

Charter Right or Charter-Lite?: Administrative Discretion and the Charter

Audrey Macklin

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Macklin, Audrey. "Charter Right or Charter-Lite?: Administrative Discretion and the Charter." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 67. (2014).
<http://digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/18>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Charter Right or Charter-Lite? Administrative Discretion and the Charter

Audrey Macklin*

I. INTRODUCTION

The intersection of the Charter¹ and administrative discretion is one of the more difficult crossroads to navigate in public law. The rules of the road keep changing, pointing us in one direction (follow the *Oakes* test! says *Multani*²) then another (go toward administrative law! says *Doré*³). It must matter which route we take; otherwise, why would the Supreme Court change the rules? Yet, the Supreme Court in *Doré* also assures us that we will arrive at the same destination, whichever path we follow.

If *Doré*'s prediction is correct, then perhaps the stakes are more doctrinal and methodological than practical, and so mainly of concern to academics and commentators. But if it is wrong, then we need to figure out whether and how the two approaches might diverge, in order to evaluate what is at stake in choosing one method over another.

II. VALUING CHARTER RIGHTS

Other contributors to this volume assay the role of Charter values in adjudication.⁴ They helpfully distinguish between Charter values and

* Professor of Law at the University of Toronto and Chair in Human Rights Law. The author thanks Paul Daly and two anonymous reviewers for constructive comments and suggestions.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “the Charter”].

² *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.) [hereinafter “*Multani*”], citing *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

³ *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.) [hereinafter “*Doré*”].

⁴ Chris Brecht & Ewa Krajewska, “*Doré* — All That Glitters is Not Gold”; Matthew Horner, “Charter Values: The Uncanny Valley of Canadian Constitutionalism”; Lorne Sossin & Mark Friedman, “Charter Values and Administrative Justice”, in this volume.

Charter rights, valiantly working against the Supreme Court of Canada's own imprecision. Sometimes, Charter values refer to the ideals that underlie and animate Charter rights, such as autonomy, human dignity, respect for diversity, equality in a broad sense, democratic participation, *etc.* As such, Charter values *qua* values-underlying-Charter-rights are invoked as tools for interpreting the meaning and scope of Charter rights themselves. What counts as a Charter value and the meaning ascribed to a given Charter value may be contestable, but whatever Charter values are, they are not Charter rights.

Where a common law rule is challenged for non-compliance with the Charter, Charter value is more or less synonymous with Charter right. The use of the term "value" rather than "right" seems intended to signal the different context in which the Charter is deployed. Here, a Charter value means a Charter-right-impacted-by-a-common-law-rule. As Matthew Horner explains, section 32 confines the Charter's application to emanations of the legislature and executive (including the administration); it does not encompass judicially produced common law. Moreover, a common law does not qualify as a "limit prescribed by law", to the extent that "law" is understood as primary or subordinate legislation.

Subjecting common law rules — whether in private law, evidence, criminal law or procedure — to the discipline of Charter "values" retains the content of Charter rights, but adapts the method of constitutional analysis to the specificity of the common law. The concept of a Charter "value" was invoked in *R.W.D.S.U. v. Dolphin Delivery Ltd.*,⁵ and the associated analytical structure developed in *Hill v. Church of Scientology*.⁶ The purpose was to enable courts *qua* neutral arbiters to review and revise potential Charter-infringing common law rules applicable as between private litigants, without unfairly imposing the section 1 justificatory burden on private parties. These considerations are not apposite to evaluating Charter compliance of discretionary decisions by a government actor.

The precise definition of Charter values (or principles), and their relationship to Charter rights and freedoms in the context of discretion, remains unarticulated by the Court. The distinguishing feature of discretion is that it is not a fixed rule that must stand or fall according to

⁵ [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.).

⁶ [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.).

its constitutionality. Instead, a decision-maker may comply with the Charter simply by choosing to exercise discretion in a manner that does not violate it.

My concern lies primarily with the use of Charter values in the sphere of administrative discretion. As with the common law, administrative discretion poses challenges for the conventional analytical framework for Charter adjudication, and it is upon this fact that jurisprudential debates pivot. I argue that the Supreme Court of Canada's current response lacks necessary rigour, clarity and suppleness. I commend the Court's democratic impulse to "bring the Charter to the people" by enabling administrative decision-makers to consider the Charter in the course of executing their functions. But I worry that any salutary effect will be dissipated by an analytical method that purports to marry a simplified proportionality analysis with *Dunsmuir*'s deferential reasonableness review.⁷ In my view, this jurisprudential mashup respects neither the primacy nor priority of Charter rights and produces instead a Charter-lite approach to discretion.

At root is a fundamental tension between the aforementioned democratic impulse and the counter-majoritarian dimension of a rights instrument like the Charter. Judges are entrusted with adjudicating the Charter not only because of their expertise, but also because of their independence from government. While many Charter challenges engage questions of redistribution that resist easy classification in terms of individual versus state, many Charter challenges do conform to type. The judiciary's real and perceived detachment from the legislature and the executive matters to the legitimacy of rights adjudication when government actors are alleged to have breached the constitutional rights of individuals subject to their authority. Standard of review jurisprudence justifies deference by reference to democratic delegation and expertise. Independence plays no role in the assessment. Contemporary administrative law doctrine reserves no place for independence as a variable relevant to a determination of the need for judicial deference.

The leading Supreme Court of Canada judgments that actually consider the Charter in the context of discretion are few and well discussed. These include *Slaight Communications*,⁸ *Chamberlain*,⁹

⁷ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter "*Dunsmuir*"].

⁸ *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.).

⁹ *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

*Multani*¹⁰ and, of course, *Doré*.¹¹ There is also an interesting counter-jurisprudence of cases where the facts bring the Charter and discretion into contact, yet the Charter issue remains dormant in the judgment. These silences are also instructive about the complexity of the interaction.

Consider *Baker v. Canada*.¹² The appellant and interveners in that case argued that the negative assessment of a humanitarian and compassionate (“H & C”) application by a non-status migrant mother breached various Charter rights.¹³ One version of the section 7 argument was that the best interests of the child constituted a principle of fundamental justice, such that deportation of a parent violated section 7 if it was inimical to the best interests of the child. On behalf of the majority, L’Heureux-Dubé J. pre-empted a Charter analysis by remarking at the outset that because “the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various Charter issues raised by the appellant and the interveners who supported her position”.¹⁴ The Court then found that one of the officers displayed a reasonable apprehension of bias against Baker and that was sufficient to vitiate the decision.

