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Charter Values and Administrative Justice

Lorne Sossin* and Mark Friedman**

I. INTRODUCING THE PUZZLE OF CHARTER VALUES AND ADMINISTRATIVE JUSTICE

What would the *Canadian Charter of Rights and Freedoms*¹ have looked like if it had been designed for administrative justice? This is a question underlying our analysis in this study. Ever since the Supreme Court made clear in *Slaight Communications Inc. v. Davidson* that discretionary decisions of public officials were to be subject to the Charter,² and expanded the reach of the Charter to most adjudicative tribunals,³ the Court has wrestled with the coherence of the relationship between the Charter and administrative justice. The Court attempted to chart a new path forward beyond a traditional application of the Charter to incorporate a potentially broader but inchoate set of “Charter values” in its 2012 decision *Doré*.⁴ With this decision as a point of departure, we elaborate below on the scope of Charter values and their distinct implication for administrative justice.

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

² [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.) [hereinafter “*Slaight Communications*”]. See June M. Ross, “Applying the Charter to Discretionary Authority” (1991) 29 *Alta. L. Rev.* 382 [hereinafter “Ross”] (on the significance of *Slaight Communications*).

³ See *Nova Scotia v. Laseur*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.). *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, [2003] 2 S.C.R. 585 (S.C.C.) and more recently *R. v. Conway*, [2010] S.C.J. No. 22, 2010 SCC 22 (S.C.C.) [hereinafter “*Conway*”].

⁴ *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12 (S.C.C.) [hereinafter “*Doré*”].

Administrative justice is defined by its diversity. While courts in every part of the country look roughly similar (all have a dais for the judge, a jury box, a chair for witnesses, counsel tables, a gallery for spectators, *etc.*), few people can close their eyes and picture what a landlord tenant board, immigration and refugee board or social benefits tribunal looks like. Yet that is where a vulnerable tenant goes to stave off eviction, where a refugee claimant goes to avoid deportation, and where a person whose benefits have been curtailed goes for recourse. In other words, vitally important disputes, involving fundamental rights and freedoms, are the province of widely disparate adjudicative bodies. There are literally hundreds of tribunals, at the federal, provincial and municipal levels, involving thousands of full- and part-time adjudicators applying a myriad of statutory schemes and regulatory regimes. If the Charter is to be Canada's "supreme law", it must have relevance for those who are most vulnerable to the adverse effects of government action (and inaction). If the Charter is to matter, it must matter in the realm of administrative justice.

Justice McLachlin (as she then was) seemed to anticipate this state of affairs more than a decade ago in her oft-quoted dissent in *Cooper v. Canada (Canadian Human Rights Commission)*,⁵ a case which probed the extent to which tribunals had jurisdiction to consider the constitutionality of their enabling legislation. The majority in *Cooper* held that a human rights commission lacked the authority to decide Charter questions because its purpose and structure were not aligned with the adjudication of Charter rights. Justice McLachlin's dissent not only reached the opposite conclusion, but did so expressly on the grounds that the Charter should be relevant where people's rights were determined. It included the following memorable reference:

The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.⁶

⁵ [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 (S.C.C.) [hereinafter "*Cooper*"].

⁶ *Id.*, at para. 70.

This passage was later adopted by a majority in *Nova Scotia (Workers' Compensation Board) v. Martin*,⁷ where the Court reversed *Cooper* and confirmed that tribunals that have the power to decide any question of law will presumptively have the power to hear and adjudicate the Charter.

In *Conway*,⁸ the Supreme Court extended administrative jurisdiction even further by establishing that tribunals that are competent to decide questions of law also have jurisdiction not only to consider Charter issues, but also to grant Charter remedies to the extent that those remedies are consistent with their enabling legislation. Tribunals can therefore be understood as adjudicative spaces that enjoy both full access to the Charter and a broad capacity for public engagement.

In this line of case law, the Supreme Court of Canada recognized that parties could seek Charter remedies from tribunals notwithstanding the practical challenges of doing so. The Court's reticence to engage with the uneven capacity of administrative tribunals is understandable, if problematic. After all, the capacity of a tribunal or administrative decision-maker is not driven by a legislative enactment, but rather by executive action, and can vary depending on the staffing, appointments and resources of a particular tribunal at a particular time. That said, the capacities of a tribunal are central to the effectiveness of the Charter.

As Abella J. observed in *Tranchemontagne v. Ontario (Director, Disability Support Program)*⁹ (a case raising similar issues to *Cooper* and *Martin* but in the context of the jurisdiction over the *Human Rights Code*), ensuring access to a meaningful forum for having one's rights adjudicated is a key aspect of access to justice. With respect to the Social Benefits Tribunal, she observed (in dissent):

The [Social Benefits Tribunal] is meant to be an efficient, effective, and quick process. Yet it seems to be having difficulty meeting this mandate. In 2004-2005, the SBT Tribunal had a backlog of 9,042 cases and received 11,127 new appeals under the [*Ontario Works Act*] and the ODSPA. This Court recognized in *Tétreault-Gadoury* ... that administrative bodies responsible for ensuring the payment of monetary benefits to eligible applicants would undoubtedly be impeded from this important and time-sensitive undertaking if they were asked to decide constitutional challenges.

⁷ [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.).

⁸ *Supra*, note 3.

⁹ [2006] S.C.J. No. 14, [2006] 1 S.C.R. 513 (S.C.C.).

Imposing Code compliance hearings on the Tribunal will similarly and inevitably impact its ability to assist the disabled community it was established to benefit in a timely way. It will be difficult to explain to the thousands of disabled individuals waiting for their appeals to be heard — many without any interim support — that there is any public benefit in the Tribunal hearing a complex, lengthy, and inevitably delaying jurisprudential issue with no precedential value. That is the real access issue in this case.¹⁰

A similar argument, of course, could be brought to bear on the tribunal jurisdiction to apply formal Charter rights. Practical challenges may render the Charter illusory in the context of administrative justice. For example, is it likely that a self-represented party before the Social Benefits Tribunal will properly identify a Charter issue, or have the capacity to fashion submissions based on the current jurisprudence related to a particular Charter right? How realistic is it to imagine such a party responding to the Crown's section 1 evidence? Will both legally and non-legally trained adjudicators have the capacity to manage Charter evidence? While some tribunals clearly can and are providing an appropriate forum for Charter adjudication, others seem ill-suited to the kind of Charter process designed by and for the courts in Canada.

