unreasonable. [emphasis added]

While the applicant’s requests were found to be unreasonable, other options may have upheld the statutory objective while nonetheless meeting the specific concerns of this particular claimant. If accommodation formed part of the framework, the Board would have been required to show that it had explored other possibilities. Focusing on balancing the interests, instead of accommodating

---

342 ET ONSC, supra note 341 at para 97. See paras 65-66 for the accommodation E.T. had requested.
343 ET ONCA, supra note 341 at para 103.
344 ET ONSC, supra note 341 at para 104.
345 Ibid at paras 105-106: The trial judge outlined that the claimant did have alternative options: independent school or homeschooling. However, these options inappropriately place the burden of accommodation solely on the parent to remove his children from public school, with no requirement on the Board to attempt to accommodate.
the claimant’s freedom of religion, allowed the Board to ignore whether such options might have been found.\footnote{See \textit{ET ONCA}, supra note 341: On appeal, the ONCA, while unanimously rejecting E.T.’s appeal, nonetheless rendered a split decision. While Justice Sharpe agreed with the ONSC that the Board’s decision refusing the appellant’s request for accommodation was reasonable (at para 35), the Majority decision, written by Lauwers J., did not confirm the ONSC’s finding that a failure to accommodate was reasonable (at paras 98-99). Instead, the Majority accepted that the refusal to accommodate \textit{could} limit the appellant’s freedom of religion, but in this case, the appellant had not proven substantial interference with his freedom (at paras 93 & 97). The Majority went on to state (at para 98) that if there was evidence that the program “undermined a parent’s ability to transmit religious faith, together with a refusal to provide accommodation, the result might well be different.”\textsuperscript{346}}

Certainly, there may be times where reasonable accommodation is deemed impossible. In those instances, it will be up to the reviewing courts to determine if this was the appropriate outcome. Nevertheless, the Charter will be better preserved through a process of attempted accommodation than if the state actor prefers its statutory objective from the outset, as occurred in \textit{E.T}. The question then becomes how such an approach could have played out in \textit{LSBC v. TWU}.

4.6 \textbf{Accommodation in \textit{LSBC v. TWU}}

The prominent narrative in \textit{LSBC v. TWU} involved only polarized outcomes – the Benchers could either uphold TWU’s freedom of religion, on one hand, or their statutory objective on the other. No other alternative existed. While all of the justices at the SCC adhered to this narrative, McLachlin C.J. stated it expressly: “where the decision is a choice between only two options (for example, to accredit or not)” the question of “whether an alternative less-infringing decision was possible” is easily met.\footnote{\textit{LSBC v TWU}, supra note 1 at para 114.} In other words, there was no need for the Benchers, or the reviewing courts, to turn their minds to other possible outcomes, as there simply were none. However, following on the argument made above and further discussed below, this represented a false dichotomy.
On the surface, it may seem implausible that any other option, apart from simply accrediting or not accrediting TWU, existed. However, as with several of the cases previously addressed, alternative options often come to light when accommodation is considered. For example, in Multani, rather than simply allowing or disallowing the kirpan, the courts found that they could allow the kirpan with restrictions. Similarly, in Baars, according to the ONSC, the Society could have either allowed the foster children to remain with the Baars or allowed the foster home with restrictions. The outcomes were therefore not limited to either/or scenarios.

Importing this reasoning into LSBC v. TWU, the Benchers should have considered accommodation, including whether they could accredit TWU with restrictions. This avenue would have necessitated dialogue between the Benchers and TWU to determine what reasonable accommodation might have looked like. As outlined above, TWU would have held responsibilities in this process, including to take actions reasonably necessary to arrive at such accommodation. One potential accommodation which comes to mind would have been for TWU to remove the mandatory aspect of the Covenant. Indeed, shortly after the release of the SCC decision, TWU did exactly this. Another option would have been for the LSBC to develop

---

348 For a more fulsome discussion on dialogue within this context, see: Dieleman, “Creative Conflict Engagement”, supra note 321.