There is, indeed, no need to resort to the Charter on matters of procedural fairness like bias where the statute does not oust a common law analysis. But the Court in *Baker* did not limit itself to the procedural fairness of the decision. It proceeded to consider substantive aspects of the decision and, specifically, whether the immigration officer abused his discretion. It extended the standard of review analysis to discretion, and found that a deferential stance of “reasonableness *simpliciter*” was appropriate to reviewing the officer’s exercise of H & C discretion. Deference did not insulate decisions entirely, however, because “discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter”.¹⁵ The Court does not explain whether a

¹⁰ *Multani, supra*, note 2.

¹¹ *Doré, supra*, note 3.

¹² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at para. 11 (S.C.C.) [hereinafter “*Baker*”].

¹³ See Sharyn Aiken & Sheena Scott, *Baker v. Canada (Minister of Citizenship and Immigration) and the Rights of Children* (2000) 15 J.L. & Soc. Pol’y 211.

¹⁴ *Baker, supra*, note 12, at para. 11.

¹⁵ *Id.*, at para. 56.

principle of the Charter is the same as, or different from, a Charter right. If different, it is not apparent how it is different. But since *Baker* did not consider it necessary to address the Charter at all, these questions did not demand attention.

The Court then found that best interests of children constituted a “central humanitarian and compassionate value in Canadian society”.¹⁶ The immigration statute’s valorization of family reunification, the content of the Ministerial Guidelines relating to children and family, and the *Convention on the Rights of the Child*’s explicit promotion of the “best interests of the child” each supported an interpretation of H & C that included attention to the best interests of the child. The Court did not address whether the best interests of the child was also a principle of the Charter.

The majority did emphasize that the best interests of children was one relevant factor among many, and not dispositive of outcome:

That is not to say that children’s best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children’s interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada’s humanitarian and compassionate tradition and the Minister’s guidelines, the decision will be unreasonable.¹⁷

Would this passage have looked the same had the best interests of the child been identified as a Charter principle? One could not answer the question without knowing more about whether a Charter principle is the same as a Charter right in content and in the mode of analysis that it triggers. The Court found that the officer had been “completely dismissive of the interests of Ms. Baker’s children”,¹⁸ but the judgment equivocates on whether the officer had no regard, or only insufficient regard, to the children’s interests. The question is now moot, because in its 2004 decision upholding corporal punishment of children, the Supreme Court ruled that the best interests of the child is not a principle of fundamental justice.¹⁹

¹⁶ *Id.*, at para. 67.

¹⁷ *Id.*, at para. 75.

¹⁸ *Id.*, at para. 65.

¹⁹ According to the Court “‘the best interests of the child’ is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice”: *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 12 (S.C.C.).

Vexing questions about the application of the Charter to discretion also lurk beneath the surface of the Supreme Court's 2002 *Suresh*²⁰ decision. The Court was confronted with a broad grant of ministerial discretion to deport non-citizens deemed to constitute threats to national security. The issue was whether the discretion authorized deportation to face a substantial risk of torture. The Supreme Court did not respond by cabining off deportation to torture as unconstitutional. Instead, it structured (or read down) the Minister's discretion to do so: deportation to torture violates section 7 unless exceptional circumstances exist. The residual discretion to deport to torture then turns on the Minister's opinion about whether exceptional circumstances connected to national security make the benefit to national security of deporting to torture exceed the harm to the person subject to torture. The Court leaves dangling the question of how this discretion should be reviewed by a court. In any individual case where the Minister proposes to exercise his or her discretion to deport a person to torture, how (if at all) does the Charter regulate that determination? Does a qualified prohibition on torture become a Charter "principle" or Charter "value" because it is nested in the exercise of individual discretion and, if so, what normative force does it exert? The Court coyly declines to explain when or why deporting a person to face torture might be a reasonable and/or constitutional exercise of discretion. Yet, the plausibility of such a scenario is crucial to legitimating the Court's choice to reject an absolute prohibition on deportation to torture. The poverty of the Court's analysis is made starker by the fact that both international law and jurisprudence under the European Court of Human Rights adopt the absolutist position.²¹

Suresh also clarifies or reverses (depending on one's perspective) an element of *Baker*. As noted above, one reading of the Court's judgment in *Baker* is that the decision-maker abused his discretion by failing to give sufficient weight to a relevant factor, namely, the best interests of the child. In *Suresh*, however, the Supreme Court insisted that courts should not engage in re-weighing the factors that a discretionary decision-maker considers, as long as the relevant factors were considered. In an

²⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.) [hereinafter "*Suresh*"].

²¹ The prohibition under international law is discussed in *Suresh, id.*, at paras. 59-75. The ECHR's prohibition was re-affirmed in *Saadi v. Italy*, no. 37201/06, judgment of February 28, 2008, online: <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276>>.

obscurely worded passage, the Court attempts to explain how the Court in *Baker* did not engage in re-weighing of evidence or relevant factors en route to the conclusion that the decision-maker exercised his discretion unreasonably.²² I return to this *infra*.

More recently, in *Divito v. Canada (Minister of Public Safety and Emergency Preparedness)*,²³ the Supreme Court of Canada upheld the Minister's statutory discretion to refuse to consent to the transfer of a Canadian prisoner to a Canadian penitentiary, but the constitutionality of the specific exercise of discretion on the facts of the case was neither argued nor decided.

III. DEVALUING CHARTER RIGHTS

Doré represents the Supreme Court of Canada's most recent pronouncement on the relationship between the Charter and administrative discretion. It seems reasonable to ask whether *Doré* can resolve the dilemmas lurking in *Baker*, *Suresh*, *Divito* and in various lower court decisions.

At issue in *Doré* was a decision by the Barreau du Québec's disciplinary body to reprimand a lawyer for writing an intemperate letter to a judge complaining about that judge's hostile and uncivil conduct in the courtroom. The lawyer objected that the decision breached his freedom of expression under section 2(b) of the Charter because it penalized him for exercising that freedom through writing a rude letter to a judge.

The disciplinary panel concluded that Mr. Doré violated art. 2.03 of the Code of Ethics of Advocates, which states that "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity". By the time the case reached the Supreme Court, Doré's argument was that the unconstitutionality did not reside in the provision of the Code of Ethics, but rather in its discretionary application to his specific case in a manner that breached his freedom of expression.