In our view, what is needed to realize the promise of the Charter in the context of administrative justice is a Charter practice that is designed by and for administrative justice. Such a sphere of practice will need to be far more pliable and adaptable than the context of the courts. Administrative decision-makers vary with respect to procedure as well as substantive and policy expertise — some are as adversarial as courts while others adopt a more activist approach to adjudication. Some involve inquisitorial processes which place the decision-maker in the position of eliciting the necessary information from the parties. Others still are discretionary or regulatory rather than adjudicative settings. Hearings may occur electronically, over the phone, in person, or in writing. Appearances before the Human Rights Tribunal may stretch into weeks of complex evidentiary testimony, while some hearings before the Landlord Tenant Board take less than 30 minutes. It is important that all these diverse contexts where Charter hearings may unfold have rules designed for a particular decision-maker's context. Many tribunals across

¹⁰ *Id.*, at paras. 90-91.

Canada already have established Rules of Practice that guide applicants in raising constitutional matters.

The Alberta Appeals Commission for Workers' Compensation Board, for instance, establishes a determined time frame and method for raising constitutional claims:

3.3(1) A party who intends to raise a question of constitutional law before the Appeals Commission relating to the distribution of powers must first provide written notice of their intention to do so, at least 14 days before the scheduled hearing date, to

- (a) the Attorney General of Canada,
- (b) the Minister of Justice of Alberta and the Attorney General of Alberta,
- (c) the Appeals Commission, and
- (d) every party.

(2) If the notice is not provided, the Appeals Commission must not consider the constitutional question.

As Freya Kristjanson has emphasized, tribunals need to consider more than just adapting their rules to the requirements and realities of Charter litigation (including, for example, the requirement to provide Notice of Constitutional Question to the Government):

Tribunals must consider the impact that the newly expanded *Charter* jurisdiction has on all aspects of tribunal design. Clear procedural rules, as discussed above, are merely the first step. Adjudicator education, and adaptation of existing rules to what may be significantly more complex types of *Charter* litigation, will be a challenge both in terms of competence and funding. Finally, these cases may be the harbinger of a new and exciting era in administrative law, fulfilling the Chief Justice's vision of a *Charter* that belongs to the people, applied with full force in the administrative justice system.¹¹

While the development of distinctive Charter rules of practice for administrative justice is in some sense a welcome response to the concern over capacity and the logistics of tribunal hearings involving the Charter, occasions where a Charter issue is identified and argued by

¹¹ See Freya Kristjanson & N. Lambek, "The Charter in Context: Applying the Charter in Everyday Administrative Decision-Making", Paper presented for 11th Annual Charter Conference, Ontario Bar Association, November 2012, at 28.

the parties will be rare in most tribunal settings. Charter values, as elaborated by the Supreme Court in *Doré*, by contrast, represent a broader and far more accessible way to ensure the Charter's relevance to the sphere of administrative justice.

While the promise of Charter values under the *Doré* framework is apparent, its potential application gives rise to a host of important questions.¹² First, how does the Charter itself fit within Administrative Law? Second, what are the sources of Charter values, and are the categories of Charter values set or growing? Third, what is the scope of Charter values (for example, must a Charter value be tied to a Charter right or a specific section or sections of the Charter)? Fourth and finally, how can Charter values be operationalized within the administrative justice context in a way that is coherent, transparent, predictable and fair? This study is divided into three sections analyzing and addressing each of these questions and their implications for administrative justice.

II. RECONCILING ADMINISTRATIVE LAW AND THE CHARTER

Since the early days of Charter jurisprudence, the Supreme Court has wrestled with how to reconcile Charter and administrative law principles, particularly in the context of reviewing the exercise of administrative discretion.¹³ The Charter may justify intervention in administrative decisions in several different circumstances involving different degrees of discretion.¹⁴

First, a law granting discretion may be unconstitutional by its very terms. For example, a law authorizing a tribunal to grant a benefit to a

¹² For a discussion of the challenges to which Charter values as set out in *Doré* give rise, see Evan-Fox Decent & Alexander Pless, "The Charter and Administrative Law: Cross-Fertilization or Inconstancy?" in L.M. Sossin & C.M. Flood, eds. *Administrative Law in Context*, 2d ed. (Toronto: Emond Montgomery, 2012).

¹³ See especially *Slaight Communications*, *supra*, note 2; *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.) [hereinafter "*Ross*"]. Portions of this analysis are drawn from L. Sossin, "Discretion Unbound: Reconciling the *Charter* and Soft Law" (2003) 45 *Can. Public Administration* 465. Portions of the analysis to follow are drawn from S. Gratton & L. Sossin, "In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court" in D. Wright & A. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011).

¹⁴ In most cases, the grounds for a Charter challenge in administrative discretion cases are based on violation of s. 2, 7 or 15, but the unconstitutional exercise of discretion might also be located elsewhere under the Charter.

defined group creates a discretion which, by its very terms, might violate section 15 of the Charter if it necessarily excludes another group from the benefit based on race, religion or one of the other enumerated or analogous grounds. For example, in *M. v. H.*, a provision of Ontario's *Family Law Act* was held to be discriminatory since it granted courts the discretion to award spousal support only to heterosexual spouses and not to same-sex couples.¹⁵

The second circumstance involves a law that grants discretion to a tribunal that is not unconstitutional on its face, but such that it might nevertheless be applied in an unconstitutional manner. For example, in *Eldridge v. British Columbia (Attorney General)*, 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 that Commission in deciding not to fund interpreters for deaf patients was found to be unconstitutional.¹⁶ Similarly, in *Canada (Attorney General) v. PHS Community Services Society*,¹⁷ a federal Minister's discretion not to provide a statutory exemption to a safe injection site that provided vital health benefits to its clients was held to violate the Charter. The Court held that "[t]he discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*..."¹⁸

In the third circumstance, a law granting wide discretionary authority without sufficient guidance as to its application or without safeguards against arbitrary conduct might violate the procedural component of section 7 of the Charter. This basis for challenging discretion was relied upon by the majority of the Supreme Court in *R. v. Morgentaler*.¹⁹ In *Morgentaler*, the impugned provision was a law prohibiting abortion unless a physician determined that the life or health of a woman was endangered. The procedures that therapeutic abortion committees established in hospitals to decide whether this threshold was met in individual cases were found by the majority to lack coherence, predictability and fairness.

Fourth, a law granting a discretion that is too vague to provide sufficient notice to those who might infringe it may violate the

¹⁵ [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.), *Family Law Act*, R.S.O. 1990, c. F.3.

¹⁶ [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

¹⁷ [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.).

¹⁸ *Id.*, at para. 117.

