

2013

Doré, Proportionality and the Virtues of Judicial Craft

Hoi L. Kong

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



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Kong, Hoi L.. "Doré, Proportionality and the Virtues of Judicial Craft." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 63. (2013).

DOI: <https://doi.org/10.60082/2563-8505.1280>

<https://digitalcommons.osgoode.yorku.ca/sclr/vol63/iss1/21>

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.

***Doré*, Proportionality and the Virtues of Judicial Craft**

Hoi L. Kong^{*}

I. INTRODUCTION

The concept of proportionality, which played a prominent role in *Doré v. Barreau du Québec*,¹ gives rise to two central debates in the academic literature.² The first pits those who believe that the concept can be used by courts to arrive at principled decisions against those who argue that the concept is deeply indeterminate and permits judges to illegitimately decide cases according to their subjective preferences. In the second debate, proponents of proportionality reasoning claim that courts are competent to assess the kinds of considerations entailed by the concept, while opponents argue that such assessments are beyond the institutional competence of courts. The positions in these debates are often framed in terms of interpretive methodology. Those who argue against judicial recourse to the concept of proportionality embrace formalist approaches that aim to reduce the range of judges' interpretive freedom. By contrast, those who write in favour of proportionality in constitutional judgments argue that formalism occludes the reasoning that lies behind courts' conclusions. These proponents of proportionality embrace purposive interpretive methods because they render judicial reasoning transparent.

In Part III of this essay, we shall see that the Court's reasoning in *Doré* touches on these debates in ways that upset the standard alignment of

^{*} Associate Professor, Hydro Québec Scholar, Faculty of Law, McGill University. I would like to thank the two anonymous reviewers of this journal for their helpful comments and Olga Redko for her research assistance. I gratefully acknowledge the financial support of the Le Dain fund.

¹ [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 [hereinafter "*Doré*"].

² For surveys of these debates, see, e.g., Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47:1 Colum. J. Transnat'l L. 72; Vicki C. Jackson, "Being Proportional About Proportionality" (2004) 21:3 Const. Commentary 803.

positions. The Court resolved a doctrinal debate about the approach that courts should take when reviewing administrative decisions that implicate Charter³ rights, and in concluding that such decisions should be reviewed on administrative law grounds, rather than through application of the *Oakes* framework,⁴ the Court blended formalist and purposive interpretive approaches. Moreover, according to the positions in the standard debates, reticence about judicial capacity to balance interests should lead to a rejection of a proportionality analysis. Yet the Court in *Doré* acknowledged the superior institutional capacity of the administrative body in question to undertake the relevant balancing of interests *and* undertook a proportionality analysis when it reviewed that body's decision.

Although the Court's reasoning in *Doré* makes it difficult to categorize in terms of the standard positions in the proportionality debates, it is open to challenges that are directed at the precision, coherence and accuracy of the reasoning. In Part II, I will articulate these challenges. In Part III, I will show in detail how the reasoning in *Doré* departed from the standard academic debates about the concept of proportionality, and I will argue that when the Court engaged a cognate set of debates, its reasoning was unconvincing. In my view, the Court could have profitably avoided these debates and focused instead on (1) crafting a decision that avoided the pitfalls identified in Part II; and (2) evaluating the consequences of its reasons. I begin by setting out the facts and reasons in *Doré*. The concerns raised in Parts II and III of this paper address questions of judicial craft, and I will conclude this paper by suggesting that the reasons of the Court would have been stronger if they had focused on these questions and not on academic debates.

II. *DORÉ*, PROPORTIONALITY AND ISSUES OF COVERAGE, CONSISTENCY AND COMPLETENESS

The Disciplinary Council of the Barreau du Québec found that a private letter, written by Mr. Doré to a judge concerning the latter's conduct in a

³ *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 "Charter"].

⁴ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"]. In this paper, I will use the expression "Charter analysis" and its cognates to refer to the standard method for analyzing claims that the state has infringed Charter rights without adequate justification. This analysis incorporates the *Oakes* framework and when I refer to it, I am by implication also referring to the *Oakes* framework.

criminal proceeding in which Mr. Doré was counsel, violated section 2.03 of the *Code of ethics of advocates*. Mr. Doré subsequently appealed the Council's decision, arguing that its application of the *Code of ethics* violated the Charter. The Tribunal des professions, in reviewing the constitutionality of the Council's decision, held that the decision satisfied a standard of correctness.⁵ The Superior Court of Quebec upheld the decision of the Tribunal, finding that the decision “‘implicitly’ held that the restriction was ‘justified in a free and democratic society’”.⁶ The Court of Appeal undertook a Charter analysis and found that although the Council's decision breached Mr. Doré's right to freedom of expression, the breach was justified under section 1.⁷

