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# *Doré*: All That Glitters Is Not Gold

**Christopher D. Bredt and Ewa Krajewska***

## I. INTRODUCTION

In *Doré v. Barreau du Québec*,[1] the Supreme Court of Canada not only confirmed the long line of case law that administrative tribunals must make decisions in accordance with the Charter,[2] it went a step further by mandating that administrative tribunals exercise their discretion in accordance with Charter *values*.

In this paper we first place *Doré* in context by providing background on the relationship between the Charter and administrative tribunals generally. Second, we summarize the divergent streams in the jurisprudence that existed prior to *Doré* on how administrative tribunals should exercise their discretion in accordance with the Charter. Specifically, up until *Doré* there was a debate in the jurisprudence on whether an *Oakes*[3] framework or an administrative law framework should govern the analysis. Third, we summarize and discuss the Court's decision in *Doré*. Fourth, we discuss the genesis and development of Charter values. The purpose of discussing this genesis is to situate the *Doré* decision in the development of the jurisprudence around Charter values. Finally, we critique the *Doré* framework.

The substance of the critique is as follows. First, the scope and essence of Charter values are ill defined. For example, while in *Doré* the Charter value at issue was freedom of expression, which has a corresponding Charter right whose scope is well defined in the case law, other values, such as human dignity or autonomy, do not have analogous rights and therefore are not jurisprudentially defined. The nebulous nature of Charter values will, in our view, lead to difficulties in the application of the proportionality analysis. As part of this critique, we

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

2 *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"].

3 *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

also question whether the standard of review of reasonableness is appropriate in the circumstances. Finally, there are practical implications of the *Doré* decision that have been left unaddressed. In particular, it is unclear who bears the onus in the different stages of the proportionality analysis and what evidentiary foundation will be required to demonstrate that a Charter value is at issue and that one has been infringed.

## II. Background on the Charter and Administrative Tribunals

In order to properly understand *Doré* and the new framework it mandates, it is important to contrast it with the legal frameworks that already exist for administrative tribunals to give effect to and apply Charter rights. The three established frameworks that already govern are as follows:

(1) granting a section 52 or section 24(1) remedy when a statute or regulation is unconstitutional;

(2) interpreting a statute or regulation to be Charter compliant; and

(3) exercising discretion in accordance with Charter rights or values.

### 1. Challenging a Statute or Regulation as Unconstitutional

In *R. v. Conway*,[4] the Supreme Court of Canada reformulated and simplified the test for when an administrative tribunal is "a court of competent jurisdiction" to consider constitutional questions (section 52 of the *Constitution Act, 1982*[5]) and to grant Charter remedies (section 24 of the Charter). In doing so, the Supreme Court simplified the law in this area by making the primary consideration whether the administrative tribunal can consider questions of law.

Prior to *Conway*, different tests were applied to determine whether a tribunal had jurisdiction under section 52 of the *Constitution Act, 1982* and section 24(1) of the Charter. Thus, the analysis depended on the nature of the Charter question at issue:

(1) If an applicant submitted that the tribunal should find a legislative provision constitutionally invalid or inapplicable, *then the analysis under section 52 applied*.

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4 [2010] S.C.J. No. 22, 2010 SCC 22 (S.C.C.) [hereinafter "*Conway*"].

5 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

(2) If an applicant requested that the tribunal provide a personal remedy on the basis that his or her Charter rights had been infringed, *then the analysis under section 24(1) applied*.

However, as the jurisprudence developed, the two tests began to overlap. In particular, the test for jurisdiction under section 24(1) came to incorporate many of the same factors that were considered under the test for jurisdiction under section 52. Accordingly, it was rare for a tribunal to have jurisdiction to grant a remedy for a Charter violation under section 24(1) if it did not also have jurisdiction to consider whether a legislative provision was constitutional under section 52.