¹⁹ [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) [hereinafter "*Morgentaler*"].

substantive component of section 7.²⁰ For example, in *R. v. Morales*, the Court held that a provision granting pre-trial detention where it was justified in “the public interest” was unconstitutionally vague.²¹

The Supreme Court’s first detailed examination of the relationship between the Charter and administrative discretion was in *Slaight Communications*.²² At issue in that case was a remedial discretion in the *Canada Labour Code* that allowed adjudicators to resolve grievances under collective agreements.²³ The grievance in *Slaight Communications* concerned an allegation of wrongful dismissal. The adjudicator found that the dismissal had been wrongful and ordered the company, first, to provide the employee with a factual reference and, second, to refrain from expressing any other views about the employee. Chief Justice Dickson for the majority chose to conduct a Charter analysis and held that neither aspect of the adjudicator’s order violated the Charter. Justice Lamer (as he then was) dissented in part and would have resolved the dispute on administrative law grounds. However, Lamer J. wrote for the Court on the issue of the proper approach to discretionary decision-making under the Charter. He identified two kinds of discretion, each of which led to different remedies:

1. The exercise of discretion was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected [Charter] right.
 - It is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.
2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not

²⁰ See generally *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.).

²¹ [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

²² *Supra*, note 2. See Ross, *supra*, note 2.

²³ R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, ss. 21, 61.5(9):

Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person; (b) reinstate the person in his employ; and (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the Charter.

- It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. ...²⁴

In the circumstances of *Slaight Communications*, the Court found that the *Labour Code* did not require expressly or by necessary implication that a Charter right be infringed, since the arbitrator could have remedied the wrongful dismissal through other means; therefore, the *Labour Code* created an imprecise discretion that permitted a Charter right to be limited. Thus, it was the order, and not the legislation, that was subjected to Charter scrutiny.²⁵

The central holding of *Slaight Communications* was that no public official could be authorized by a statute to breach the Charter and therefore, all discretionary authority had to be read down to only authorize decision-making which is consistent with Charter rights and guarantees. Justice Lamer explained this reasoning in the following terms:

Although this court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter and he exceeds his jurisdiction if he does so.²⁶

Thus, discretionary authority always comes with an implied condition, which is that it be exercised in a manner consistent with all applicable Charter rights.

²⁴ *Slaight Communications*, *supra*, note 2, at para. 91.

²⁵ The majority found that, while both the positive and the negative order violated the freedom of expression under s. 2(b) of the Charter, each was a reasonable limit under s. 1 and therefore the orders were upheld.

²⁶ *Id.*, at para. 87.

The principle in *Slaight Communications* was applied in subsequent cases²⁷ where the Court highlighted the overlapping nature of the Charter and administrative law analysis, observing that it was difficult to conceive of a case where a court would conclude that a decision was unconstitutional but nonetheless reasonable.

The Court confronted the dilemma of administrative discretion again in the context of *Little Sisters Books and Art Emporium v. Canada (Minister of Justice)*.²⁸ At issue was the discretionary authority of customs officials to seize imported goods that met the obscenity test under section 163 of the *Criminal Code*.²⁹ Justice Binnie, writing for the majority, characterized the administration of the *Customs Act*³⁰ by customs officers as oppressive and dismissive of the appellants' freedom of expression. He concluded that the effect — whether intended or not — was to isolate and disparage the appellants on the basis of their sexual orientation.

The Court also held that, although the exercise of discretion by customs officers violated the Charter, the *Customs Act* provision authorizing this conduct did not. Following the *Slaight Communications* approach, the majority of the Court characterized the discretion contained in the customs legislation as capable of being applied in a fashion consistent with the Charter. Therefore, the majority saw no basis to strike down the authority of customs officials to seize material on the grounds of obscenity.³¹

Sometimes, the Court may apply a Charter and administrative law analysis to the same exercise of discretion. *Suresh v. Canada (Minister of Citizenship and Immigration)*,³² for example, dealt with the discretionary authority of the Minister to deport refugees in circumstances where they

²⁷ See *Ross, supra*, note 13, and *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.).

²⁸ [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) [hereinafter "*Little Sisters*"].

²⁹ R.S.C. 1985, c. C-46.

³⁰ R.S.C. 1985, c. 1 (2nd Supp.).

³¹ See *Little Sisters, supra*, note 28, at para. 204. Justice Iacobucci, writing for himself and two other members of the Court, dissented on this point. He held that the legislation itself was unconstitutional since it did not contain sufficient safeguards against unconstitutional enforcement. For the minority, simply trusting the customs bureaucracy to improve its administration of the Act was not enough, and they would have imposed a different decision-making structure to remedy the Charter breach.

³² [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.) [hereinafter "*Suresh*"].

faced the possibility of torture.³³ *Suresh* challenged the Minister's deportation order on both Charter and administrative law grounds. A unanimous Court conducted both a Charter review of the enabling provision and an administrative review of the Minister's decision pursuant to that provision, eventually determining that the process by which *Suresh* was ordered deported violated his Charter rights.

With its decision in *Multani v. Commission scolaire Marguerite-Bourgeoys*,³⁴ the Court made its first effort to develop a more comprehensive approach to the dilemma of whether a Charter or administrative law analysis should apply to administrative action. *Multani* involved the discretionary decision of a school board to prohibit a Sikh student from wearing his kirpan, a ceremonial dagger, to school. The student and his family challenged the decision as an infringement of his freedom of religion. The Supreme Court was unanimous in allowing the challenge and striking down the Board's decision but it split 6:2 on whether a Charter or administrative law analysis should be applied in reaching this result.

Madame Justice Charron for the majority adopted a Charter analysis since the central issue in the case was whether or not the Board's decision complied with the requirements of the Charter.³⁵ In contrast, Deschamps and Abella JJ. for the minority argued that an administrative law analysis should be conducted instead of a Charter analysis because the instrument being assessed by the Court was an administrative decision rather than a "norm of general application" such as "a law, regulation, or other similar rule of general application".³⁶

The majority defined the role of administrative law solely in terms of jurisdiction and warned against allowing the fundamental values protected by the Charter to be dissolved into mere administrative law

³³ *Id.*, at para. 2. Section. 53(1)(b) of the *Immigration Act*, R.S.C. 1985, c. I-2, gave the Minister limited discretion to deport where: the refugee's "life or freedom would be threatened" if he or she were returned to his or her country and the Minister's belief that the refugee constituted a "danger to the security of Canada".

³⁴ [2006] S.C.J. No. 6, 2006 SCC 6 (S.C.C.) [hereinafter "*Multani*"].