On appeal, the Supreme Court of Canada addressed the question of whether a court reviewing an administrative decision-maker's exercise of discretionary authority should (1) apply a Charter analysis, including the *Oakes* test; or (2) apply an administrative law approach to judicial review. The Court held that the latter approach was the correct one. Citing to the Chief Justice's reasons in *Alberta v. Hutterian Brethren of Wilson Colony*,⁸ the Court distinguished situations in which the constitutionality of a law is at issue from situations in which an administrative decision applies Charter values to a particular set of facts.⁹ The Court further reasoned, drawing on *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*,¹⁰ that the prescribed by law requirement under section 1 applies to norms that are authorized by statute and are “binding rules of general application, and ... sufficiently accessible and precise to those to whom they apply”.¹¹ The Court contrasted such norms with administrative decisions that engage the Charter rights of individuals¹² and reasoned that the latter fit uneasily with the prescribed by law requirement under section 1. The Court further reasoned that it is conceptually difficult to determine what the “pressing and substantial” objective of an exercise of discretion is.¹³

⁵ *Doré*, *supra*, note 1, at para. 19.

⁶ *Id.*, at para. 20.

⁷ *Id.*, at para. 21.

⁸ [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567 (S.C.C.) [hereinafter “*Hutterian Brethren*”].

⁹ *Doré*, *supra*, note 1, at para. 36.

¹⁰ [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.) [hereinafter “*Vancouver Transportation*”].

¹¹ *Id.*, at para. 53, cited in *Doré*, *supra*, note 1, at para. 37.

¹² *Doré*, *supra*, note 1, at para. 36.

¹³ *Id.*, at para. 38.

In addition to advancing these specific reasons for adopting an administrative law approach to reviewing discretionary decisions that implicate Charter rights, the Court introduced more general considerations. For example, the Court invoked common law cases involving Charter values in order to support the claim that it is difficult to apply the *Oakes* framework outside of the context of the review of a law or other rule of general application.¹⁴ In addition, the Court noted that according to current administrative law doctrine, administrative authorities are required to consider fundamental values (including Charter values) when exercising discretion, and that administrative authorities can be empowered to adjudicate matters that implicate these values.¹⁵ The Court further cited academic commentary, which criticized the Court's reasoning in *Multani*.¹⁶ The Court reasoned that according to the critics, "the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion".¹⁷

In light of these considerations, the Court held that judicial review of administrative decision-making that involves Charter values (but does not involve determinations of the constitutionality of a law) should be undertaken using a reasonableness standard. According to the Court, this form of review recognizes the specific expertise of administrative bodies exercising discretion under their enabling statutes in relation to specific sets of facts.¹⁸ By contrast, the Court reasoned, application of the Charter analysis would result in courts reviewing administrative decision-making on a correctness standard and would, the Court reasoned, end in *de novo* review of countless discretionary decisions.¹⁹ The Court concluded its analysis by prescribing an analytical framework for administrative actors making decisions that implicate Charter values. According to the Court, administrative decision-makers should consider the relevant statutory objectives and ask how the Charter value at issue can be best protected in light of those objectives.²⁰ The Court described this analysis as being "at the core of the proportionality exercise" and "requir[ing] the decision-maker to balance the severity of the interference of the *Charter* protection

¹⁴ *Id.*, at paras. 39-42.

¹⁵ *Id.*, at paras. 28-29.

¹⁶ *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.) [hereinafter "*Multani*"].

¹⁷ *Doré, supra*, note 1, at para. 33.

¹⁸ *Id.*, at paras. 47-48.

¹⁹ *Id.*, at para. 51.

²⁰ *Id.*, at paras. 55-56.

with the statutory objectives”.²¹ The Court concluded its analysis by recognizing the “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”.²²

With this brief summary of the reasons in view, let us now turn to an assessment of the decision. In the following we shall see that *Doré* is open to challenge for reasons relating to (1) the scope of its application and (2) the coherence and the adequacy of its reasoning. As I assess these dimensions of the reasons, I will advance proposals that address the relevant concerns. These proposals do not give rise to broad questions of legal theory, but rather engage what I perceive to be failings of judicial craft.

1. Concerns about the Scope of the Reasons’ Coverage

Consider first concerns relating to uncertainty about the scope of the reasons’ application. These concerns arise because the Court shifted terminology in three instances. First, at the very outset of its reasons, the Court focused its analysis on *adjudicated* administrative decisions,²³ yet later in the reasons, the Court mentioned administrative decision-makers who exercise discretion,²⁴ and did not limit its discussion to adjudicated decisions. Second, for the purposes of demonstrating that the section 1 analysis is inapt for administrative decisions, the Court distinguished laws of general application from decisions that affect a particular individual. Yet at other points, the Court distinguished laws of general application from administrative decision-making without limiting the discussion of such decisions to individualized assessments, and cited to cases in which groups, not individuals, were the objects of the relevant decision-making.²⁵ Third, the Court referred in certain passages to the

²¹ *Id.*, at para. 56.

²² *Id.*, at para. 57.

²³ *Id.*, at para. 4.

²⁴ See, e.g., *id.*, at para. 24.