After reviewing the evolution of the jurisprudence on the power of administrative tribunals to consider Charter issues, in *Conway* the Court set out the following test for whether an administrative tribunal can grant a remedy under section 24(1) of the Charter:

(1) Does the administrative tribunal have jurisdiction, explicit or implicit, to decide questions of law? If it does, and unless it is clearly demonstrated that the legislature intended to exclude the Charter from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the Charter — and Charter remedies — when resolving the matters properly before it.[6]

(2) If the answer to the first question is affirmative, the remaining question is whether the tribunal can grant the *particular remedy* sought, given the relevant statutory scheme. At issue will be whether the remedy sought is the kind of remedy that the legislature intended to fit within the statutory framework of the tribunal. Relevant considerations will include the tribunal's statutory mandate, structure and function.[7]

An overarching theme in *Conway* was the Court's acceptance that administrative tribunals should play a primary role in determining Charter issues falling within their jurisdiction. The decision could be said to fall within a general trend affirming the power of administrative tribunals and respecting their decision-making (as seen in *Dunsmuir v.*

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6 *Conway*, *supra*, note 4, at para. 81.

7 *Id.*, at para. 82.

*New Brunswick*,[8] *Canada (Citizenship and Immigration) v. Khosa*[9] and *Bell Canada v. Bell Aliant Regional Communications*[10]).

Significantly, and perhaps anticipating *Doré*, Abella J. wrote that tribunals can vindicate a claimant's Charter rights by exercising their regular statutory powers and processes in ways that accord with Charter values. Justice Abella wrote:

> Remedies granted to redress *Charter* wrongs are intended to meaningfully vindicate a claimant's rights and freedoms. ... Yet it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct *Charter* applications. ... *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes. ... In this case, it may well be that the substance of Mr. Conway's complaint about where his room is located can be *fully addressed within the framework of the Board's statutory mandate and the exercise of its discretion in accordance with* Charter *values*.[11]

## 2. Interpreting a Statute or Regulation so that It Is Constitutional

There is an established framework for a court or tribunal to interpret a statute or regulation in order for it to be constitutional. The Supreme Court has rejected the proposition that statutes should automatically be interpreted into conformity with Charter values. Charter values are relevant to statutory interpretation only where the statute is ambiguous and reference to a Charter value would help resolve the ambiguity.[12]

Most recently, the Supreme Court confirmed this approach in *R. v. Clarke*,[13] in which the accused did not directly challenge the constitutionality of sentencing legislation but argued instead that the provision was ambiguous and that the appropriate exercise involved the application of Charter values. Justice Abella, for the Court, reiterated that statutory ambiguity is a prerequisite to the application of Charter values when interpreting legislation.[14]

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[8] [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter "*Dunsmuir*"].

[9] [2009] S.C.J. No. 12, [2009] 1 S.C.R.. 339 (S.C.C.).

[10] [2009] S.C.J. No. 40, [2009] 2 S.C.R. 764 (S.C.C.).

[11] *Conway*, *supra*, note 4, at para. 103 (emphasis added).

[12] *Bell ExpressuVu v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, at paras. 61-66 (S.C.C.); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, [2005] 2 S.C.R. 539, at para. 48 (S.C.C.).

[13] [2014] S.C.J. No. 100, 2014 SCC 28 (S.C.C.).

[14] *Id.*, at para. 15.

### 3. Where a Statute or Regulation Is Not Contrary to the Charter, but Grants Discretion to the Decision-maker

An example of this kind of use of the Charter can be found in *Eldridge v. British Columbia (Attorney General)*.[15] In that case, a law authorizing the Medical Services Commission to fund certain health services was found not to violate the Charter, but the exercise of discretion by the Commission not to fund interpreters for deaf patients was found to be unconstitutional.

The decision in *Doré* falls under this last category. Mr. Doré did not challenge the constitutionality of the Code of Ethics under which he was reprimanded. Nor did he challenge the length of the suspension he received. The issue was whether the Barreau du Québec exercised its discretion in accordance with Charter values by reprimanding Mr. Doré for the letter he had sent.

## III. THE TENSION BETWEEN AN *OAKES* FRAMEWORK AND AN ADMINISTRATIVE LAW FRAMEWORK

Until *Doré* there were two strands of jurisprudence on how administrative tribunals and reviewing courts should assess whether an administrative decision-maker exercised discretion in accordance with the Charter. Initially, the jurisprudence dictated that an *Oakes* analysis was appropriate. More recently, a number of cases have suggested that an administrative law framework was better suited to the tribunal context. In *Doré*, the Court reviewed this jurisprudential history and settled on the administrative law framework. However, it is clear from the new framework set out in *Doré* that the idea of proportionality underlying the *Oakes* test will nevertheless continue to play a significant role.