³⁵ *Id.*, at para. 2. The majority (Charron J., McLachlin C.J.C., Bastarache, Binnie and Fish JJ.) held that the Board's decision infringed the student's freedom of religion under s. 2(a) of the Charter and that the infringement could not be justified under s. 1. Justice LeBel wrote a separate opinion agreeing with the majority that a Charter analysis was appropriate but proposing that the s. 1 analysis be modified in cases involving administrative discretion, at paras. 140-155.

³⁶ *Id.*, at paras. 85, 103. The minority would have reviewed the Board's decision on a standard of reasonableness and would have concluded that the decision was unreasonable in disregarding the student's freedom of religion.

principles.³⁷ The majority position appears either to be unaware of or to discount the significant substantive role of administrative law in supervising the exercise of discretion and of public authority more broadly. It is difficult to reconcile the thin and one-dimensional view of administrative law in the majority judgment in *Multani* or *Suresh* with the robust view of administrative law animating earlier Supreme Court judgments such as *Baker v. Canada (Minister of Citizenship and Immigration)*.³⁸

The Court revisited this debate in *Doré*.³⁹ In *Doré*, the Court reviewed the decision of a provincial law society that imposed a disciplinary penalty on a lawyer for inappropriate criticism of a judge. The Court of Appeal approached *Doré* as a Charter case, much like *Slaight Communications*, but the Supreme Court took a different approach. Justice Abella, this time writing for the Court, adopted an administrative law analysis to review the Quebec Barreau's decision and asserted that there is nothing in such an approach inconsistent with strong Charter protections. This approach is set out in the following terms:

The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised “in light of constitutional guarantees and the values they reflect” (*Multani*, at para. 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are always required to consider fundamental values. ... These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens “an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship” (Liston, at p. 100).⁴⁰

While the Court's decision in *Doré* may have the potential to infuse Charter values throughout administrative justice and to develop a more “robust” approach to administrative law principles,⁴¹ it remains a skeletal

³⁷ *Id.*, at para. 16.

³⁸ [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter “*Baker*”].

³⁹ *Supra*, note 4.

⁴⁰ *Id.*, at para. 35.

⁴¹ *Id.*, at para. 34.

approach that needs to be fleshed out in the diverse contexts of administrative justice. *Doré* itself represented a less-than-ideal context in which to develop a Charter values approach, since the dispute was litigated on the basis of a Charter right (freedom of expression), even if expressive freedom may also be considered a value (a point elaborated below).

The most important question that arises post-*Doré* might well be: where do Charter values come from? At first glance, this question is so straightforward as to be obvious. The source of Charter values must be the Charter itself. But this clarity quickly gives way to murk. Does every Charter right give rise to a corresponding value? Moreover, must values derive only from one or more particular rights, or can they flow from underlying Charter principles that are not set out in specific rights such as human dignity? It is to this question that our analysis now turns.

1. Sources of Charter Values

According to Peter Hogg, the concept of “Charter values” existing outside or beyond the interpretation of specific Charter rights can be traced to the 1986 decision in *R.W.D.S.U. v. Dolphin Delivery Ltd.*,⁴² where the Supreme Court ruled that common law principles ought to be consistent with the “fundamental values enshrined in the Constitution”.⁴³ *Dolphin Delivery*, of course, considered the issue of principles lying *outside* the application of the Charter (beyond the scope of section 32) rather than values giving rise to a different kind of application of the Charter.

The Court alluded to a concept of “Charter values” earlier that year in an entirely different context, while defining what a “free and democratic society” constitutes in *R. v. Oakes*.⁴⁴ In *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 for a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society” as the genesis of the rights and

⁴² [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.) [hereinafter “*Dolphin Delivery*”].

⁴³ Peter W. Hogg, “Equality as a *Charter* Value in Constitutional Interpretation” (2003) 20 S.C.L.R. (2d) 113, at 116 [hereinafter “Hogg”].

⁴⁴ [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter “*Oakes*”].

freedoms guaranteed by the Charter.⁴⁵ Interestingly, Dickson C.J.C. adopted the approach that Charter values underlie Charter rights as opposed to the rights being the source for the values. Values in this context, in other words, temper or limit rights. For this reason, not every Charter value will accord with a specific Charter right and not every right must give rise to a specific value.⁴⁶

These references to Charter values were offered for the purpose of explaining (or demarcating) Charter rights, rather than developing an alternative framework for aligning administrative justice and the Charter. That said, the Court has used Charter values to extend the scope of Charter rights. For instance, in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, McLachlin C.J.C. used the values identified in *Oakes* to give rise to a new protected right under section 2(d):

We conclude that the protection of collective bargaining under s. 2(d) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.⁴⁷

Chief Justice McLachlin reaffirmed the findings in *Oakes* by highlighting that “[h]uman dignity, equality, liberty, respect for the autonomy of the person, and the enhancement of democracy are among the values that underlie the *Charter*”.⁴⁸ Two years after *Health Services*, the Court offered the following in *Alberta v. Hutterian Brethren of Wilson Colony*:⁴⁹

The deleterious effects of a limit on freedom of religion requires us to consider the impact in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy: *Thomson Newspapers*, at para. 125; see also *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*,

⁴⁵ *Id.*, at para. 64.

⁴⁶ See, for example, Angela Cameron and Paul Daly, who argue that Dickson C.J.C.’s approach to proportionality in *Oakes* constitutes a Charter value that must be considered by administrative decision-makers, in “Furthering Substantive Equality through Administrative Law: *Charter Values in Education*” [hereinafter “Cameron & Daly”]. On file with authors.

⁴⁷ [2007] S.C.J. No. 27, 2007 SCC 27, at para. 86 (S.C.C.) [hereinafter “*Health Services*”].

⁴⁸ As McLachlin C.J.C. notes, these values were also reaffirmed in *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.) and *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.). See *Health Services, id.*, at para. 81.

⁴⁹ [2009] S.C.J. No. 37, 2009 SCC 37 (S.C.C.) [hereinafter “*Hutterian Brethren*”].

2007 SCC 27, [2007] 2 S.C.R. 391. The most fundamental of these values, and the one relied on in this case, is liberty — the right of choice on matters of religion.⁵⁰

Two tribunal cases underscore how Charter values and Charter rights interact. In the pre-*Health Services* case *Re Telus Communications Inc.*,⁵¹ the Canadian Industrial Relations Board considered whether requiring employees to join a bargaining unit in the absence of a representation vote violated their freedom from compelled association. The Board relied on the Federal Court of Appeal decision *British Columbia Terminal Elevator Operators' Assn. v. International Longshore and Warehouse Union, Canada*⁵² to find that the right to be free from compelled association constituted a Charter value stemming from section 2(d); however, the tribunal did not cite a Charter value supporting the right to collective bargaining. Arguably, it found quite the opposite: *International Longshore* highlighted that the freedom to express one's "opinion and commitment to the principles of trade union solidarity by respecting the lawful picket lines of others" did not constitute a Charter value.