²⁵ See, e.g., *id.*, at para. 32, referring to, among other cases, *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.) (school boards that were proxies for parents and communities) and *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.) (a private institution with a religious affiliation).

section 1 analysis in unqualified terms,²⁶ while in other passages, it used adjectives such as “full” and “strict” to qualify the section 1 analysis.²⁷

These shifts in usage are potentially significant. For example, if the Court’s reasons apply only to adjudicative bodies, we may have reasons for excluding the application of the Charter that are independent of, or supplement, those which the Court articulated in *Doré*. According to current interpretations of section 32, the Charter applies in four situations. First, the Charter applies when an entity that is uncontroversially governmental is acting: included among such entities are Ministers, employees within a governmental department or police officers.²⁸ Second, the Charter applies to entities that are under sufficient governmental control.²⁹ Third, the Charter applies to a non-governmental entity when and to the extent that it is implementing a particular governmental program.³⁰ Fourth, the Charter applies to entities that are governmental in nature.³¹ Tribunals engaged in adjudication do not fit easily within any of these categories. It may be that such tribunals would fit under Professor Hogg’s proposed test for state action, which he draws from *Slaight Communications*.³² According to that test, the Charter applies to an exercise of statutory authority under which a power of compulsion is granted.³³ Yet, as Professor Hogg himself notes, *Eldridge* and *Lavigne v. OPSEU*³⁴ have departed from this test. One might as a result conclude that according to current section 32 jurisprudence, tribunals engaged in adjudication are not state actors and therefore the Charter does not apply to them for that reason, rather than for the reasons that the Court expressly identifies in *Doré*.

There is a second source of uncertainty about the scope of the reasons’ application. As we have seen, the Court in some passages of *Doré* focused on individualized administrative decision-making, but in other

²⁶ See, e.g., *Doré*, *supra*, note 1, at para. 35.

²⁷ *Id.*, at para. 33.

²⁸ See, e.g., *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, [2008] 1 S.C.R. 761 (S.C.C.) [hereinafter “*Lake*”].

²⁹ See, e.g., *Vancouver Transportation*, *supra*, note 10.

³⁰ See, e.g., *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

³¹ See, e.g., *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.).

³² *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.) [hereinafter “*Slaight*”].

³³ Peter W. Hogg, *Constitutional Law of Canada*, 2012 student ed. (Toronto: Carswell, 2012), at 37-15 [hereinafter “Hogg”].

³⁴ *Lavigne v. OPSEU*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.), cited in Hogg, *id.*, at 37.2(c).

sections referred to administrative decision-making that is not confined to individuals. The distinction is significant because the rationales for excluding a Charter analysis from cases of individualized administrative decision-making may not apply to administrative decision-making involving groups. For example, in the language rights context, an executive's decision, under a statutory scheme, not to extend language rights services may affect an entire community.³⁵ The general application of such a decision may render it similar to a situation in which a legislature passes a *statute* that violates the language rights of an entire community.³⁶ The Court in *Doré* seems to distinguish individualized decision-making from general rules on the basis that the former involves specific facts, while the latter are applied generally. Yet an impugned decision affecting a group and an impugned statute that targets an identifiable group are not obviously distinguishable on these bases. Each involves specific facts and each has general, not individualized, application.³⁷ If the cases are indistinguishable, then one implication of the reasons in *Doré* might be that a court would be justified in applying the Charter analysis to governmental decisions involving entire groups, but this implication is not spelled out clearly in the reasons.

The Court compounded this uncertainty about the classes of administrative decision-makers and the kinds of decisions to which its reasoning applies when it inconsistently used adjectives to qualify the section 1 analysis. The Court sometimes used adjectives such as “full” and “strict” to modify “section 1 analysis” when the Court reasoned that the section 1 analysis should not be applied to administrative decision-making. This usage creates uncertainty about whether and when a “partial” section 1 analysis would be appropriate in cases involving administrative decision-making. If one were to accept the above discussion of the ambiguities in the Court's reasoning, one might argue for a complete exclusion of the Charter analysis from adjudicative or individualized administrative decision-making, but accept some form of Charter analysis in other situations.

³⁵ See, e.g., *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.) [hereinafter “*Doucet-Boudreau*”].

³⁶ See, e.g., *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] S.C.J. No. 47, [2009] 3 S.C.R. 208 (S.C.C.).

³⁷ It is worth noting that in *Hutterian Brethren*, *supra*, note 8, the majority in *obiter* at paras. 67-71 specifically distinguished individualized decision-making from rules of general application in order to demonstrate that the concept of reasonable accommodation was not pertinent to a s. 1 analysis involving legislation. The majority in that case emphasized that it is the *individual* focus of such decisions that attracts a reasonable accommodation analysis, but in making this argument, the majority did not expressly address cases in which a decision affects an entire group.