The first time the Supreme Court considered whether an administrative tribunal's discretionary decision accorded with the Charter was in *Slaight Communications Inc. v. Davidson*.[16] The issue in the case was the remedial discretion in the *Labour Code* that allowed adjudicators to resolve grievances under collective agreements. In *Slaight*, the adjudicator ordered, among other things, that the employee be reinstated and that the company, a radio station, give the employee a letter of reference of specified content and refrain from saying anything further

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15 [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

16 [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.) [hereinafter "*Slaight*"].

about the employee. The company challenged the labour adjudicator's decision on the ground that it infringed its freedom of expression under section 2(b) of the Charter.

Justice Lamer (as he then was), in concurring reasons, held that the Charter applied to a labour adjudicator's decision and used the section 1 framework developed in *Oakes*[17] to determine whether the decision complied with the Charter. Justice Lamer wrote:

> The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the Charter. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.[18]

Justice Lamer adopted the *Oakes* framework instead of the general administrative law framework for the review of discretionary decisions. He rejected the latter as, in his view, it did not have the appropriate tools to evaluate the legality of discretionary decisions challenged on the basis of Charter arguments because it did not allow a court "to examine [the] appropriateness [of a discretionary decision] or … substitute its own opinion for that of the person making the order".[19]

Chief Justice Dickson, in concurring reasons, also preferred the *Oakes* analysis. In his view, the administrative law standard is less onerous than section 1 and it "rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis".[20]

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[17] *Supra*, note 3.

[18] *Slaight*, *supra*, note 16, at 1081.

[19] *Id.*, at 1074; see also Geneviève 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, 2004) 61, at 68.

[20] *Slaight*, *id.*, at 1049.

Justice Abella in *Doré* notes that the approach in *Slaight* attracted academic concern from administrative law scholars.[21] For example, Professor Geneviève Cartier wrote that the Court's opinion expressed a "hierarchical view" of the relationship between administrative law and the Charter. The role of administrative law was "reduced to one of formal determination of jurisdiction on the basis of statutory interpretation, and it does not have the ability to deal with issues of fundamental values".[22] The main critique was that the Court should not have bypassed administrative law in favour of the Charter.[23]

The notion that an administrative tribunal should take into account Charter values was first captured in *Baker v. Canada (Minister of Citizenship and Immigration)*,[24] in which L'Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the Charter, when exercising their discretion.[25]

The conflict between the *Slaight* strand of jurisprudence and the *Baker* strand of jurisprudence came to a head in *Multani v. Commission scolaire Marguerite-Bourgeoys*.[26] The issue in that case involved the discretionary decision of a school board to prohibit a Sikh student from wearing his kirpan to school. The student and his family challenged the decision of the school board as an infringement of his freedom of religion. While the Supreme Court unanimously struck down the board's decision, it split 6:2 on whether a Charter or administrative law analysis applied.

Justice Charron, for the majority, applied the Charter analysis. She held that the school board's decision infringed the student's freedom of religion and that the infringement could not be justified under section 1. Justice LeBel wrote a separate concurring opinion agreeing that the Charter analysis was appropriate but proposing that the section 1 analysis be modified in cases involving administrative discretion.

Justices Abella and Deschamps held that an administrative law analysis applied because the decision being assessed was an administrative decision rather than a law, regulation or other similar rule of general

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[21] See, for example, J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall L.J. 51, at 74; Cartier, *supra*, note 19, at 68.

[22] Cartier, *id*.

[23] *Doré*, *supra*, note 1, at para. 27.

[24] [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

[25] *Id.*, at paras. 53-56.

[26] [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.).

application. They reviewed the school board's decision on a standard of reasonableness and found it unreasonable in disregarding Multani's freedom of religion.

We turn now to a discussion of *Doré*, where Abella J. for a unanimous Court, determined that the administrative law analysis should be adopted rather than the *Oakes* approach.