As this measure was ultimately reached following LSBC v. TWU, it could be argued that the LSBC’s administrative process was fixed through judicial review. However, the trouble is that this outcome did not capitalize on the expertise of the Benchers. It is unclear whether the removal of the mandatory aspect would actually be sufficient, or if the LSBC would require further changes in the future in order to approve TWU’s proposed law school. As outlined in Chapter Three, the administrative body is in the best position to understand the statutory scheme and relevant facts. If the administrator, with its expertise, does not bear the burden of attempting to find a reasonable accommodation, the best options for accommodating rights may be left on the table. Further, if the judiciary comes up with the accommodation, and it is not a workable accommodation for the administrative scheme, this will create additional burdens on the claimant. After proceeding through the various levels of judicial review and obtaining a decision, that claimant will still have to recommence the process with the administrative body to find a workable solution. Ultimately, it is the administrative decision-maker, in dialogue with the affected party, who needs to arrive at minimally impairing outcomes if the Charter is to be meaningful in administrative justice.
diversity and equity training which could have been incorporated into the Profession Legal and Development Course (“PLTC”) required by the LSBC for all law graduates prior to entry into membership. While these are only two suggestions, any number of possibilities could have been explored or combined to allow TWU to operate a law school while nonetheless maintaining the LSBC’s statutory objectives. Instead, however, the LSBC fell into the narrative of polarization and did not explore more creative possibilities. Further, the reviewing courts did not question whether the LSBC had attempted a reasonable accommodation. Consequently, TWU’s freedom of religion was subordinated to the statutory objective without exploration of whether less-infringing options were available.

4.7 Conclusion

In both constitutional and administrative law, the SCC appears to be leaning towards balancing as opposed to considering whether a less-infringing option was reasonably available. While the implications of this in constitutional law is not addressed in this paper, in administrative law, this creates a significant risk of polarized outcomes. It enables state actors to favour their statutory objective over the implicated Charter right without looking for ways to uphold both. In this way, Charter rights can be subordinated to statutory objectives even when less-infringing options were reasonably available.

In order to strengthen the Charter within administrative justice, we should return to the language of accommodation. Because of its need for flexibility and the frequency of conflicting rights, administrative law is well-suited to accommodation, as it is through accommodation that the particular circumstances of each case can best be addressed. Further, administrative justice enables parties to dialogue and allows state actors to exercise their expertise in order to develop
new and creative options which can simultaneously uphold both Charter rights and statutory objectives.

If this approach had been followed in LSBC v. TWU, a different outcome may have been reached. The Benchers and TWU could have dialogued about what reasonable accommodation might have looked like. The Benchers would have borne the duty of attempting to accommodate, and TWU would have held responsibilities in the dialogue process. In so doing, this case could have pointed to a better way forward, a way in which the Charter becomes “meaningful to ordinary people.” 350

350 Cooper, supra note 6 at para 70. See footnote 6 for further discussion on this reference.
Chapter 5: Conclusion

5.1 Findings and Recommendation

The purpose of the *Doré/Loyola* framework is to provide oversight to administrative decisions to ensure they do not run roughshod over the *Charter*. Regrettably, as demonstrated by *LSBC v. TWU*, the framework does not provide this necessary protection. Instead, as argued in Chapter Two, the framework creates the risk of administrative decision-makers prioritizing statutory objectives and undervaluing *Charter* protections. There are three reasons for this which form my main objections to the framework. First, the *Doré/Loyola* expands the scope of discretion available to both administrators and judges. Second, the framework incorrectly imagines a conflict of rights. Lastly, statutory objectives can too easily outweigh *Charter* rights. These failings are particularly troubling from the perspective of minority rights, as it leaves them vulnerable to the changing views of society. As argued in Chapter Three, this risk was heightened in *LSBC v. TWU* through the LSBC Referendum which required members to choose between the rights of two minority groups. This runs contrary to Canadian constitutional norms in which democracy and minority rights are to coexist symbiotically. In Chapter Four, I argued that in order to improve the *Doré/Loyola* framework, reasonable accommodation needs to be returned to the analysis. Instead of leaning towards balancing, administrative decision-makers should be encouraged to find creative options to accommodate *Charter* protections where possible. In this way, the promises of the *Charter*, including minority rights, will be better preserved in administrative justice.
5.2 Limitations of Research