In addition, the Court's inconsistent use of adjectives to modify "section 1 analysis" could be taken to suggest the possibility of a modified or "partial" *Oakes* test to at least some forms of non-adjudicative administrative decisions. Fox-Decent and Pless have argued that *Lake*,³⁸ which the Court cites in *Doré*, represents one version of a modified application of the *Oakes* test. In that case, the Court deferred to the Minister's assessment of whether an infringement of a Charter right was justified.³⁹ But as Fox-Decent and Pless note, such a degree of deference is unprecedented, particularly because on the facts of *Lake* it did not seem as if the Minister actually undertook a section 1 analysis.⁴⁰ This level of deference significantly lightens the burden a government bears to justify an infringement of a constitutional right, and if this is what the Court in *Doré* meant by a modified or partial, rather than a full or strict section 1 analysis, it might have justified such a shift in terms more explicit than the ones offered in *Doré*.

There is a final concern about the scope of the reasons' coverage that Fox-Decent and Pless identify. In *Doré*, there was no question that the administrative decision-maker had infringed a Charter right, but there may be cases in which such a question is engaged. The Court in *Doré* is not entirely clear as to whether administrative decision-makers' judgments about whether a Charter right has been *infringed at all*, as opposed to whether such an infringement is *justified*, should be reviewed on a deferential standard of reasonableness.⁴¹ If these former determinations are to be made on a reasonableness standard, a heavier burden would seem to be imposed on a party seeking judicial review of administrative action that implicates a Charter right than the burden that would be imposed on a claimant challenging legislation (or regulations) on Charter grounds. If the Court in *Doré* intended to create such a distinction, it might have offered an explicit justification for doing so, but if it did not intend to do so, it might have expressly ruled out such a distinction. The Court's lack of precision in this instance, as in the instances identified above, creates a degree of uncertainty that is further heightened by a conceptual incoherence in the *Doré* reasons and by the incompleteness of some of the Court's reasoning. Let us turn now to these matters.

³⁸ *Supra*, note 28.

³⁹ Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?" in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2013) 407, at 427-28).

⁴⁰ *Id.*, at 428.

⁴¹ *Id.*, at 430.

2. Concerns about the Coherence and Adequacy of the Reasons

Recall that according to the Court in *Doré*, subjecting administrative decision-makers to Charter analysis would subject them to a correctness standard that would require courts to undertake *de novo* examinations of a wide range of decisions in the administrative state. The Court cited Professor Mullan⁴² for this proposition, and in my view this holding and this citation give rise to concerns about the internal coherence of the reasons in *Doré* and the adequacy of the reasons advanced. Consider first the issue of internal coherence.

In the concluding lines of its analysis of the proper approach to judicial review of administrative decisions that implicate Charter issues, the Court wrote: “there is ... 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”.⁴³ This claim seems to be inconsistent with the Court’s assertion earlier in the reasons that subjecting administrative action to Charter scrutiny would result in *de novo* review of such action. That claim expressed a concern that courts will be insufficiently deferential to administrative decision-making. But if (as the Court suggests) the *Oakes* test, like reasonableness review, allows for similar degrees of deference, then the objection cannot stand. Either the two approaches are inconsistent because the *Oakes* test results in a more stringent standard of review, or they are in harmony because they accord similar degrees of deference to state action. They cannot be both.

Furthermore, the Court relied on Professor Mullan’s interpretation of *Multani* to support its conclusion about *de novo* review under the *Oakes* test.⁴⁴ In my view, that interpretation is problematic. According to Professor Mullan, although the majority in *Multani* made gestures towards deferring to the administrative decision-maker, the majority ultimately reviewed the decision on a non-deferential correctness standard because it found that the decision amounted to a complete ban on the claimant’s right to exercise his religious freedom.⁴⁵ Professor Mullan seems to conclude that because in *Multani* no deference was accorded to the

⁴² David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*” (2006) 21 N.J.C.L. 127 [hereinafter “Mullan”].

⁴³ *Doré*, *supra*, note 1, at para. 57.

⁴⁴ *Id.*, at para. 51.

⁴⁵ Mullan, *supra*, note 42, at 142.

administrative decision-maker, courts will in general adopt a non-deferential stance when applying the *Oakes* test to the actions of such decision-makers.⁴⁶ But this is a *non sequitur*. It is true that when the state infringes a right in a way that amounts to a complete ban on that right, a court will consider such a ban to be a factor favouring non-deferential review under the *Oakes* test.⁴⁷

However, courts engaged in a section 1 analysis will not *always* engage in non-deferential review. In particular, when the impugned state action involves balancing interests, or considering competing social science evidence, courts will consider adopting a deferential stance.⁴⁸ As a consequence, and contrary to what the Court in *Doré* suggested, the simple fact that a court applies the *Oakes* test to an administrative decision does not mean that it will engage in non-deferential review. In order to avoid this implication, one might read the *Doré* decision more narrowly to say that once a court has established that the applicable standard of review is reasonableness, it should defer to administrative decision-makers, even when they engage in actions that amount to a total ban on the exercise of a Charter right. Yet if the Court had meant to take this position, I suggest that it should have offered specific supporting reasons. It is not enough, in my view, to express general concerns about consigning administrative law to a mere “formal role”.⁴⁹

There is another point in the reasons in *Doré* at which the Court offered little in support of a conclusion. The Court held that “when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the ‘pressing and substantial’ objective of a decision is”.⁵⁰ The Court cited no authorities in support of this claim, nor did it explain the specific nature of the conceptual difficulty. This lacuna is particularly striking, given that the Court in *Multani* articulated just such an objective.⁵¹ The majority in *Multani* reasoned that the Commission’s decision was prescribed by law

⁴⁶ *Id.*, at 142-43.