## IV. *DORÉ* — HOW DOES AN ADMINISTRATIVE DECISION-MAKER APPLY CHARTER VALUES IN THE EXERCISE OF STATUTORY DISCRETION?

### 1. Factual Background

At issue in *Doré* was the Barreau du Québec's decision to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding. The lawyer did not challenge the constitutionality of the Code of Ethics under which he was reprimanded. Nor did he challenge the length of the suspension he received. He challenged the constitutionality of the decision of the Barreau du Québec itself, claiming that it violated his freedom of expression under the Charter.[27]

Interestingly, in the courts below, including the Superior Court and the Court of Appeal, the case was framed as an infringement of Mr. Doré's *right* to freedom of expression.[28] It was only at the Supreme Court level that the decision was written to discuss Charter values instead of rights.

Writing for a unanimous Court, Abella J. framed the issue raised by the case as how to protect Charter guarantees and the values they reflect in the context of an adjudicated administrative decision. Normally, if a discretionary decision is made by an adjudicator within his or her mandate, that decision will be reviewed for its reasonableness. The question is whether the presence of a Charter issue calls for the replacement of the administrative law framework with the *Oakes* analysis.

After reviewing the history of the Court's jurisprudence on this issue, in her decision in *Doré*, Abella J. noted that the academic commentary that followed *Multani* was consistently critical. It argued that the use of a

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[27] *Doré*, *supra*, note 1, at para. 2.

[28] See *Doré v. Tribunal des professions*, [2008] Q.J. No. 5222, 2008 QCCS 2450 (Que. S.C.) and *Doré v. Bernard*, [2010] Q.J. No. 88, 2010 QCCA 24 (Que. C.A.).

strict section 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion.[29] Justice Abella concluded that the *Oakes* analysis should be rejected in favour of an administrative law approach. She outlined the appropriate standard of review for this kind of decision and then set out a new proportionality framework designed to guide parties and decision-makers.

### 2. Standard of Review

On the issue of the standard of review, Abella J. held that deference will be appropriate even when Charter values are at issue so long as the administrative decision-maker has the requisite expertise. She conceded that there is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness.[30] However, she wrote that it is not clear that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of Charter values in making a discretionary decision.[31]

Given the administrative decision-maker's expertise and its proximity to the facts of the case, Abella J. found that in the case of the Barreau du Québec, deference was justified. She wrote, that "[e]ven 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*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis."[32]

### 3. An Administrative Law Proportionality Framework

On the proportionality framework, while Abella J. rejected the "formulaic application of the *Oakes* test" as not workable in the context of an adjudicated decision, "distilling its essence works the same justificatory muscles: balance and proportionality".[33] In particular, she noted that some

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[29] *Doré*, *supra*, note 1, at para. 33, citing David Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*" (2006) 21 N.J.C.L. 127; Stéphane Bernatchez, "Les rapports entre le droit administrative et les droits et libertés : la révision judiciaire ou le contrôle constitutionnel" (2010) 55 McGill L.J. 641.

[30] *Doré*, *id.*, at para. 43.

[31] *Id.*, at para. 43.

[32] *Id.*, at para. 54 (emphasis in original).

[33] *Id.*, at para. 5.

aspects of the *Oakes* test are "poorly suited to the review of discretionary decisions, whether judges or administrative decision-makers".[34]

However, when one reviews the proportionality framework set out by the Court in *Doré*, it is evident that the proportionality analysis from *Oakes* plays a significant role: the administrative tribunal is mandated to balance the severity of the interference with the Charter protection with the statutory objectives:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. …
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> 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. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. …
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> If, 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.[35]

The framework can be broken down into three steps:

(1) the decision-maker must determine the Charter value at issue and how it will be infringed;

(2) the decision-maker must consider the statutory objectives of the regulatory regime; and

(3) the decision-maker must ask how the Charter value at issue will best be protected in view of the statutory objectives. This requires balancing the severity of the interference with the Charter value with the statutory objective.

We now turn to a consideration of the genesis of the term Charter values. In order to understand the role that Charter values are to play in the administrative law context under *Doré*, it is useful and helpful to look back and see how the concept of Charter values has been used and developed in the jurisprudence up until *Doré*.

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[34] *Id.*, at paras. 37-39.

[35] *Id.*, at paras. 55-58.

## V. THE GENESIS OF CHARTER VALUES

Prior to *Doré*, Charter values have been used as an interpretive tool in two ways. First, Charter values have been used by the Court to interpret and define the scope of Charter rights. In other words, values have been used as the underlying principles that assist the Court in defining the scope of a Charter right. Second, Charter values have been used to develop the common law to ensure that the common law develops in a manner that is consistent with the Charter.