Something else happened to freedom of expression on its way to Ottawa. It departed the Quebec Court of Appeal as a Charter right, but arrived at the Supreme Court of Canada as a Charter value. At the outset

²² *Suresh, id.*; see also *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339 (S.C.C.).

²³ [2013] S.C.J. No. 47, [2013] 3 S.C.R. 157 (S.C.C.) [hereinafter "*Divito*"].

of the Court's analysis, Abella J. describes the appellant's position as a violation of "the expressive *rights* protected by s. 2(b) of the Charter".²⁴ Two paragraphs later, Abella J. reformulates the issue as follows: "It goes with saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter values*."²⁵ In the course of the judgment, she refers to the object of analysis as a Charter value over 30 times; the term "expressive rights" appears eight times in the judgment. Apart from when she quotes or paraphrases other authors or judgments, Abella J. eschews both "Charter right" and "freedom of expression" in relation to discretionary decisions.²⁶

While it would be pedantic to extract too much significance from semantic features of the judgment, the choice of language seems deliberate. Since freedom of expression is indisputably a protected Charter right, and sanctioning Doré for his letter undeniably imposed a limitation on his freedom of expression, it follows that the term "Charter value" rather than "Charter right" does not capture a difference in content. It must signify that freedom of expression is protected differently when it is limited by the exercise of discretion than when it is limited by statute or regulation. But what is the difference? Two possibilities spring to mind. First, the scope or depth of the protection afforded freedom of expression is diminished where it is limited through discretion. Alternatively, the quantity of protection does not vary, but the analytical framework by which the limitation is assessed is different where it arises in the context of discretion.

Doré purports to convey the latter meaning. Justice Abella explains that "while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality".²⁷ The goal, then, is that the exercise of Charter-infringing discretion is subject to a proportionality test that is tailored to the specificity and individualized nature of discretion. The essence of proportionality is that a decision should "[interfere] with the relevant *Charter* guarantee no

²⁴ *Doré, supra*, note 3, at para. 22 (emphasis added).

²⁵ *Id.*, at para. 24 (emphasis added).

²⁶ *Id.* Paragraph 6 is an exception, wherein Abella J. states that the relevant question is whether "the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right".

²⁷ *Doré, supra*, note 3, at para. 5.

more than is necessary given the statutory objectives”.²⁸ Later in the judgment, Abella J. provides the roadmap:

[The administrative decision-maker] balances the Charter values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. ...

Then the decision-maker should ask how the Charter value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.²⁹

This abridged proportionality analysis resembles the last step of the *Oakes* test insofar as it asks decision-makers to identify the competing interests (Charter values versus statutory objectives), and balance the two in determining how to exercise their discretion. One can speculate on whether this description is adequate to guide decision-makers, especially non-lawyers, about what they are expected to do.

The task of integrating the Charter into the exercise of discretion is distinct from determining the standard of review applicable on judicial review of the discretionary decision. *Dunsmuir* winnowed down the range of issues attracting a non-deferential correctness standard of review to constitutionality, jurisdictional conflict between tribunals, questions of “central importance to the legal system as a whole” and outside the expertise of the decision-maker, and “true questions of jurisdiction”.³⁰ *Dunsmuir*’s Supreme Court progeny have failed to identify a single question of central importance and expressed skepticism about the very existence of “true questions of jurisdiction”.³¹ *Doré* further shrinks the ambit of correctness review by preferring a deferential reasonableness standard for questions of constitutionality where they arise in the individual exercise of discretion.

According to the Court, deference to discretionary decisions that engage the Charter is warranted because of the administrative decision-maker’s relative expertise:

²⁸ *Id.*, at para. 7.

²⁹ *Id.*, at paras. 55-56.

³⁰ *Dunsmuir*, *supra*, note 7, at paras. 59, 60.

³¹ *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Assn.*, [2011] S.C.J. No. 61, [2011] 3 S.C.R. 654 (S.C.C.).

Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case.³²

At this point, the Court turns to explicating why deferring to an administrative actor's application of the proportionality-test-for-discretionary-decisions will not dilute the level of protection that the Charter provides to individuals. The key claim is that judicial deference in administrative law is not so different from elements of judicial deference built into the *Oakes* test. According to the Court:

... the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes".

... Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.³³

The Court in *Doré* insists that its administrative law method will not diminish Charter protections compared to its rival from *Multani*, the *Oakes* test. The cogency of this position depends on two related functional claims: first, that integrating a proportionality test into discretionary decisions will do the same work as the proportionality test for common law doctrine, namely, adapt the *Oakes* test to a different

³² *Doré*, *supra*, note 3, at para. 54 (emphasis in original). See also *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] S.C.J. No. 11, [2013] 1 S.C.R. 467 (S.C.C.). The Court engages in a bifurcated analysis whereby the interpretation of s. 14 of the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 and its constitutionality are evaluated on a correctness standard, and the findings of fact and the application of the hate speech provision to those facts attract a deferential "reasonableness" standard of review.

³³ *Doré*, *id.*, at paras. 56, 57.

juridical context without diluting its potency. Second, a deferential standard of reasonableness will not insulate Charter violations from judicial rectification any more than does the *Oakes* test.

The Court's abbreviated account of proportionality analysis for administrative actors amounts to instructing them to name the relevant Charter "value", identify the statutory objectives, and then balance them. Maybe three decades of section 1 analysis has persuaded the Court that the basic components of proportionality analysis are self-evident — perhaps even intuitive — so that if the Court keeps its instructions simple, any administrative decision-maker ought to be able to do it without the benefit of legal training or repeated exposure. The burgeoning legal scholarship and jurisprudence devoted to describing, defending, refining and critiquing proportionality might suggest undue optimism on that score.