⁴⁷ See, e.g., *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.).

⁴⁸ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 989-90 (S.C.C.).

⁴⁹ *Doré*, *supra*, note 1, at para. 33.

⁵⁰ *Id.*, at para. 38.

⁵¹ It is equally striking that only two months earlier the Court released *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.), in which a unanimous Court at para. 137 applied a s. 1 analysis to an exercise of ministerial discretion and had no difficulty in articulating a pressing and substantial objective.

because it was made pursuant to a statutory grant of discretion,⁵² and concluded that the pressing and substantial objective behind the decision was to ensure a reasonable level of safety in schools.⁵³ It may be that the *Doré* Court found the presentation of the objective by the majority in *Multani* to be unconvincing, but the majority in *Multani* evaluated without evident difficulty an objective that did not seem to be particularly controversial. If a court effectively overrules a precedent on specific grounds, it would seem to be prudent to offer reasons for such an overruling, rather than simply asserting that it would be difficult to respect the precedent.

How, then, might one address the uncertainties in the coverage, as well as the inconsistencies and gaps in the Court's reasoning in *Doré*? One solution might be to propose doctrinal rules that aim to accommodate the tensions in *Doré*. For example, a court might reason that the *Oakes* test should apply to non-adjudicative administrative decisions that affect an entire group, even though such decisions do not take the form of generally applicable and accessible legal rules. Such a court might reason that the similarities in effects between a non-adjudicative decision affecting a group and a general rule would counsel subjecting both to the *Oakes* test. In undertaking such an *Oakes* analysis, a court may add to the existing reasons for deference additional ones drawn specifically from the administrative law context. For instance, a reviewing court might take into consideration the fact that an administrative decision-maker possessed specific expertise when such a court decides how much deference to accord an administrative decision affecting an entire group. Furthermore, a court undertaking such an analysis might reason by analogy from *Multani* in order to determine whether and how such a decision was prescribed by law, and whether the objective advanced by the decision-maker was pressing and substantial.

Alternatively, one could imagine a court applying the current section 32 jurisprudence and concluding that tribunals engaged in adjudication should not be subject to Charter scrutiny. In support of such a conclusion, a court might note that it is exceedingly difficult to characterize a single pressing and substantial objective behind *any* adjudicative decision.⁵⁴ Our hypothetical

⁵² *Multani*, *supra*, note 16, at para. 41.

⁵³ *Id.*, at para. 48.

⁵⁴ The reasons of Deschamps and Abella JJ. in *Multani*, *id.*, at para. 111, refer specifically to the problems of formulating a s. 1 justification for “an administrative body with quasi-judicial functions ... in light of the fact that it is supposed to be independent of the government”. One might argue that any adjudicative decision aims to give effect to the purpose of the legislation it interprets and rely on

court would further distinguish instances of adjudication from the kind of discretionary decision-making that the Court assessed in *Multani*. In so doing, it would offer specific reasons for not applying that precedent to adjudicative tribunals and it would be clear about the standard of review applicable to decisions about *whether* a Charter right has been engaged or violated. Finally, our hypothetical court might incorporate *Oakes*-type considerations into the balancing analysis that the Court prescribed in *Doré*. For instance, in assessing how the Charter value at issue would be best protected in light of the relevant statutory objectives, a reviewing court might, as a general rule, consider that Charter values are not sufficiently protected when the administrative decision-maker imposes a total ban on the exercise of a Charter right, and subject any such ban to non-deferential review.

Of course, these attempts at addressing the gaps and inconsistencies in the *Doré* reasons are only suggestive. It is, however, worth noting that these suggestions engage the reasons in *Doré* on their own terms and assess the specific implications that arise from those reasons. The analysis in this Part did not attempt to categorize the reasons in terms of the standard academic debates about proportionality and judicial review that were canvassed in the Introduction to this paper. In what follows, I will argue that one reason for resisting such a standard framing of the Court's reasons in *Doré* is that they do not fit easily within that framing. The Court did, however, respond to positions advanced in a related set of debates, and I will close this essay with an assessment of the Court's engagement with those debates and a discussion of one specific consequence that the Court, in staking a position in those debates, seemed to overlook. I will conclude that the Court should have focused on producing a set of reasons that was attentive to concerns of judicial craft, instead of engaging somewhat carelessly in academic debates.