### 1. Charter Values to Interpret Charter Rights

The concept of Charter values was developed for the purpose of explaining the scope and limit of Charter rights. In *R. v. Oakes*, Dickson C.J.C. identified values such as "the respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions" as the genesis of the rights and freedoms guaranteed by the Charter.[36] In other words, Charter values underlie Charter rights.

More recently, in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, McLachlin C.J.C. relied on Charter values to interpret section 2(d) as protecting the process of collective bargaining.[37] She wrote:

> Protection for a process of collective bargaining within s. 2(*d*) is consistent with the Charter's underlying values. The *Charter*, including s. 2(*d*) itself, should be interpreted in a way that maintains its underlying values and its internal coherence.
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> . . .
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> Human dignity, equality, respect for autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter* (citations omitted). All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(*d*) of the *Charter*.[38]

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[36] *Oakes*, *supra*, note 3, at para. 64.
[37] [2007] S.C.J. No. 27, 2007 SCC 27, at para. 39 (S.C.C.).
[38] *Id.*, at paras. 80-81.

This approach sees Charter values not as something that deserves Charter protection in and of itself. Rather, Charter values are principles underlying the right that enables the courts to define the scope of a right, to determine whether or not the right has been infringed and then in the *Oakes* analysis to balance the extent of that infringement with the statutory objectives.

### 2. Charter Values Used to Develop the Common Law

In *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*,[39] the Supreme Court of Canada concluded that while the Charter does not apply to private actors or the common law, the common law should always be interpreted and developed in a manner consistent with the values of the Charter.[40]

In *R. v. Salituro*,[41] the Supreme Court elaborated on the importance of interpreting the common law in accordance with Charter values. In that case, the Crown had called the accused's estranged wife as a witness. The Court held that the common law rule prohibiting spouses from testifying against each other was inconsistent with developing social values and with the values enshrined in the Charter. Justice Iacobucci commented as follows:

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, *supra*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.
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> …

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39 [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.).

40 *Id.*, at 603.

41 *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 (S.C.C.).

> Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values ... then the rule ought to be changed.[42]

Charter values were invoked by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, which challenged a judge's order restraining the broadcast of a docudrama while a criminal trial on similar issues was ongoing or about to start.[43] The accused feared that the program might influence jurors and thereby affect his right to a fair trial. He obtained an order from a superior court judge prohibiting the broadcast until the completion of the trial. The media challenged the publication ban under section 2(b) of the Charter. Chief Justice Lamer held that the discretion at common law to order a publication ban in criminal proceedings must be exercised so as to conform to the Charter. In his view, the pre-Charter common law rule favoured a right to a fair trial over the right to freedom of expression. The protection accorded under the Charter to freedom of expression called for a reformulation of the common law rule.

In *Hill v. Church of Scientology*,[44] a Crown prosecutor brought an action against the Church of Scientology and its counsel for libel because of various statements made about his conduct. The defendants challenged the validity of the common law of libel, claiming that it violated their freedom of expression. Speaking for the Court, Cory J. held that the common law must be interpreted in a manner consistent with the Charter:

> Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.[45]

Justice Cory concluded that a traditional section 1 framework justification is not appropriate where a conflict is alleged between

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42 *Id.*, at 670 and 675.

43 [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

44 [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.) [hereinafter "*Hill*"].

45 *Id*., at para. 92.

Charter values and the common law. Rather, a more flexible balancing of interests is required.

> When the common law is in conflict with Charter values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the Charter "challenge" in a case involving private litigants does not allege the violation of a Charter right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. *Charter values, framed in general terms, should be weighed against the principles which underlie the common law*. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.[46]

In *Grant v. Torstar Corp.*,[47] the Court held that the traditional common law of defamation gave inadequate weight to freedom of expression and that greater latitude had to be given to the media when reporting on matters of public interest. In *Grant*, the Chief Justice stated the question as "whether the traditional defences for defamatory statements of fact curtail freedom of expression in a way that is inconsistent with Canadian Constitutional values. Does the existing law strike an *appropriate balance* between two values vital to Canadian society — freedom of expression on the one hand, and the protection of individuals' reputations on the other?"[48]

Similarly, in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,[49] freedom of expression was given precedence over some of the competing interests at stake. The Court amended the common law rules on secondary picketing so that secondary picketing is only illegal if it involves a separate tort or a crime.