I recognize that a number of critiques can be made of the methodologies I utilize throughout my thesis. Critics of doctrinal legal research argue that such research is too normative, too theoretical, not “scholarly,” and not grounded in the real world. My hope is that some of these concerns can be balanced by the inter-disciplinary, critical theory, and socio-legal elements I also incorporate. Nevertheless, I recognize that using other methodologies alongside doctrinalism does not satisfy all critics. For example, Panu Minkkinen argues that following a set methodology in critical legal studies can lead to “conformity of legal orthodoxy” similar to that which occurs in traditional legal research. Therefore, in holding to my belief that a strong doctrinal foundation is key to making a clear legal argument, I may be off-setting some of the validity of my critical legal arguments. Nonetheless, my methodology derives from my own viewpoints on the law, and I see doctrinalism as maintaining a vital place within legal research.

Certain limitations also exist in the political science studies I examine in Chapter Three. I make broad generalizations regarding the effects of direct democracy on all types of minorities, yet the studies undertaken in the United States primarily focus on LGBTQ rights, and the studies in Switzerland primarily look at the rights of religious minorities. Consequently, a gap exists in my research as to whether and how the majority treats certain minority groups better or worse than others. While I do address studies which refer to “in-group” and “out-group” minorities, one of these studies notes that this is an issue in need of further study.

---

353 Christmann & Danaci, supra note 205 at 156.
Another limitation in the political science research is potential location bias, as the studies I explore largely focus on California and Switzerland. While these two geographical regions engage in more direct democracy processes than other parts of the world, this does not address the potential for phenomena, such as negative effects on minority rights, to be localized and not conclusive of broad generalizations on direct democracy works in Canada. To respond to this, it is useful to point out that California and Switzerland have significant political and geographic differences, and yet the conclusion is the same regarding the negative effect on minority rights in both places. Further, in spite of these differences, Canada is similar in many ways to both California and Switzerland, as all three involve Western, post-Christian democracies. Additionally, the example of the BC Indigenous Treaty Referendum hopefully highlights that Canada is not immune from risks of discrimination against minorities in the context of direct democracy.

Lastly, my research is limited by the nature of administrative law itself, as it includes decision-makers across numerous facets of life. Many decisions go unreported, and only a few ever result in judicial review. It is therefore difficult to assess how reasonable accommodation might actually play out on the ground across the broad span of the administrative justice system. Nevertheless, it is my hope is that if reviewing courts provide better guidelines for the protection of minority rights through reasonable accommodation, this will have a “trickle-down” effect to administrative decision-makers at all levels through training and oversight bodies.354

354 For example, in BC, the BC Council of Administrative Tribunals provides training and support to administrative decision-makers across the province.
5.3 **Areas for Future Research**

In light of the limitation expressed above, one area of future research could explore accommodation *on the ground* in administrative law. This would require branching outside of traditional legal research into socio-legal research. Given the incredibly broad scope of such an undertaking, this research would need to be narrowed. For example, it could explore one decision-maker’s attempts at accommodation over a period of time, or it could compare different tribunals’ efforts to reasonably accommodate in similar cases. However, because of this narrowing, such research could not make broad generalizations. Nevertheless, it would form part of a body of research exploring the advantages and disadvantages of accommodation in administrative law.

Given the significant academic commentary critiquing the *Doré/Loyola* framework as outlined in Chapter Two, another area of future research is to compare how lower courts incorporate these critiques into their analyses. While I highlighted the ONSC’s approach in *Baars*, courts will certainly develop other ways to ameliorate concerns with the *Doré/Loyola* framework as time passes. Future research could therefore explore the advantages and disadvantages of these various approaches.