III. INTERPRETIVE ISSUES AND CONSEQUENCES

In the Introduction, we saw that debates about the concept of proportionality give rise to disagreements about (1) whether judges applying the concept improperly import into their judgments subjective preferences;

Dickson C.J.C.'s decision in *Slaight*, *supra*, note 32, for this proposition. Yet in *Slaight*, it was a remedial order that was at issue, and such orders can be interpreted to directly advance a legislative purpose. It would seem to be more difficult to characterize an adjudicative judgment about, for instance, whether a decision infringed a Charter right, as seeking to advance a legislative purpose.

and (2) whether courts possess the requisite institutional capacity to assess the kinds of issues to which applications of the concept typically give rise. We saw further that those who claim that proportionality analysis involves an unacceptable degree of indeterminacy, and that courts are institutionally incapable of undertaking the relevant inquiries, typically favour formalist interpretive methods. By contrast, those who are more optimistic about the ability of judges to apply the concept of proportionality with principled precision, and who believe that courts possess the requisite institutional capacities, typically favour purposive interpretive strategies. In what follows, I will examine the extent to which the reasons in *Doré* fit within the standard debate.

1. Proportionality Debates and the Reasons in *Doré*: An Uneasy Fit

The Court in *Doré* deployed reasoning that sounds in the language of formalism when it held that the analytic structure of the *Oakes* test does not fit exercises of administrative discretion. We saw above that the Court distinguished, as a categorical matter, generally applicable rules from individualized decisions. Such a categorical analysis is the hallmark of formalist reasoning.⁵⁵ Yet, contrary to the standard alignment of positions in debates about proportionality, the Court deployed this formalist reasoning in order to open the door to proportionality analysis, rather than to foreclose it. According to the Court's reasoning, whether a court characterizes state action as a general rule or as an administrative decision, that state action will be subject to a proportionality analysis under either the *Oakes* test or the balancing analysis set out in *Doré* itself.

Furthermore, when the Court rejected the application of the Charter analysis to exercises of administrative discretion, because such an analysis would impose a correctness standard, it advanced purposive arguments. The Court held that a reasonableness standard would advance the purposes of a "values-based", rather than a "formalistic" approach to administrative law,⁵⁶ and concluded that a reasonableness standard was appropriate because administrative decision-makers possess the institutional capacity to undertake the relevant fact-based determinations.

⁵⁵ See generally Lawrence B. Solum, "The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism and the Future of Unenumerated Rights" (2006) 9 U. Pa. J. Const. L. 155; Larry Alexander, "'With Me, It's All er Nuthin': Formalism in Law and Morality" (1999) 66:3 U. Chicago L. Rev. 530.

⁵⁶ *Doré*, *supra*, note 1, at para. 31.

Once again, the Court resisted the standard alignment of positions in the debate surveyed above. Authors who typically embrace purposive interpretations believe that courts are well positioned to weigh the relevant considerations at stake in constitutional disputes, but the result of the Court's purposive interpretation in *Doré* was judicial deference to administrative actors who, in the Court's judgment, possessed a greater degree of institutional competence to make the relevant determinations than courts.

In short, the reasoning in *Doré* did not fall within the standard alignment of positions in the debates about proportionality in constitutional adjudication. The Court did not, however, avoid those debates altogether. Instead, the Court engaged a related set of debates about formalist and purposive legal reasoning in Canadian administrative law. The Court addressed this debate most directly when it referred to academic criticisms of the reasoning in *Multani*,⁵⁷ but references to the debates can be seen throughout the reasons in the Court's criticisms of approaches to administrative law that it characterized as "formalistic"⁵⁸ and as representing an "impoverished" understanding of that body of law.⁵⁹

2. Engaging Inadequately Academic Debates

In my view, these references contribute little to the Court's reasoning. We have already seen that the Court's reasoning made recourse to formal categories and, indeed, the Court has been criticized for relying on such categories by the authors whom it cited in *Doré* to support the adoption of a purposive approach to administrative law.⁶⁰ The Court's express rejection of formalism therefore appears to contradict the formalistic analysis it

⁵⁷ *Id.*, at para. 33.

⁵⁸ *Id.*, at para. 31.

⁵⁹ Genevieve Cartier, "The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion" [hereinafter "Cartier"] in David Dyzenhaus, ed., *The Unity of Public Law* (Portland, OR: Hart Publishing, 2004) 61, at 69, cited in *Doré*, *supra*, note 1, at para. 27.

⁶⁰ The Court cites Gratton and Sossin in *Doré* to support a shift away from the "formal" approach to review of administrative decisions articulated by *Multani* (Susan L. Gratton & Lorne Sossin, "In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court" [hereinafter "Gratton & Sossin"] in David A. Wright & Adam Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 145, at 157). In the text that the Court cites, the authors criticize as formalistic the Court's reasoning in *Vancouver Transportation Authority*, *supra*, note 10. That categorical distinction between rules and decisions is, however, one of the bases for the conclusions drawn in *Doré*, *supra*, note 1, and the Court refers at para. 37 specifically to the passage that Gratton and Sossin criticize.

undertook, the cases it cited (including *Vancouver Transportation*) and the arguments of the very academic authorities upon which it relied. The Court's invocation of purposivism gives rise to a similar set of problems.