However, in the post-*Health Services* decision *Re Certain Employees of Brandt Tractor Ltd. v. I.U.O.E., Local 115*, the British Columbia Labour Relations Board cited *Health Services*, and pursuant to the *Doré* framework, balanced the established right of employees not to associate under the *Labour Relations Code* with *the value of collective bargaining* and the avoidance of industrial instability in the workplace.⁵³

In this way, Charter values have migrated from the judicial context to the context of administrative justice, but without serious or sufficient discussion of the implications of this shift. The decision in *Brandt Tractor* further demonstrates the symbiotic relationship between Charter values and Charter rights but also reveals a lack of coherence in the

⁵⁰ *Id.*, at para. 88.

⁵¹ [2004] C.I.R.B.D. No. 19, 2004 CIRB 278 (C.I.R.B.), judicial review denied [2004] F.C.J. No. 2123, 2004 FCA 438 (F.C.A.).

⁵² [2001] F.C.J. No. 459, 2001 FCA 78 (F.C.A.) [hereinafter "*International Longshore*"].

⁵³ [2012] B.C.L.R.B.D. No. 192 (B.C.L.R.B.) [hereinafter "*Brandt Tractor*"]. *Labour Relations Code*, R.S.B.C. 1996, c. 244. A similar view was endorsed by the Nova Scotia Court of Appeal in *Egg Films v. Nova Scotia (Labour Board)*, [2014] N.S.J. No. 150, 2014 NSCA 33 (N.S.C.A.) [hereinafter "*Egg Films*"]. The Court cited the Nova Scotia Labour Board's interpretation of *Doré* with approval: "The Board can only infer that the Supreme Court of Canada was strongly reinforcing the notion that labour relations tribunals must be careful to ensure that in interpreting their constitutive statutes, they engage in a purposive interpretational approach which is consonant with the *Charter values of freedom of association* in Charter section 2(d)" (emphasis added). See *Egg Films, id.*, at para. 45.

determination of whether a matter is better suited to Charter rights or a Charter values approach.

One way forward may be to harken back to a pre-*Doré* approach — such as that articulated by the Court in *Baker*.⁵⁴ In *Baker*, the Court decided that administrative decision-makers ought to use their discretion “in accordance with the principles of the rule of law ... in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms”.⁵⁵ The Court expanded on the need for decision-makers to negotiate the rule of law, administrative law and Charter principles by submitting that their “discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter”.⁵⁶ While Charter rights were raised in *Baker* (and fully argued), the Court chose to resolve the challenge on administrative law grounds with reference to the importance of Charter values in circumscribing the exercise of administrative discretion.

David Dyzenhaus has argued that *Baker* advanced the concept of the “common law constitution”.⁵⁷ He sees the rule of law as the fundamental value that the Charter and the common law Constitution articulate but do not exhaust.⁵⁸ However, it is unclear whether Dyzenhaus suggests that Charter values are subsumed within the wider principles of the rule of law or the other way around. In a subsequent paragraph, he suggests that decision-makers are subject to rule of law values, which are “considered to be the fundamental or constitutional values of the society”.⁵⁹ At the end of the day, distinguishing Charter values from other aspects of the “common law constitution” may result in distinctions with little difference. The key principle for our purposes is that where an adjudicative decision-maker is reviewing an exercise of discretion, the first recourse of the adjudicator should be to Charter values. Arguably, a matter should only proceed to a hearing based on a Charter right where a Charter values framework is not able to resolve the challenge at issue.

⁵⁴ *Supra*, note 38.

⁵⁵ *Id.*, at para. 53.

⁵⁶ *Id.*, at para. 56.

⁵⁷ David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) 27 *Queen’s L.J.* 445, at 448 [hereinafter “Dyzenhaus”].

⁵⁸ *Id.*, at 498.

⁵⁹ *Id.*, at 499.

Courts and tribunals have used the passages in *Baker* referred to above to limit the exercise of discretion when societal and constitutional interests were at stake. For instance, the Ontario Court of Appeal in *Deloitte & Touche LLP v. Ontario (Securities Commission)*⁶⁰ and the Ontario Securities Commission in *Re Black*⁶¹ invoked the passages in *Baker* to rule that the Commission's statutorily conferred discretion to authorize disclosure in the public interest was restricted by the Charter. The Ontario Securities Commission in *Black* relied on Charter values in its analysis to determine the extent to which disclosure implicated the public interest.⁶²

The requirement to consider constitutional principles, however, has also created inconsistencies in applying the Charter in administrative realms. In *Lalonde v. Ontario*, consistent with the approach the Supreme Court adopted in *Baker*, the Ontario Court of Appeal ruled that the Health Restructuring Commission was obligated to consider the constitutional principles of "respect for and protection of minorities" in exercising its discretion to downscale health services.⁶³ As the Court of Appeal notes: "If the values of an international convention not adopted in statute form by Parliament have a bearing on the validity of the exercise of ministerial discretion, it must be the case that failure to take into account a fundamental principle of the Constitution when purporting to act in the public interest renders a discretionary decision subject to judicial review."⁶⁴

The Ontario Superior Court in *Tremblay v. Lakeshore (Town)*, by contrast, held that a municipality was not obliged to consider the interests of the French linguistic minority because "the case is to be determined on traditional administrative law principles rather than constitutional analysis".⁶⁵ While the issue here may simply be semantics (the difference between a discretionary decision-maker being "obligated" to consider constitutional principles as opposed to the failure to consider such principles giving rise to a *prima facie* case of unreasonableness), the outcome of a case may turn on such characterizations. *Doré* suggests that

⁶⁰ [2002] O.J. No. 2350, 159 O.A.C. 257, at para. 29 (Ont. C.A.), aff'd [2003] S.C.J. No. 62, [2003] 2 S.C.R. 713 (S.C.C.).

⁶¹ 2007 LNONOSC 1055, 31 O.S.C.B. 10397 (O.S.C.) [hereinafter "*Black*"].

⁶² *Id.*, at paras. 87-88.

⁶³ [2001] O.J. No. 4767, 56 O.R. (3d) 577, at para. 173 (Ont. C.A.) [hereinafter "*Lalonde*"].

⁶⁴ *Id.*, at para. 179.