Indeed, even before one arrives at the proportionality analysis, one must figure out if a Charter "value" is engaged. Sometimes, the answer seems easy, as it was in *Doré*, thereby obviating the need for the Supreme Court of Canada to consider how a decision-maker ought to approach those steps in the Charter analysis that precede *Oakes*' section 1 proportionality test. At other times, it may be more obscure. In *Divito*, judges of the Federal Court, the Court of Appeal and the Supreme Court of Canada disagreed on whether the discretion to withhold consent to a citizen prisoner's transfer to Canada engaged section 6(1) mobility rights. The majority of the Supreme Court rejected the argument that refusing a prisoner transfer *prima facie* infringed the appellant's Charter section 6 right to enter Canada, yet went on to rule that the individual discretionary decision to consent to a prisoner transfer request must comply with Charter "values". It is far from clear what the Charter "value" would be, and how it would differ from the Charter section 6 right to enter one's country of citizenship. Presumably, an administrative actor must make a preliminary assessment of whether his or her decision engages a Charter "value", bringing whatever insight his or her field expertise and proximity to the facts of the case offers in aid of this determination. Separating the inquiry into whether a Charter "value" is at stake from the question of whether limitations on that "value" are justified also demands a certain level of sophistication. It is worth recalling that the decision-makers in *Doré* happened to be lawyers acting as a disciplinary body for the Barreau du Québec. Most administrative decision-makers who exercise discretion are not trained lawyers performing a formal adjudicative role.

The Court asserts that an administrative decision-maker "exercising a discretionary power ... has, by virtue of expertise and specialization,

particular familiarity with the competing considerations at play in weighing *Charter* values”.³⁴ If this is true, then this expertise would presumably be equally pertinent and advantageous in a constitutional challenge to the administrative body’s constitutive statute, or legislative provisions granting discretion. After all, virtually all constitutional issues before an administrative decision-maker will arise in a concrete and specific factual context that engage the decision-maker’s expertise and specialization.

Returning to *Doré*, there is no reason to think that the Barreau disciplinary body’s expertise and specialization would be any less salient had the Code of Ethics for Advocates explicitly proscribed oral or written communication that failed to display moderation or dignity. Yet, had the disciplinary body been called upon to determine the constitutionality of the discretion-conferring provision itself, that decision would have attracted no deference *per Dunsmuir*, and would have been assessed against a standard of review of correctness. What the Court does in *Doré* is take valid reasons for permitting an administrative decision-maker to consider the Charter, and repackage them into reasons for deferring to the result of that consideration. This either contradicts the logic of *Dunsmuir*’s retention of correctness for constitutional matters, or portends the erosion of correctness review for constitutionality.

It is certainly the case that any competent administrative decision-maker who exercises discretion should be acquainted with the objectives of the statute he or she administers, and will have acquired experience in determining facts, drawing inferences and balancing competing factors. If all that proportionality analysis demanded of decision-makers is that they stir “Charter value” into the mix of costs and benefits to be weighed en route to a decision, and then ask themselves whether it is necessary to limit the Charter protection in order to advance the statutory objectives, then one might suppose that administrative decision-makers’ expertise will serve them well enough.

But that is not how proportionality operates under section 1 of the Charter. The normative uniqueness of Charter rights structures a more demanding inquiry. A proportionality analysis in the context of rights adjudication is not neutral as between rights and freedoms protected by the Charter and other interests, entitlements or “values”. To denominate an interest as a right is to recognize its normative primacy. As such, a

³⁴ *Doré, id.*, at para. 47.

Charter right intrinsically “weighs” more (by virtue of being a right) than something called an interest, value or entitlement.

A Charter right, once established, also asserts normative priority. A rights bearing individual need not justify the exercise of a Charter right; rather, the state must justify infringing it. The pre-eminence of Charter rights exemplifies what David Dyzenhaus describes as a rule of law culture of justification, as opposed to a “managerial culture”:

[The culture of justification] is shaped by the assumption that *the public authority bears the onus of justifying the limit on the right asserted*, and it requires that the authority regard persons as bearer of rights, not as individuals who may or may not be accorded a privilege.³⁵

While the Court in *Doré* does instruct decision-makers to assess the necessity of limiting the Charter protection in order to achieve statutory objectives, the Court provides no practical advice about how to do that. Yet, the appraisal expected from administrative decision-makers cannot be made without attending to the existence and extent of conflict between advancing statutory objectives and protecting a Charter “value”, possible alternatives to conflict, the alternatives to resolving that conflict in the manner chosen, and even the importance of a given statutory objective in the context of the decision. Perhaps the Court in *Doré* intends to signal all of this when it remarks that “decision-makers ... must remain conscious of the fundamental importance of *Charter* values in the analysis”.³⁶

There is another dimension to expertise that runs through the jurisprudence on judicial review, and it furnishes a slightly different rationale for deference. As Binnie J. commented in *Dunsmuir*, “different administrative decisions command different degrees of deference, depending on who is deciding what”.³⁷ Sometimes, judges show deference to administrative decision-makers located at or near the top of what Binnie J., in *Dunsmuir*, dubbed the administrative food chain:

A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be “at the extreme legislative end of the *continuum* of administrative decision-making” (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659). On the other hand, a ministerial delegate making a deportation decision

³⁵ David Dyzenhaus, “Proportionality and Deference in a Culture of Justification” in Grant Huscroft, Bradley Miller & Grégoire Webber, eds., *Proportionality and the Rule of Law* (Cambridge: Cambridge University Press, 2014) 234, at 251 (emphasis added).

³⁶ *Doré*, *supra*, note 3, at para. 54.

³⁷ *Dunsmuir*, *supra*, note 7, at para. 135.

according to ministerial guidelines was accorded considerably less deference in *Baker* (where the “reasonableness *simpliciter*” standard was applied). The difference does not lie only in the judge’s view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, a unanimous Court adopted the caution in the context of counter-terrorism measures that “[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove” (para. 33). ... Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, or policy decisions arising out of decisions of major administrative tribunals, as in *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at p. 753, where the Court said: “The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council.”³⁸

Similarly, in *C.U.P.E. v. Ontario (Minister of Labour)*,³⁹ Bastarache J. (dissenting) stated that a statutory grant of discretion to a Minister “as opposed to an apolitical figure”⁴⁰ signalled legislative preference for political accountability over legal accountability, and supported a posture of curial deference.⁴¹ Ministers tend to attract higher deference precisely because of their proximity to the legislative branch — if the legislator has delegated decision-making authority to a member of the executive who is also a legislator, perhaps it is because the decision calls upon those skills, perceptions and knowledge that a political actor possesses, and courts should defer accordingly.

But in Charter litigation, proximity to the political branch of government pulls in the opposite direction — decisions by elected officials (legislators) are distrusted precisely because they might be inclined to trade off individual rights in the name of political gain. In other words, democratic legitimacy, political acumen and access to (presumably) expert staff may incline courts to display particular deference to Ministers in judicial review of discretion, but this translates awkwardly into a rationale for deference where the Charter is at issue. The fact that an administrative

³⁸ *Dunsmuir, id.*, at para. 136.