Purposive approaches to legal questions are most convincing when a clear connection is drawn between the purposes articulated and the legal regime proposed.⁶¹ Yet, although the Court in *Doré* referred to various purposes, such as allowing the Charter to “nurture” administrative law⁶² or preventing a “strict s. 1 analysis” from reducing “administrative law to having a formal role in controlling the exercise of discretion”,⁶³ it is not entirely clear why a desire to advance these purposes would lead to the approach proposed. For example, if, as the Court suggested, administrative bodies should be empowered to “consider *Charter* values within their scope of expertise”,⁶⁴ it is not obvious why Charter review of such decisions, which would involve an application of a deferential standard in the section 1 analysis, would not yield that result. Administrative decision-makers subject to such review would undertake their tasks in light of the possibility of constitutional review and would therefore incorporate Charter considerations into their decision-making processes. Moreover, if the justifications offered for such decisions were reviewed under section 1 on an appropriately deferential standard, administrative agencies would incorporate Charter values in their decisions without being threatened by persistent and intrusive judicial interventions.

Similarly, if the relevant purpose behind applying administrative law standards of review is to avoid reducing administrative law to a “formal role” in controlling discretion, it is not clear why courts should necessarily apply the same standard of review to administrative decision-making involving Charter values as they would apply to administrative decision-making that does not engage such values.⁶⁵ The Court in *Doré* held that

⁶¹ See, e.g., Martha Nussbaum, “Foreword: Constitutions and Capabilities: ‘Perception’ Against Lofty Formalism” (2007) 121 Harv. L. Rev. 4.

⁶² *Doré*, *supra*, note 1 at para. 29.

⁶³ *Id.*, at para. 33.

⁶⁴ *Id.*, at para. 35.

⁶⁵ It is worth noting that neither Evans (J.M. Evans, “The Principles of Fundamental Justice: The Constitution and the Common Law” (1991) 21:1 Osgoode Hall L.J. 51 [hereinafter “Evans”]) nor Cartier, *supra*, note 59, who are cited by the Court in *Doré*, *supra*, note 1 at para. 27, to support an exclusive recourse to an administrative law standard of review in cases where Charter rights are implicated, argue for such an approach. Cartier expressly states at 85 that her analysis of the review of discretionary decisions “does not lead to concluding that there is no justification for using the constitutional standard of the *Charter* where discretionary decisions are challenged on the basis of *Charter* arguments”. Similarly, Evans explicitly sets out at 57 the conditions under which the Charter should apply in cases in which the legality of administrative action involving a

the reasonableness review that is applied to disciplinary panels when their decisions implicate Charter values should be identical to the review of such panels more generally.⁶⁶ The Court reasoned that the only alternative to such an approach would be to apply a correctness standard. But a careful reading of the article by Professor Mullan upon which Court relied for its reasoning on this point suggests that the Court presented a false dichotomy.

Professor Mullan argues for a modified approach to judicial review of administrative action when Charter interests are implicated. According to him, the Court should place a burden of justification on government in Charter cases to demonstrate that its decisions took into consideration the relevant Charter values, and only when the government has discharged that burden should a reviewing court accord that decision deference.⁶⁷ Such an approach would differ from the standard case of judicial review in administrative law where the “onus rests with the applicant to establish a basis for judicial review by reference to whatever standard is produced by the pragmatic and functional analysis”.⁶⁸ In Professor Mullan’s view, his proposed approach would give adequate weight to the constitutional interests at stake in judicial review of administrative decisions involving Charter values. Such an approach would not reduce administrative law to a “formal role” in controlling discretion, yet it would not require a uniform standard of review for discretionary decisions that involve Charter issues and those that do not engage such issues. My point here is not to claim that Professor Mullan’s approach is correct and that the Court’s is in error. It is rather to point out that when the Court engaged academic debates, it did so with insufficient rigour and with a lack of attention to the arguments of the authorities it invoked.⁶⁹

Charter-protected interest is challenged: “It should only be necessary to resort directly to the *Charter* when a ground of judicial review that would otherwise have been available at common law has clearly been abrogated by statute, or when the existing common law of judicial review does not give to a *Charter* right the degree of protection that the applicant is seeking.”

⁶⁶ *Doré, supra*, note 1, at para. 45.

⁶⁷ Mullan, *supra*, note 42, at 147-48.

⁶⁸ *Id.*, at 146.

⁶⁹ There is an additional example of this lack of care in addressing the arguments of academic authorities. One of the authorities the Court invokes to support the claim that *Multani, supra*, note 16, has been subjected to academic criticism in fact supports the reasoning of the majority in *Multani* (Gratton & Sossin, *supra*, note 60, who in turn rely on Susan L. Gratton, “Standing at the Divide: The Relationship Between Administrative Law and the *Charter* Post-*Multani*” (2008) 53:3 McGill L.J. 477).