As can be seen from these cases, the use of Charter values to develop the common law has a long pedigree stretching back to the early years of Charter jurisprudence. However, it is important to note that while the courts use the term "Charter values", it is more accurate to say that they are using Charter rights to assist in the development of the common law.

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[46] *Id.*, at para. 97 (emphasis added).

[47] [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640 (S.C.C.) [hereinafter "*Grant*"].

[48] *Id.*, at para. 41 (emphasis added).

[49] [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156, 2002 SCC 8 (S.C.C.) [hereinafter "*R.W.D.S.U., Local 558*"].

## VI. CRITIQUE OF THE *DORÉ* FRAMEWORK

The substance of our critique is threefold. First, we discuss the jurisprudential and legitimacy problems that Charter values pose to adjudicators. Second, we explore whether a reasonableness standard of review is warranted. Third, we discuss the adjudicative practicalities that are not resolved in *Doré*, such as who will have the onus on the proportionality analysis and what will be required in terms of evidentiary foundation.

### 1. The Indeterminate Scope of Charter Values and Their Legitimacy

While setting up Charter values as the central part of the analysis in *Doré*, the Supreme Court did not explore or elaborate upon the source of those values or their boundaries.

In their paper "Charter Values and Administrative Justice", in this volume, Professor Lorne Sossin and Mark Friedman provide a non-exhaustive list of the Charter values which have been variously mentioned or elaborated by courts, some of which parallel specific Charter rights, and some of which go beyond the specific text of the Charter. These include: liberty, human dignity, equality, autonomy, fairness, expressive freedom and privacy.

Some of these values align with Charter rights while others, such as human dignity, liberty, fairness and autonomy, do not neatly line up with a corresponding Charter right. Moreover, there is very little case law that defines the scope of these Charter values.

The *Doré* proportionality analysis requires defining the scope of the Charter value. In *Alberta v. Hutterian Brethren of Wilson Colony*,[50] Abella J. wrote: "In order to determine whether the measure falls within a range of reasonable options, courts must weigh the *purpose* against the *extent of the infringement*."[51] The extent of the infringement is informed by the scope of the right or, in the case of *Doré*, the value. Without knowing the scope of that value, the proportionality analysis is difficult if not impossible to apply.

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[50] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, 2009 SCC 37 (S.C.C.).

[51] *Id*., at para. 195 (emphasis added).

In the case of *Doré*, the extent of the infringement on the lawyer's freedom of expression could be understood and balanced in the proportionality analysis because expressive freedom is a Charter right whose scope has been defined in the jurisprudence.[52] That is not the case for other Charter values, which do not have a corresponding Charter right. The proportionality analysis requires as a starting point the scope of the right or value.

As noted above, in almost all the other cases discussed above on interpreting the common law in accordance with Charter values, a corresponding Charter right was at issue. In *Grant*, the Chief Justice discussed and outlined the core rationales and purpose of the guarantee of free expression in section 2(b) of the Charter.[53] She then discussed the competing value of protection of reputation that underlies the law of libel to then be able to conclude that a balanced approach to libel law properly reflects the interests of both the plaintiff and the defendant.[54]

In contrast, while the courts have recognized the value of respect for human dignity as an essential value underlying the Charter guarantee of equality, the Supreme Court itself has characterized it as an abstract and subjective notion and acknowledged that its use as part of a legal test has led to difficulty. In *R. v. Kapp*, McLachlin C.J.C. and Abella J. wrote: "But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants rather than the philosophical enhancement it was intended to be."[55]

In summary, we are concerned that, given the indeterminate definition and scope of Charter values, the *Doré* framework may lead to an unwieldy and unpredictable proportionality analysis. This outcome is undesirable as, in our view, unpredictability in adjudication leads to increased costs and risks that are borne by the litigants advancing and defending these claims, and by the administrative law and regulatory system as a whole. This would undermine one of the very purposes of the system of administrative tribunals — to resolve disputes more quickly and cheaply.

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[52] See, for example, *Grant*, *supra*, note 47, at paras. 47-50; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 976 (S.C.C.).

[53] *Grant*, *id.*, at paras. 47-50.

[54] *Id.*, at para. 61.