⁶⁵ *Tremblay v. Lakeshore (Town)*, [2003] O.J. No. 4292, 179 O.A.C. 123, at para. 22 (Ont. S.C.J.).

the importance of a bright line between administrative law and constitutional principles may be diminishing.

Charter values within the *Doré* framework are rooted in constitutional sources but take on significance within an administrative law analysis. There remains ambiguity, however, as to the precise sources of these Charter values within Canada's Constitution. The significance of these sources is clearly the Charter itself. In *Doré*, for example, it is apparent that the source of the value of expressive freedom is the right to freedom of expression in section 2 of the Charter. In other settings, however, the relationship may be less linear. Privacy and human dignity have been recognized as Charter values even though they do not arise from a single Charter provision. More remote still, some Charter values (such as respect for minority rights) may be tied to unwritten or underlying constitutional principles or the "common law" Constitution.

Addressing the question of where Charter values come from and how they are related to, but distinct from, Charter rights remains at an embryonic stage. Peter Hogg has argued that every Charter right likely has a corresponding Charter value, although this view has not been adopted by the courts.⁶⁶ As discussed above, David Dyzenhaus's discussion of Charter values in *Baker* adopts the premise that the Charter simply has made more explicit the fundamental values that already underlie Canada's "common law constitution".⁶⁷ Charter values could also flow from the preambular language reflecting commitments to the rule of law and supremacy of God. We suggest that there may well be multiple sources for Charter values — as the Charter both extended and reflected Canada's constitutional commitments.

While recognizing the importance of Charter values in *Doré*, the Court did not explore or elaborate upon the source of those values or their boundaries. They are simply assumed to exist and to form a knowable conceptual framework to guide discretionary decision-making.⁶⁸ Since the Court in *Doré* did not provide a definitive list of values that are to inform administrative law decisions, previous jurisprudence and tribunal decisions may be of assistance. It is to this task that we now turn.

⁶⁶ Hogg, *supra*, note 43, at 117.

⁶⁷ Dyzenhaus, *supra*, note 57, at 453, 489.

⁶⁸ *Supra*, note 4, at para. 6.

2. The Scope of Charter Values

As Nicolas Lambert has observed, the main problem with attempting to reconcile the various references to Charter values across disparate cases is the lack of precise definition or explanation as to what is or is not a Charter value and why.⁶⁹ While any attempt to map the terrain of Charter values must necessarily be a tentative enterprise in light of this ambiguity, we argue that clarifying the scope of Charter values is essential to ensuring their coherent and principled application in the administrative justice context.

One approach to Charter values (in the sense the term was used in the context of administrative justice in *Doré*) is that this refers to a *method* of applying Charter rights. In other words, unlike the situation where a Court (or tribunal) adjudicates a Charter challenge featuring the adversarial presentation of evidence, the shifting onus of proof under section 1 and an *Oakes* analysis, *etc.*, a Charter values approach obviates this formal methodology in favour of an administrative law balancing of the Charter right at issue and the statutory objectives. On this view, the scope of Charter values is simply the various rights set out in the section of the Charter.⁷⁰ In *Doré*, for example, the value at issue was expressive freedom, and its scope is as set out in section 2(b) of the Charter. A Charter values methodology could similarly be applied to the rights set out in section 15, section 7, and so forth. This approach has the value of clarity and transparency, but also appears to use a term, “Charter values”, that has been deployed to convey something different than simply the text of the Charter rights themselves. When the Court refers to the importance of Charter values in interpreting and developing the common law, for example, the Court has indicated that such values include “human dignity” and the “values enshrined in the Charter”.⁷¹

The courts have recognized a number of Charter values in common law and constitutional settings. Will all these values be applicable to the context of administrative justice? While it is premature to attempt to map

⁶⁹ Correspondence with one of the authors and Professor Lambert, January 24, 2013, on file with authors. See also N. Lambert, “The *Charter* in the Administrative Process: Statutory Remedy or Refounding of Administrative Jurisdiction?” (2007) 13 Rev. Const. Stud. 21.

⁷⁰ We are grateful to discussions with David Wright for fleshing out this approach to the scope of Charter values.

⁷¹ *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654, at para. 49 (S.C.C.) [hereinafter “*Salituro*”].

the entire terrain of Charter values in the context of administrative justice, those Charter values already recognized by the courts likely will serve as a point of departure. More importantly, the methodology employed by the courts in developing Charter values in judicial settings may shed light on how the scope of such values may be applied by administrative decision-makers.

Below, we set out a non-exhaustive list of the Charter values which have been variously mentioned or elaborated by the courts, some of which parallel specific Charter rights, and some of which go beyond the specific text of the Charter.

(a) Liberty

As the Chief Justice asserted in the *Hutterian Brethren* decision, “liberty” is perhaps the most significant Charter value. Liberty has been discussed as a Charter value in at least two senses. First, in the positive sense, liberty has been framed as an expression of individual choice. Second, liberty has been used in the negative sense, as freedom from interference by the state. Justice Bertha Wilson addressed “liberty in the context” of the values underlying the Charter in her concurring reasons in *Morgentaler*:

The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance. ...

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.⁷²

While Wilson J.'s view of liberty did not attract majority support in *Morgentaler*, similar formulations have been adopted by the Court in discussing the value of liberty in subsequent cases, particularly as part of the section 1 justification analysis.

In *Hutterian Brethren*, the Court considered whether a religious community's freedom of religion was infringed by a requirement that photos accompany an application for a driver's licence.⁷³ The Chief Justice, as noted above, recognized that in determining whether an infringement is justified, the Court should consider not just Charter rights but the values underlying those rights, of which the most important is "liberty". Because the incidental effect of the photo requirement for driver's licences was not to preclude religious practice but rather to impose a cost on religious practice (where transportation options other than driving would have to be pursued), it constituted a reasonable limit. Had the incidental impact been to preclude the practice of a religious ritual or sacrament, as the ban on kirpans in schools at issue in *Multani* implicated, the Court would presumably have come to the opposite conclusion based on the liberty value.

While the Court's recourse to values such as liberty as part of the section 1 analysis has been incorporated into the *Oakes* framework of analysis, it remains to be worked out how such values will inform the balancing envisioned in *Doré*. At a minimum, the Court's examination of the Charter value of liberty suggests that these values will be treated as a spectrum rather than an absolute point or bright line for purposes of such balancing. This is particularly relevant for administrative justice, where nearly every statutory tribunal or regulatory agency includes within its mandate the adjudication of state interference in the freedom of people to pursue their own choices.

⁷² *Supra*, note 19, at 166-67. This passage was cited with approval by Iacobucci J. in *Salituro*, *supra*, note 71, in elaborating the application of Charter values to the development of the common law.