³⁹ *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] S.C.J. No. 28, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.) [hereinafter “*Retired Judges Case*”].

⁴⁰ *Id.*, at para. 18.

⁴¹ See also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] S.C.J. No. 43, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 58 (S.C.C.) (*per* Binnie J.).

decision-maker is also a high-ranking elected official is not a reason to defer to the balance he or she strikes between protection of individual rights and advancement of other objectives (statutory or otherwise). It may even be a reason *not* to defer.^{41A}

It must be acknowledged, however, that the Supreme Court of Canada in *Lake* was not troubled by this tension. It counselled deference to the Minister's determination of whether extradition would infringe a fugitive's Charter rights.⁴² In my view, when a court refrains from scrutinizing a Minister's Charter calculus on account of the Minister's political status, it is not engaging in deference-as-respect, but rather deference-as-abdication. It is not the same careful and circumscribed exercise of restraint that a court might exhibit in assessing alternative options under the minimal impairment branch of the *Oakes* test; it is, rather, a casual and tacit declaration that courts ought not to interfere with ministerial power in certain politicized contexts, even where constitutionally protected human rights are at stake. Perhaps one could defend judicial abdication on some notion of justiciability or institutional legitimacy, but that does not alter the character of the act. In the interests of clarity, it would be preferable for the Court to provide a normative justification for deeming certain rights violations non-justiciable, rather than concealing it behind a "reasonableness" review.

In *Doré*, the discretion was exercised by the Barreau du Québec, an independent, quasi-judicial tribunal composed of lawyers. Administrative decision-makers situated elsewhere on the executive spectrum between legislator and judiciary should not be presumed to possess comparable expertise or neutral disposition toward rights protection. As Ruth Sullivan notes of many "non-judicial" administrative actors:

Their focus tends to be narrow and coloured by the concerns and possibly by the biases of their own professional culture. They may have particular interests to promote on behalf of their department or agency or they may have strong views respecting the groups or problems

^{41A} A parallel debate about the standard of review applicable to questions of law decided by a non-adjudicative body, including a minister, is unfolding in the Federal Court of Appeal. See, e.g., *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)* (sub nom. *Canada (Minister of Fisheries and Oceans) v. David Suzuki Foundation*), [2012] F.C.J. No. 157, 2012 FCA 40 (F.C.A.); *Kandola v. Canada (Minister of Citizenship and Immigration)*, [2014] F.C.J. No. 322, 2014 FCA 85 (F.C.A.).

⁴² *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, [2008] 1 S.C.R. 761, at para. 34 (S.C.C.), quoted in *Doré*, *supra*, note 3, at para. 50.

regulated by their legislation. This may put them into an adversarial position with other interested parties.⁴³

The foregoing does not suggest that decision-makers with authority to interpret law should not consider the Charter when exercising discretion. Their valuable “field expertise” may enhance the fact-finding process, the elaboration of the statutory scheme and the richness of the evidentiary foundation. Some individual decision-makers may also produce legally sophisticated and cogent Charter analyses. Many will not, either for lack of ability, time, resources or independence, or some combination thereof. There is simply no basis for a presumption that a decision-maker’s “field expertise”, which may contribute constructively to some aspects of a Charter analysis, equips the decision-maker to manage all aspects of a Charter analysis. On judicial review, judges should certainly pay attention to the reasons given by decision-makers exercising Charter-impacting discretion. After all, sometimes the reasons may be persuasive, and a judge should be as open to benefiting from a rigorous and compelling set of reasons in the same way he or she is open to persuasion from high-quality submissions by counsel, analyses by law clerks or opinions of fellow judges.

In other words, the arguments in favour of Charter jurisdiction do not explain why deference is owed to their Charter outcomes. Nor do arguments about why courts should defer to the exercise of discretion on non-Charter matters automatically extend to those aspects of discretion that implicate the Charter. Yet *Doré* commits both of these errors. The slippage is exacerbated by the fact that the Court in *Doré* equips administrative decision-makers with a Charter-lite methodology that is approximate, vague and incomplete, starting with its problematic invocation of Charter “values”, and ending with its account of proportionality.

The Court in *Doré* might plausibly have taken the view that the constraints facing administrative decision-makers generally make it unrealistic to expect a sophisticated and thorough Charter analysis (even if, in practice, a few administrative decision-makers will do it very well). Fair enough. The Court might also have adapted its Charter methodology to the context of discretion without sacrificing the priority and primacy of rights, just as the Court did for common law rules. But if the Charter-lite approach to discretion lacks the rigour of a proper Charter analysis, it is not apparent why the outcomes it generates should merit a deferential

⁴³ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008), at 625.

posture on review, quite apart from the competence of the decision-maker deploying it.⁴⁴

An obvious objection to curial deference is that it insulates the violation of fundamental rights and freedoms from judicial scrutiny and remedy. The words “I may have come to a different conclusion, but I cannot say that the tribunal was unreasonable in its decision” plays like an appropriate expression of judicial modesty in the 21st-century administrative state. The statement “I may have concluded that the applicant’s Charter rights were violated, but I cannot say the Minister was unreasonable in concluding that they were not” sounds a more discordant note. Perhaps the Court wished to deflect this concern with its account of how elements of curial deference are already built into the *Oakes* test. This would invite an inference that judicial review of the reasonableness of a discretionary discretion, and a direct application of the *Oakes* test, would produce comparable Charter protection. The routes might be different, but the destination is the same.

So, for example, the Court finds symmetry in the reasonableness standard of judicial review and the “minimal impairment” inquiry in the *Oakes* test:

This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, “courts must accord some leeway to the legislator” in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure “falls within a range of reasonable alternatives”. The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, “falls within a range of possible, acceptable outcomes”.⁴⁵

⁴⁴ The recent Alberta Court of Queen’s Bench decision in *Wilson v. University of Calgary*, [2014] A.J. No. 348, 2014 ABQB 190 (Alta. Q.B.) provides an interesting illustration of the difficulties. Anti-abortion students challenged limitations placed on their public display before the university disciplinary bodies as a violation of their Charter-protected freedom of expression. The decision-maker (an academic without legal training) rejected the argument in three sentences, and the reviewing court spent almost four pages explaining why the Charter analysis was unreasonable, *per Doré*. Query whether the expectation that the decision-maker’s specialization and experience in student discipline equipped him for the task of balancing Charter rights. A reasonableness review proceeds as if the decision-maker was entirely capable of engaging in the kind of analysis that the Court found he unreasonably failed to do, but the case provides ample basis for concluding that he was not and should not have been expected to do so.