[55] [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483, at para. 22 (S.C.C.).

A related issue is that if the Court intends that Charter values extend beyond Charter rights, then the *Doré* analysis raises significant concerns from a constitutional legitimacy perspective. The rights set out in the Charter were part of a constitutional amending process that resulted in their adoption. The broader Charter values are principles that the Court has looked to assist in interpreting the Charter, but are not themselves enshrined in the *Constitution Act, 1982*. The *Doré* analysis should not be used as a method of promoting values to rights.

## 2. The Reasonableness Standard of Review

In *Doré*, the Court held that an administrative tribunal's decision on how it balances Charter values should be reviewed on a standard of reasonableness. The *Doré* decision on standard of review is arguably at odds with the Court's decision in *Dunsmuir*, where the Court affirmed that constitutional issues are necessarily subject to correctness review because of the unique role of section 96 courts in interpreting the *Constitution Act, 1982*.[56]

The anomalies that arise from applying a reasonableness standard of review to administrative decisions where Charter values are at issue are obvious. For example, when an appeal court reviews a decision of a lower court where the lower court has used Charter values to interpret the common law, the standard of review is correctness. Arguably, Superior Court judges have at least as much if not more expertise in the interpretation of the Charter and Charter values as administrative decision-makers. Further, no deference is given to administrative decision-makers in determining that a law or regulation is contrary to the Charter. It is difficult to understand how the administrative decision-maker's expertise on Charter values is entitled to deference, if the expertise to apply the Charter in a section 52 or section 24 context is not.

To understand the practical implications of the difference in the application of the standard of review, consider a hypothetical example from a law society hearing. If the law society passes a regulation precluding advertising and a member of the profession challenges it as unconstitutional as infringing upon freedom of expression, the law society's decision is reviewed on a standard of correctness. However, if a panel of the law society decides that the nature or type of advertising by

[56] *Dunsmuir*, *supra*, note 8, at para. 58.

one of its members constitutes conduct unbecoming to the profession even though it also affects the member's freedom of expression, that decision is reviewed on a standard of reasonableness. This would mean that decisions that affect the body of a profession, such as in the first example, are reviewed on a standard of correctness, while decisions that affect an individual member are reviewed on a standard of reasonableness. Such an outcome is akin to saying that a declaration that a statute is unconstitutional under section 52 of the *Constitution Act, 1982* should attract a standard of review of correctness, while a decision to grant an individual remedy under section 24 of the Charter is reviewable on a standard of reasonableness.

*Doré* also does not mention the range of possible administrative decision-makers. This should be a consideration when determining the standard of review. *Doré* was decided in the context of an adjudicative and adversarial proceeding that closely resembles a court. However, many administrative decision-makers do not resemble a court and do not have the same procedural safeguards that are afforded in an adversarial proceeding. Many administrative decision-makers are simply front line administrative staff such as customs officers.

While *Doré* addressed the standard of review of an adjudicative administrative tribunal, the Quebec Court of Appeal in *Québec (Procureur general) v. Loyola High School* extended this reasoning to a minister's decision where the discretionary character of the decision has been recognized.[57] In that case, the decision at issue was that of the Minister of Education. Loyola, a private Catholic high school in Quebec, had asked the Minister to be exempted from teaching a mandatory course on ethics and religious culture. The Minister had declined the request.

The deferential standard of review in *Doré* surely needs to be revisited when other administrative decision-makers who do not have a court-like process or do not have expertise, such as a minister, are making discretionary decisions based on Charter values that have a serious impact on applicants.

One possible approach to consider would be to bifurcate the standard of review to recognize the respective expertise of courts and administrative decision-makers. On identifying the Charter value and defining its scope, administrative decision-makers would be subject to a correctness standard of review as this is within the realm of expertise of the courts. However, on the

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[57] [2012] Q.J. No. 15094, 2012 QCCA 2139, at para. 146 (Que. C.A.), appeal heard and reserved March 24, 2014, [2013] S.C.C.A. No. 42 (S.C.C.).

application of the Charter value to the factual and legislative context, the administrative decision-maker would be accorded deference. This recognizes the administrative decision-maker's expertise with the enabling statute and that he or she is best placed to make the findings of fact.