⁷³ *Supra*, note 49.

(b) *Human Dignity*

The value of human dignity is invoked often in Charter jurisprudence but rarely explored.⁷⁴ As noted above in Wilson J.'s reasons in *Morgentaler*, it is described as a value informing nearly all Charter rights. Additionally, it is referred to as a Charter value in *Hill v. Church of Scientology*.⁷⁵ While examining the value of freedom of expression, discussed below, Cory J. submits that "the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights".⁷⁶ That said, Cory J. was also careful to emphasize that the application of Charter values such as human dignity to common law rules is not the same as expanding the application of the Charter itself to all private action, and in so doing attempted to distinguish Charter rights from Charter values. Justice Cory explained:

The most that the private litigant can do is argue that the common law is inconsistent with Charter values. It is very important to draw this distinction between Charter rights and Charter values. Care must be taken not to expand the application of the Charter beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to Charter scrutiny. Therefore, in the context of civil litigation involving only private parties, the Charter will "apply" to the common law only to the extent that the common law is found to be inconsistent with Charter values.⁷⁷

We believe a similar approach underlies *Doré*. Human dignity has arisen not just in the expressive context but in a variety of other Charter settings. Where an exercise of discretion appears to undermine this value, should this be included within the scope of Charter values which an administrative decision-maker ought to consider? Pearl Eliadis, for example, has argued that cases concerning poverty law should be informed by the "Charter-inspired value" of human dignity.⁷⁸

If human dignity is within the scope of Charter values, then Charter values may become over-broad, inchoate and difficult to apply

⁷⁴ For discussion, see L. Sossin, "The 'Supremacy of God', Human Dignity and the Charter of Rights and Freedoms" (2003) 52 U.N.B.L.J. 227 [hereinafter "Sossin"].

⁷⁵ [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.) [hereinafter "*Hill*"]. See also *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, 2008 SCC 40, at para. 79 (S.C.C.).

⁷⁶ *Id.*, at para. 120.

⁷⁷ *Id.*, at para. 95.

⁷⁸ For further discussion, see Sossin, *supra*, note 74.

coherently. If human dignity lies outside the scope of Charter values, however, then a two-tier approach to the Charter may develop, with courts pursuing a broad approach to the term while administrative adjudicators would be limited to a narrow approach. Given that what is at issue in the application of Charter values in administrative justice is an administrative law balancing, not a specific invalidation of any government action, then we would suggest the broader approach is more appropriate. Subject to judicial review on reasonableness grounds as envisioned in *Doré*, it should be for administrative decision-makers and adjudicators to determine the range of Charter values which have application in the framework of their specialized context. Yet the open-ended and uncharted nature of such a value raises important concerns. How will parties and their advocates anticipate the ways in which a value as diffuse as “human dignity” might factor into the decision-making process? In a social benefits context, will it mean something similar to what it means in a prison or hospital context? Operationalizing values such as human dignity poses far more challenging dilemmas than recognizing those values, as we explore further in the final section of this study.

(c) *Equality*

Equality is a value that has underpinned decisions dealing with a variety of Charter rights, and also is set out as a specific guarantee in section 15 of the Charter. The extensive reference to the equality value lends support to Angela Cameron and Paul Daly’s view that it constitutes a fundamental principle of the Constitution, akin to those unwritten constitutional principles elaborated in the *Secession Reference*.⁷⁹ In other words, the Charter value of equality goes well beyond the specific elaboration of the equality right under section 15. For example, Peter Hogg outlines several cases concerning freedom of association, the right to vote and principles of fundamental justice that are premised on the value of equality.⁸⁰

The equality value has been used in common law settings as well. In *MacCabe v. Westlock Roman Catholic Separate School District No. 110*,⁸¹

⁷⁹ Cameron & Daly, *supra*, note 46, at 19; see *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter “*Secession Reference*”].

⁸⁰ Hogg, *supra*, note 43, at 121, 122, 126-30.

⁸¹ [2001] A.J. No. 1278, 2001 ABCA 257 (Alta. C.A.) [hereinafter “*MacCabe*”].

for example, the Alberta Court of Appeal ruled that the common law guiding tort remedies should try to be consistent with Charter values, which includes “equality”. Equality also has been referenced in administrative justice settings. In *Ismail v. British Columbia (Human Rights Tribunal)*,⁸² for example, the British Columbia Superior Court employed a *Doré* analysis to balance the values of equality and free expression.

(d) *Autonomy*

Personal autonomy is a Charter value that has been used as an interpretive guide in common law settings.⁸³ Here again, while captured in specific rights such as the right to be free from unreasonable search and seizure in section 8 of the Charter, autonomy extends beyond this and any other specific Charter right as well. For example, the Supreme Court in *Salituro* suggested that the common law rule invalidating the competence of a spousal witness in the context where the spouses are irreconcilably separated was inconsistent with Charter values, specifically that “individual choices [should] not be restricted unnecessarily”.⁸⁴

Justice Iacobucci, writing for the Court, explained the relevance of Charter values as follows:

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, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed. The common law rule making an irreconcilably separated spouse an incompetent witness for the prosecution against the other spouse is inconsistent with the values in the Charter. Subject to consideration of the limits on the judicial role, the rule ought therefore to be changed. Society can have no interest in preserving marital harmony where spouses are irreconcilably separated because there is no marital harmony to be preserved.⁸⁵

⁸² [2013] B.C.J. No. 1308, 2013 BCSC 1079 (B.C.S.C.).

⁸³ *MacCabe*, *supra*, note 81, at paras. 106-107 (Alta. C.A.).

⁸⁴ *Salituro*, *supra*, note 71, at para. 45.

⁸⁵ *Id.*, at para. 49.

Mayo Moran has used *Salituro* to explain the importance of Charter values as a guide to the interpretation and application of the common law. For example, in addition to Iacobucci J.'s concerns over autonomy, the common law rule was premised on an anachronistic view of women and an exaggerated emphasis placed on the promotion of marital harmony.⁸⁶ In this respect, the common law rule clashed with the equality values enshrined in the Charter.⁸⁷ Moran uses this example to stress the need to look beyond specific guarantees in the Charter when interpreting the common law, in favour of a reading that is in accordance with the "basic underlying theory of the *Charter*".⁸⁸ From this standpoint, autonomy and equality values speak to the broader, more fundamental values of the Charter; it is against these underlying values that the common law develops.⁸⁹

This connection is not unique to autonomy and equality. Indeed, many Charter values (just like Charter rights) should be seen as mutually reinforcing and interlocking. This adds to the coherence of Charter values in administrative justice, but also to their complexity and variability.