⁴⁵ *Doré, supra*, note 3, at para. 56.

In the next paragraph, Abella J. reiterates her view of “conceptual harmony” between a reasonableness review and the *Oakes* test:

As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, “[t]he issue becomes one of proportionality” (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a “margin of appreciation”, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.⁴⁶

The scope, meaning and application of deference by the Supreme Court in the context of “minimal impairment” are matters of considerable complexity and nuance.⁴⁷ In any event, I concur with David Mullan’s skepticism that administrative law deference and “margin of appreciation” in the context of minimal impairment share as much in common as Abella J. implies. As Mullan comments:

[E]ven when translated to the world of judicial review of administrative action, that limited concession [in the *Oakes* test] to a margin of appreciation in the context of a justification of a *prima facie* violation of a protected right or freedom seems far removed from the respect for agency choice found in the normal application of an unreasonableness standard of review.⁴⁸

Mullan’s point appears to be that the deference contemplated by judicial review on a standard of reasonableness is qualitatively different and quantitatively broader than that which is contemplated under the narrower and more confined “leeway” accorded to the legislator under the minimal impairment stage of the *Oakes* test. After all, the premise of deference in administrative law is that the choice of the legislator to confer authority on the executive (rather than directly on the courts) signals a preference for the specialization, field expertise and possible efficiency in fulfilling the legislator’s mandate that an administrative body (as opposed to a court) can bring to the job. The *Charter* tilts in the opposite direction. The adjudication of rights and the judicial authority to

⁴⁶ *Doré, id.*, at para. 57.

⁴⁷ See Richard Moon, “Justified Limits on Expression: The Collapse of the General Approach to Limits on Charter Rights” (2002) 40 *Osgoode Hall L.J.* 335, at 358-65.

⁴⁸ David Mullan, “Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!” (2013) 42 *Advocates Q.* 1, at 52.

invalidate legislation or otherwise remedy Charter-infringing government action are predicated on the superior institutional competence, expertise and independence that courts can bring to that job (as opposed to the legislator or the executive). The limited space allocated to a “margin of appreciation” for legislative choice does not make deference a defining feature of the Charter’s analytical framework.

Paul Daly also conducts an extended, incisive, comparative analysis of each step of the *Oakes* test and the elements of reasonableness review in administrative law. He tests the hypothesis that proportionality (using *Oakes* as the paradigm) is broadly reconcilable with reasonableness review in administrative law. He concludes that it is not: *Oakes*’ proportionality test is a more intrusive standard of review.⁴⁹

The structural asymmetry between deference in administrative law and deference in Charter analysis is visible at close range when applied to the exercise of discretion. As noted above, the primacy accorded to Charter rights means that Charter rights matter more than other interests, claims or entitlements. Charter rights *weigh* more. That is why, under the *Oakes* test, the party seeking to limit a Charter right bears a heavy burden of justification. The stages of the test are designed to ensure that limiting a right serves important objectives, actually advances those objectives and limits the right no more than required to achieve the objective. Only after clearing each of those hurdles does one arrive at the ultimate balancing of the last step, in which the failure to accord sufficient weight to the Charter right may still yield the conclusion that the government has not discharged its burden.

Meanwhile, the Court’s standard of review jurisprudence shows no sign (yet) of nuancing the position that deferential review of discretion precludes re-weighing the factors that go into the decision. Recall that while the Court in *Baker* appeared to fault the decision-maker for failing to give appropriate weight to the best interests of affected children, the Supreme Court in *Suresh* insisted that this perception was mistaken:

It follows that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion

The Court’s recent decision in *Baker*, *supra*, did not depart from this view.

⁴⁹ Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012), Ch. 5.

... To the extent this Court reviewed the Minister's discretion in that case, its decision was based on the ministerial delegate's failure to comply with self-imposed ministerial guidelines, as reflected in the objectives of the Act, international treaty obligations and, most importantly, a set of published instructions to immigration officers.

The passages in *Baker* referring to the "weight" of particular factors ... must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors ...⁵⁰

The Court's concern with re-weighting discretionary judgment is that it will erode curial deference by opening up discretionary decisions to excessive judicial intervention. The Court has subsequently reiterated its opposition to re-weighting evidence, inferences or factors when engaging in a reasonableness review of discretion.⁵¹

Doré does not explicitly depart from this admonition against re-weighting, but one might contend that it implies a softening of the position. After describing the technique of incorporating Charter values into the reasonableness inquiry, Abella J. states that "[i]f in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable".⁵² Perhaps the modifier "proper" in front of balancing is intended to convey something about the relative weight accorded to a Charter "value" compared to statutory objectives. Absent more explicit language, however, this remark seems too oblique to displace the emphatic insistence in post-*Dunsmuir* jurisprudence that reasonableness review of discretion does not permit re-weighting.

It is difficult to resist the conclusion that *Doré's* breezy methodology may sometimes but not always or necessarily deliver the same level of Charter protection as would a more meticulous Charter analysis. Cracks at several points expose its structural weakness. First, the term Charter "value" rather than "right" obfuscates the crucial question that should lie

⁵⁰ *Suresh*, *supra*, note 20, at paras. 34-37 (emphasis in original).

⁵¹ See, e.g., *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339 (S.C.C.).

⁵² *Doré*, *supra*, note 3, at para. 58.

at the core of the inquiry, which is whether the decision engages a constitutionally protected right or freedom, and whether that right or freedom is equally protected from infringement by discretion as by law. Second, the proportionality analysis that the Court commends to administrative decision-makers does not acknowledge or respect the primacy or the priority of constitutionally protected rights. As such, administrative decision-makers are not instructed to treat a Charter right or freedom (if that is what a “value” is) as intrinsically weightier than other types of interests or considerations.

This Charter-lite methodology would not be fatal, if courts on judicial review were authorized to measure the outcomes reached by the administrative decision-maker against a substantive metric that did value Charter rights and freedoms appropriately. But according to *Doré*, a reviewing court must assess the result of the proportionality analysis on a standard of reasonableness, and must not re-evaluate the weight accorded to the Charter “value” as against competing interests or objectives. To re-weigh would undermine fidelity to the principle of curial deference in administrative law. Despite *Doré*’s promise, it seems beyond peradventure that an administrative actor exercising discretion will form the view that the Charter “value” is less important than the objectives sought by its infringement, and a reviewing court will not intervene because it is not supposed to re-weigh the factors, even if it might have given greater weight to the harm inflicted by the Charter violation.