3. Considering Consequences, Avoiding Generalizations

In the foregoing we considered concerns about how the Court in *Doré* treated specific arguments in the debate about formalist and purposive approaches to administrative law. In what follows, I will argue that while engaging in those debates, the Court neglected to consider a significant implication of its arguments. The Court in *Doré* at several points reasoned that it wanted to preserve a “richer conception of administrative law”.⁷⁰ Moreover, the Court made it clear that it sought to avoid applying the Charter analysis to discretionary decisions. The result of applying a Charter analysis to such decisions, the Court reasoned, would be that “a rich source of thought and experience about law and government will be overlooked”.⁷¹

Yet in attempting to avoid this outcome, the Court in *Doré* put into question the availability of section 24(1) remedies. The Court in *Schachter v. Canada* specified the conditions under which a section 24(1) remedy is available, and it is worth quoting the passage in its entirety:

Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person’s *Charter* rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.⁷²

If we are to take the broadest reading of the Court’s reasons in *Doré* seriously, then it would seem that section 24(1) would have virtually no application, because most, if not all, of the potential cases in which section 24(1) would apply would no longer be susceptible to Charter review. As we have seen above, the Court in *Doré* can be interpreted as having sought to preclude the Charter analysis from applying to (1) cases in which administrative actors make decisions that affect individuals’ Charter interests; and (2) cases in which a statute, legislative provision or other rule is not at issue, but an administrative decision-maker acts under the authority of statute. These two conditions are the precise circumstances under which the Court in *Schachter* states that section 24(1) applies. Moreover, the Court in *Schachter* reasons that there may be rare circumstances in which section 24(1) may apply in conjunction with

⁷⁰ *Doré*, *supra*, note 1, at para. 35.

⁷¹ Evans, *supra*, note 65, at 73, cited in *Doré*, *supra*, note 1 at para. 34.

⁷² [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at 719-20 (S.C.C.) [hereinafter “*Schachter*”].

section 52(1), but then proceeds to rule out a series of possible scenarios.⁷³ So, if section 24(1) does not apply in the circumstances in which an entity to whom the Charter applies makes a decision under the authority of a statute, it would not seem to have much, if any, application at all. This consequence is particularly serious, since the Court has stated in a discussion of section 24(1) remedies that Charter rights are only made meaningful if there are responsive and effective remedies available to claimants.⁷⁴ If the Court in *Doré* effectively has ruled out recourse to section 24 remedies by sharply limiting the cases in which those remedies are available, then it would seem to have rendered impotent an essential mechanism by which Charter rights are given effect.

IV. CONCLUSION

How then are we to understand this outcome in light of our discussion of the Court's engagement with the academic debates about administrative law? We have seen that the Court in *Doré* sought to advance some purposes that scholars of administrative law have articulated. In particular, the Court (citing Professor Evans) aimed to ensure that administrative law would not be "overlooked or lost altogether".⁷⁵ And the Court (citing Professor Cartier) aimed to avoid "an impoverished picture of administrative law".⁷⁶ Yet while focusing on these general aims, the Court overlooked the impact of its decision on the structure of the Charter. The analysis above suggests that at least in some circumstances, theoretical parsimony may be the wiser course for courts seeking to resolve thorny questions of the allocation of institutional decision-making authority. In this respect, the *Doré* reasons offer positive and negative lessons. As we have seen above, the Court eschewed the standard positions in debates about proportionality as it developed its analysis of the boundaries between Charter and administrative law review of administrative decision-making. But when the Court engaged a cognate set of debates, it did so in ways that raised rather than resolved questions, mischaracterized positions in those debates, and overlooked important consequences of its reasoning.

⁷³ *Id.*, at 720.

⁷⁴ *Doucet-Boudreau*, *supra*, note 35, at para. 25.

⁷⁵ Evans, *supra*, note 65, at 73, cited in *Doré*, *supra*, note 1, at para. 27.

⁷⁶ Cartier, *supra*, note 59, at 69, cited in *Doré*, *id.*

In my view, the Court in *Doré* would have been on firmer ground if it had focused on rendering a set of reasons that avoided the pitfalls identified in Parts II and III of this paper. The reasons would have been stronger if they had avoided ambiguities, been internally coherent, offered more fully articulated support for their conclusions and closely considered the effects of the Court's decision on related areas of public law. Attention should have been paid to these specific issues of judicial craft, rather than to general theoretical concerns about "formalism" or a "rich" or "impoverished" conception of administrative law. I do not mean to suggest that theoretical debates in the academy have no place in the public law jurisprudence of the Supreme Court of Canada. I do, however, think that those debates, which can often be pitched at a high level of generality that is far removed from the particular circumstances in which courts render decisions, should lie in the background and only emerge to the fore when they are directly and specifically relevant to resolving a question before a court. Theoretical debates should not, in my view, be the direct and primary object of judicial analysis, particularly when courts engage in them incompletely while overlooking the impacts of their reasoning on structural mechanisms of the Constitution, such as remedies. To fail to weigh adequately these kinds of impacts while at the same time devoting significant attention to general and theoretical concerns about the nature of administrative law is to engage in reasoning that lacks a sense of proportion.