Lastly, should the SCC revise the *Doré/Loyola* framework in the future, another area of research would be to examine whether such changes actually improve the framework and satisfy the concerns with the current framework explored in this paper. Indeed, an overhaul by the SCC would be the best way in which to ensure consistency with the *Doré/Loyola* framework and therefore better protections for minority rights across Canada.
5.4 **Contributions to the Literature**

This thesis is an important contribution to emerging research on the intersection of the *Charter* and administrative justice. While the *Doré/Loyola* framework is a recent addition to the administrative law playing field, it has elicited a lot of academic commentary. My research builds on the work of numerous scholars before me who have critiqued the framework, as outlined in Chapter Two. However, there has been no unanimous agreement on how to improve the framework. Further to this, *LSBC v. TWU* added significant confusion to this area of law given the four separate judicial opinions, three of which were critical of the framework. As this decision was released within a year of writing this thesis, there has not yet been a significant body of academic work addressing it in depth. It is therefore an opportune time to discuss the limitations of the *Doré/Loyola* framework specifically as utilized in *LSBC v. TWU*. As this area will certainly garner significant academic commentary in the future, the suggestions provided in this paper will hopefully provide a base from which future research can be conducted.
5.5 **Looking Ahead**

Canada is a country with a strong heritage of minorities. As former Chief Justice McLachlin noted extrajudicially:

Canada has, from the beginning, been a place of diversity—a characteristic it maintains to the present day. It has managed that diversity by practices of mutual respect and cooperation. Diversity, Canada’s central challenge, has been approached, for the most part, from the stance of inclusion and accommodation. Our history is not a history of exclusion, subjugation, or exile, but a history of coming together in full recognition of our differences and working out those differences in the spirit of mutual respect. In a multicultural global world where other nations are struggling to deal with diversity, we have set a high mark.\(^{355}\)

The purpose of this thesis is to point to ways to maintain this high-water mark in the context of administrative justice. In seeking to protect the rights of minorities, not only do we become the welcoming country we purport to be, indeed, we protect the rights of us all.

\(^{355}\) Beverley McLachlin, “Canadian Constitutionalism and the Ethic of Inclusion and Accommodation” (2016) 6:3 UWO J Leg Stud 1 at 5.
Bibliography

LEGISLATION


*Charter of Human Rights and Freedoms*, RSQ, c C-12.

*Legal Profession Act*, RSBC 1996, c 255, s 3.

CASES

*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36.


*Baars v Children’s Aid Society of Hamilton*, 2018 ONSC 1487.


*Chandler v British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 300.


*Delta Air Lines Inc v Lukács*, 2018 SCC 2.

*Doré v Barreau du Québec*, 2012 SCC 12.


*ET v Hamilton-Wentworth District School Board*, 2016 ONSC 7313.

*ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893.


*Kane v Canada (Attorney General)*, 2011 FCA 1.

*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568.

*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.
McKitty v Hayani, 2018 ONSC 4015.
Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62.

R v KRJ, 2016 SCC 31.
R v NS, 2012 SCC 72.

Roncarelli v Duplessis, [1959] SCR 121, 16 DLR (2d) 689.
Stemijon Investments Ltd v Canada (Attorney General), 2011 FCA 299.
Stewart v Elk Valley Coal Corp, 2017 SCC 30.
Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1.
Syndicat Northcrest v Amselem, 2004 SCC 47.

Trinity Western University v British Columbia College of Teachers, 2001 SCC 31.
Trinity Western University v Nova Scotia Barristers’ Society, 2015 NSSC 25.
Trinity Western University v Law Society of British Columbia, 2015 BCSC 2326.
Trinity Western University v Law Society of British Columbia, 2016 BCCA 423.
Trinity Western University v Law Society of Upper Canada, 2018 SCC 33

SECONDARY SOURCES


“B.C. treaty referendum” (2 July 2004), online: *CBC News*  


Binnie, Ian. “Putting Reasonable Accommodation in Historical Perspective” (Lecture delivered at the CIAJ Conference, Quebec City, 25 September 2008).


“Bulling ahead with B.C.’s referendum” (5 April 2002), online: *The Globe and Mail*  


Iacobucci, Frank. “‘Reconciling Rights’ the Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 SCLR (2d) 137.


Liston, Mary. “Self and Democratic Governance in TWU” (Faculty Roundtable Discussion on Law Society of British Columbia v. Trinity Western University at Peter A. Allard School of Law, University of British Columbia, Vancouver, 27 September 2018) [unpublished].