David Mullan is surely right to observe that not all Charter violations are equal; some rights infringements are graver than others. Sanctioning a lawyer for an impudent letter and deporting a person to torture may both infringe the Charter, but are orders of magnitude apart in impact. Yet, *Doré* discloses no sensitivity to this spectrum and its implications for judicial review. Nothing in the judgment offers a doctrinal basis for claiming that a ministerial decision to deport a person to torture demands something different from a reviewing court than a decision to sanction a lawyer for writing a vitriolic letter to a judge. When administrative law’s logic of curial deference collides with the Charter’s logic of rights protection, *Doré* sides with deference.

One might agree that *Doré* fails to take Charter rights seriously (or seriously enough) in the context of discretion, but still maintain that the approach to Charter adjudication (including the *Oakes* test) is poorly suited to the exercise of discretion. Perhaps a tailored proportionality test is as necessary for discretion as it is for common law rules. Designing a thorough and comprehensive proportionality test for discretion lies

beyond the scope of this paper, but I have elsewhere attempted to stipulate basic desiderata that the logic of proportionality requires of a decision that engages a Charter right.⁵³

- a. Recognition of the normative primacy and priority of the *Charter* right(s);
- b. Constitutionally and statutorily valid objectives sought to be achieved by the exercise of discretion in the individual case;
- c. An evidentiary basis beyond mere speculation for material facts, and inferences from those facts;
- d. Where protection of a *Charter* right may conflict with attainment of a valid objective, the reasons should show that the conflict is genuine and the choice to infringe a *Charter* right is necessary in the individual case.
 1. A conflict is not *genuine* where the specific rights infringement does not demonstrably advance attainment of the objective in relation to that case.
 2. A conflict is not *genuine* where the objective can be advanced without violating a *Charter* right or by a less severe intrusion on that right.
 3. A conflict is not *necessary* when a reasonable compromise in attainment of the objective in the individual case can minimize or avoid a rights violation.⁵⁴

These criteria may be imperfect, but they attempt to capture minimum and necessary elements of a rights analysis that are flexible enough to adapt to the context of discretion without sacrificing the primacy and priority of Charter rights. In the face of *Doré*'s slack methodology, it seems important to articulate and aspire to elements of sound Charter reasoning. And if applying these criteria seems to ask too much from many administrative decision-makers, then that would seem to weaken the case for judicial deference to their Charter-impacting decisions.

⁵³ The author was counsel to the intervener Asper Centre for Constitutional Rights in *Divito*, *supra*, note 23. The intervener's factum proposed an adaptation of a Charter analysis to the exercise of discretion that did not compromise the primacy or priority of Charter rights. See online: <<http://www.aspercentre.ca/Assets/Asper+Digital+Assets/David+Asper+Centre/Asper+Digital+Assets/Asper+Case+Materials/Divito-factum.pdf>> [hereinafter "Factum"]. The proposed analysis is particularly indebted to Denise Réaume, "Limitations on Constitutional Rights: The Logic of Proportionality", University of Oxford Legal Research Paper Series, No. 26/2009.

⁵⁴ Factum, *id.*, at para. 17.

What is at stake if *Doré*'s Charter-lite does not deliver individuals seeking rights protection to the same destination as a more exacting Charter analysis? Writing in dissent in *Cooper*, McLachlin J. (as she then was) makes a strong plea for broad authority among administrative decision-makers to consider Charter issues that come before them, and her view ultimately prevailed in *R. v. Conway*:

[E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the Charter does not change the matter. The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-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.⁵⁵

To fulfil the promise of bringing the Charter to the people, it matters not only that administrative decision-makers consider the Charter; it matters *how* they consider it, and it matters even more *how carefully* a reviewing court supervises their decisions. Instructing administrative decision-makers to apply *Doré*'s Charter-lite proportionality test creates the appearance that "all law and law-makers that touch the Charter conform to it". But if judicial review applies a deferential standard that does not inquire into weight, it disables itself from discerning superficial appearance from genuine conformity. One might question whether "the people" benefit from enabling administrative actors to incorporate the Charter into discretionary decision-making if the methodology tilts toward undervaluing the Charter and the results are insulated from meaningful scrutiny.

From a governance perspective, the divergence between the *Doré* model and a more conventional Charter analysis raises important questions. Governments select from a range of options about how to effectuate policy choices through law. *Doré* embodies the salutary aspiration that all branches and institutions of government share a primary commitment to the rule of law (including the Constitution) and manifest that fidelity in the performance of their assigned mandates.

⁵⁵ *Cooper v. Canada (Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854, at para. 70 (S.C.C.), quoted in *R. v. Conway*, [2010] S.C.J. No. 22, [2010] 1 S.C.R. 765, at para. 77 (S.C.C.).

But consider as well the possibility of a government that regards the Charter and the judiciary as sources of undemocratic, elitist constraint on the exercise of public power by elected representatives for the benefit of the people who voted for them. Such a government might wish to maximize the ambit of executive power and minimize the risk of being thwarted by judicial review including (or especially) where Charter rights and freedoms are at stake. Such a government could proceed by articulating rules that explicitly or by necessary implication limit a Charter right. Or, it could grant an administrative actor discretion to act, and then structure and confine potentially Charter-infringing discretion by stipulating the purpose of the discretion and relevant factors to guide the decision. In either case, the government must be prepared to defend the constitutionality of those rights-limiting provisions under the *Oakes* test.

But such a government, reading *Doré*, might cynically and reasonably conclude that conferring broad, open-ended and non-specific discretion (especially on a Minister) will maximize the latitude available to limit Charter rights and minimize the likelihood and intensity of judicial oversight. In these instances, a reviewing court will restrict itself to asking whether the decision-maker balanced the relevant Charter “value” against competing factors. Following *Doré*, a reviewing court will eschew second-guessing the quality of the balancing exercise. The upshot is that the more the state governs through discretion, the less accountable it will be for Charter violations that happen within that zone of discretion.