### 3. Practical Problems: Onus and Evidentiary Foundation

While arguably borrowing from the *Oakes* proportionality analysis, the Supreme Court in *Doré* did not address how the framework would operate in practice. The Supreme Court did not address: (1) who will carry the burden; and (2) what types of evidence will be required.

In the traditional *Oakes* analysis, after an applicant has demonstrated that a Charter right has been infringed, it is up to the Attorney General to demonstrate that the infringement is justified. In contrast, when interpreting the common law to be consistent with Charter values, the Supreme Court held in *Hill* that the shift of onus which normally operates in a Charter challenge to government action does not apply. Justice Cory wrote:

> This is not a situation in which one party must prove a *prima facie* violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a Charter right, it is appropriate that the government undertake the justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with Charter values but also that its provisions cannot be justified.[58]

However, in *R.W.D.S.U., Local 558*,[59] which dealt with the common law rule on secondary picketing, the Supreme Court took a different approach on where the onus lies. The Court had to interpret and apply the value of freedom of expression to the common law rules on secondary

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[58] *Hill*, *supra*, note 44, at para. 98.

[59] *Supra*, note 49.

picketing. The Supreme Court held that "[t]he starting point must be freedom of expression. Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society."[60]

It is unclear which approach applies in the *Doré* framework. While the Court noted in *Doré* that the issue arises in the *Oakes* analysis and it cited its decision in *Hill*, it did not provide a solution for the administrative law context. Justice Abella wrote: "[W]hen 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, or who would have the burden of defining and defending it."[61] We can surmise from her reasons that Abella J. favours the approach adopted in *Hill* and therefore after that the party challenging the decision should bear the burden of proving that the administrative tribunal's decision was not made in accordance with Charter values.

Moreover, it will not always be the case that the Attorney General or the government will be a party to the administrative proceeding. To the contrary, the Attorney General's presence may be the exception instead of the rule. For example, in *Slaight*, the adjudication was between the employee and the company. The question becomes who in such a proceeding leads evidence on the purpose of the statute in order to enable the administrative tribunal to conduct the proportionality analysis.

A further practical problem is the question of whether an applicant needs to serve a notice of constitutional question. If an application to judicially review an administrative tribunal's decision is brought on the ground that the tribunal's decision infringed on Charter values, it is not clear whether the applicant would have to serve a notice of constitutional question.

Certain tribunals have incorporated a process on how to address constitutional rights in their adjudication while others may be unprepared to address these issues. For example, the Rules of Procedure of the Ontario Review Board provide that where there is an allegation that the constitutional rights or freedoms of an accused have been violated and a remedy is sought, the party seeking the remedy must provide notice of its intention to make such argument no less than 15 days prior to the hearing.[62]

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[60] *Id.*, at para. 36.

[61] *Doré*, *supra*, note 1, at para. 38.

[62] Review Board Rules of Procedure, online: <http://www.orb.on.ca/scripts/en/legal/orb-rules.pdf>.

However, other tribunals, especially ones where the parties are often unrepresented, may face greater challenges in adjudicating these issues.

## VII. CONCLUSION

The Supreme Court's decision in *Doré* resolves the disparate strands of jurisprudence on how an administrative tribunal should make a decision in accordance with Charter values by balancing the statutory objectives against the interference with the Charter value at issue. However, serious questions arise as to whether this framework will be workable in practice. Specifically, administrative tribunals may be faced with attempting to balance Charter values that have as of yet been undefined. Added to this concern is a deferential standard of review that in our view is not warranted. Moreover, it is not clear how this adjudication will proceed in practice. It appears from *Doré* that the onus will lie on the litigants advancing their Charter rights, but in a private administrative law dispute, it may put the respondent in a difficult position to advocate for the objectives of the statute and how those should properly be balanced against the Charter values. The Court needs to take a sober second look at this issue with a view to narrowing and defining the concept.

We suggest the following approach to adjudicating whether an administrative tribunal exercised its discretion in accordance with Charter values. First, only Charter values that have a corresponding Charter right should be recognized and adjudicated. This allows administrative tribunals and the parties to rely on a solid body of jurisprudence in defining the right at issue. Second, we suggest that the standard of review of correctness apply to the review of a tribunal's definition and scope of a Charter right or value. Only the tribunal's application of Charter values should be granted deference. Constrained as we suggest, Charter values can play a useful role in the exercise of administrative discretion.