Reading *Doré* as a lesson about governance is disquieting. All other things being equal, the rule of law is better served if law-makers are encouraged to communicate through transparent and defined grants of legal authority, even when governing through discretion. This is particularly the case for powers that carry the potential to infringe constitutionally protected rights. A doctrine that creates incentives to govern opaquely in order to minimize legal accountability (especially for rights violations) undermines the aspirations of the rule of law.

IV. CONCLUSION: TAKING RIGHTS SERIOUSLY IN ADMINISTRATIVE LAW

A perennial challenge and frustration of administrative law is the near-impossibility of tailoring a one-size-fits-all doctrine of judicial review that will work equally well across the myriad domains of the administration. The range of activities, actors and impacts that doctrine

purports to address is simply too vast and diverse. One must add to this the range of pathologies that differentially preoccupy critics and commentators of the Court's standard of review jurisprudence. For some, the dominant threat is a retrograde or inexperienced judiciary thwarting the expertise of administrative actors. For others, it is the systematic disregard of vulnerable individuals' interests, rights and entitlements by inept, under-resourced or politicized bureaucrats. Over-judicialization of the administration may paralyze it. Inadequate attention to legality may produce injustice. The problem, of course, is that these and other pathologies exist simultaneously across the spectrum of the administrative state. A doctrine animated by ameliorating one pathology risks exacerbating another.

What does this mean for the application of the Charter in the context of administrative discretion? David Mullan captures an important intuition about the risks of overweening judicial scrutiny. In a passage quoted with approval by Abella J. in *Doré*, he states:

If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]⁵⁶

Yet Mullan is also alert to the dangers of judicial abdication. For example, the Supreme Court of Canada recently upheld the security certificate issued against Mohamed Harkat, which opens the possibility that the Minister of Citizenship and Immigration will exercise his discretion to order Harkat's deportation to Algeria, even if Harkat faces a substantial risk of torture there.⁵⁷ In another passage from the same article — not quoted by Abella J. in *Doré* — Mullan qualifies his earlier caution about judicial micro-management:

⁵⁶ *Doré*, *supra*, note 3, at para. 51, quoting David Mullan, "Administrative Tribunals and Judicial Review of Charter Issues after *Multani*" (2006) 21 N.J.C.L. 127, at 145 [hereinafter "Mullan 2006"].

⁵⁷ *Canada (Minister of Citizenship and Immigration) v. Harkat*, [2014] S.C.J. No. 37, 2014 SCC 37 (S.C.C.).

It may also be the case that there are situations where the institutional frame-work that forms the context for the judicial review application is one where there can be no reasonable assurance that the decision-maker can or will give the *Charter* rights and freedoms at stake their appropriate weighting. In those instances, the Court may be completely justified in correctness review. Thus, for example, in the context of *Suresh* and *Ahani*, where the decision-maker's primary concerns are the security interests of Canada, the expectation that *Charter* rights and freedoms will be evaluated properly may simply not be justified at least in the absence of some internal, independent check. If so, then correctness review may be necessary if, indeed, *Charter* rights and freedoms are not to be devalued.⁵⁸

Mullan's two examples usefully orient one toward identifying ingredients in a more refined account of how courts on judicial review ought to assess the legality of discretionary decisions that affect Charter rights. Recall that the logic of deference animating standard of review analysis derives from the presumed expertise of administrative decision-makers in relation to their statutory mandate, in tandem with the legislator's choice to confer authority on emanations of the executive (agencies, boards, tribunals and bureaucrats) rather than on the judiciary. Unlike administrative law doctrine concerning the requirements of procedural fairness, standard of review jurisprudence is formally indifferent to the interest at stake in the decision. Nor does standard of review analysis attend to the independence of the decision-maker. Both of these must matter when constitutional rights are at issue, for these considerations form part of the logic animating a judicially enforceable human rights instrument.

Therefore, I suggest that the following considerations (which do not figure in *Dunsmuir*, *Pushpanathan*,⁵⁹ *Multani* or *Doré*) should guide a court that is called upon to review Charter-impacting exercises of discretion:

- (1) The magnitude of the rights violation. The more serious the rights violation, the greater the importance of attending closely to the weight ascribed to the Charter right against countervailing considerations.

⁵⁸ Mullan 2006, *supra*, note 56, at 148, n. 75.

⁵⁹ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.).

- (2) The independence of the decision-maker from political influence. The closer the relationship between the decision-maker and the legislator, the less reason to defer to the balancing of individual rights against majoritarian interests.
- (3) Where no or inadequate reasons are provided for the exercise of discretion that infringes a Charter right, curial deference neither requires nor authorizes retrofitting reasons to support the result reached by the administrative decision-maker.
- (4) The extent to which the discretion is structured and guided through constitutionally valid legislation, regulation or “soft law”. Where the exercise of discretion will routinely and predictably limit Charter rights (*e.g.*, in civil or criminal commitment, parole, immigration detention, child apprehension, extradition, *etc.*), legislators can and should stipulate the purposes for which the discretion is granted and the factors relevant to the exercise of discretion. If these provisions withstand an ordinary Charter challenge (including the section 1 *Oakes* test), then the individual exercise of discretion within those demarcated constitutional boundaries should benefit from greater deference than exercises of broad, general and unstructured discretion. If the legislator declines to structure the discretion, then the individual exercise of discretion warrants no deference.⁶⁰

Whether these considerations travel under the rubric of reasonableness, correctness or some other label matters less than that they receive proper and explicit attention. If *Multani*'s approach was too blunt in its importation of the *Oakes* test and a correctness standard of review, then *Doré* repeats the same error in the opposite direction with its combination of Charter-lite proportionality and reasonableness review. Following *Multani*, David Mullan correctly (and reasonably) concluded that there is “room for deference to the discretionary judgments of statutory authorities exercising powers that have the potential to affect *Charter* rights and freedoms”, but in order to prevent devaluation of those rights and freedoms “there should be recognition that the framework within which deference operates will often, perhaps invariably need to be different than in the case of judicial review of administrative action that

⁶⁰ Ideally, this should incentivize legislators to be more transparent in structuring and defining the scope of discretion in legislation.

does not affect *Charter* rights and freedoms”.⁶¹ Unfortunately and ironically, *Doré* invites the risk of devaluing the Charter through the invocation of Charter values and accompanying methodology. Justice McLachlin (as she then was) correctly observed that many more people have their rights determined by administrative decision-makers than by courts. The quality of Charter protection they receive should not depend on who makes the determination.

⁶¹ Mullan 2006, *supra*, note 56, at 149.