(e) Fairness

In addition to the Charter values expressed above, numerous courts and commentators have noted values stemming from common law rules concerning process. The Charter value of fairness is particularly applicable to the sphere of administrative justice, where procedural fairness has universal relevance.

Robert Currie notes that the Charter values of procedural fairness and a fair trial, embodied within sections 7 and 11(d), inform the common law rules of evidence.⁹⁰ Currie goes on to demonstrate that other common law rules of defence, such as confession rules and the ability to make a full answer and defence, have been "constitutionalized" through their intersection with "Charter standards".⁹¹ Kent Roach expands upon this point by demonstrating that the common law rules relating to admissibility

⁸⁶ Mayo Moran, "Authority, Influence, and Persuasion: *Baker*, *Charter* values and the Puzzle of Method" in David Dyzenhaus, ed., *The Unity of Public Law* (Toronto: Hart, 2004), at 417.

⁸⁷ *Id.*, at 418.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Robert J. Currie, "The Evolution of the Law of Evidence: Plus Ça change ...?" (2011) 15 *Can. Crim. L. Rev.* 213, at 222.

⁹¹ *Id.*

of evidence were modified in *R. v. Seaboyer*; *R. v. Gayme*⁹² in order to be consistent with Charter values.⁹³ He notes that other common law presumptions such as fairness and respect for international commitments to human rights reflect Charter values, whereas common law presumptions such as the right to property have lost their resonance in the Charter era.⁹⁴

The decisions in *Hennessy v. Horse Racing Alberta*⁹⁵ and *Gonzalez v. Alberta (Driver Control Board)*⁹⁶ affirm Roach and Currie's findings that procedural fairness and common law rules of evidence arguably are informed by Charter values as well.⁹⁷ In *Hennessy*, the Queen's Bench reviewed an appeal from the Tribunal of Horse Racing Alberta. The Court found that the claimant was denied procedural fairness and fundamental justice because he was unable to make a full answer and defence, which the Court considered a Charter value.⁹⁸

Finally, the Quebec Court of Appeal recently described "natural justice" as a Charter value emanating from section 7 of the Charter. In *Syndicat des travailleuses et travailleurs de ADF - CSN v. Syndicat des employés de Au Dragon Forgé Inc*, the Quebec Court of Appeal applied *Doré* to balance the objective of a law that sought to maintain confidentiality in disciplinary boards with the value of natural justice.⁹⁹

(f) Expressive Freedom

The Supreme Court has identified "freedom of expression" as a Charter value. In its decisions concerning defamation,¹⁰⁰ journalist-sourced privilege¹⁰¹ and picketing,¹⁰² the Court has used the Charter value

⁹² [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.).

⁹³ Kent Roach, *Constitutional Remedies in Canada*, 2d ed., Release No. 19, December 2012 (Toronto: Canada Law Book, 2012), at para. 14.780.

⁹⁴ Kent Roach, "Common Law Bills of Rights as Dialogue between Courts and Legislatures" (2005) 55 U.T.L.J. 733, at 747-78.

⁹⁵ [2006] A.J. No. 1613, 2006 ABQB 903 (Alta. Q.B.) [hereinafter "*Hennessy*"].

⁹⁶ [2001] A.J. No. 1159, 2001 ABQB 757 (Alta. Q.B.).

⁹⁷ See Currie, *supra*, note 90, and Roach, *supra*, note 93. See also *A. (L.L.) v. B. (A.)*, [1995] S.C.J. No. 102, [1995] 4 S.C.R. 536 (S.C.C.); *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.); and the 2014 Alberta Transportation and Safety Board decision, *Re LRM*, 2014 ABTSB 266 (Alta. T.S.B.).

⁹⁸ *Hennessy*, *supra*, note 95, at para. 28.

⁹⁹ [2013] Q.J. No. 4292, 2013 QCCA 793, at para. 45 (Que. C.A.).

¹⁰⁰ *Hill*, *supra*, note 75; *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, 2009 SCC 61 (S.C.C.).

¹⁰¹ *R. v. National Post*, [2010] S.C.J. No. 16, 2010 SCC 16 (S.C.C.).

¹⁰² *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156, at paras 106-107 (S.C.C.).

of freedom of expression in order to rule on the validity of the common law in the Charter era. The use of the value was most recently applied by the Ontario Court of Appeal. In *Jones v. Tsige*, the Court of Appeal balanced the right to privacy with the Charter value of freedom of expression.¹⁰³

Expressive freedom has also been applied in the context of administrative justice. In *Goldberg v. Law Society (British Columbia)*, the British Columbia Court of Appeal discussed whether the Charter value of “freedom of expression” was engaged in a disciplinary hearing case. The Court highlighted the Charter value of freedom of expression, opposed to the Charter right of section 2(b), because “we [the court] do not have a Charter issue squarely before us”.¹⁰⁴ Freedom of expression as a Charter value was confirmed in *Pridgen v. University of Calgary*, where the Court rejected the findings of the Review Committee and Board of Governors on the basis that it made no attempt to balance the statutory mandate with the right of freedom of expression.¹⁰⁵ While the Court discussed freedom of expression in light of Charter rights and statute, its discussion of Charter values and application of *Doré* support the contention that freedom of expression constitutes a Charter value.

The value was more clearly applied in the 2014 case *Wilson v. University of Calgary*.¹⁰⁶ In *Wilson*, a student anti-abortion group held on-campus protests displaying graphic imagery. The university administrators, pursuant to their authority under the *Post-secondary Learning Act*,¹⁰⁷ requested that the images be turned away from public viewing. In evaluating the administrators’ decision, the Alberta Court of Queen’s Bench balanced the Charter value of “free expression” with the statutory objective of promoting campus safety.

Expressive freedom as a Charter value has also been identified at the tribunal level. In *Taylor-Baptiste v. Ontario Public Service Employees Union*¹⁰⁸ and *Marceau v. Brock University*,¹⁰⁹ the Ontario Human Rights

¹⁰³ [2012] O.J. No. 148, 108 O.R. (3d) 241 (Ont. C.A.).

¹⁰⁴ [2009] B.C.J. No. 657, 2009 BCCA 147, at para. 57 (B.C.C.A.).

¹⁰⁵ [2012] A.J. No. 443, 2012 ABCA 139, at paras. 126, 176 (Alta. C.A.).

¹⁰⁶ [2014] A.J. No. 348, 2014 ABQB 190 (Alta. Q.B.).

¹⁰⁷ S.A. 2003, c. P-19.5.

¹⁰⁸ [2013] O.H.R.T.D. No. 179, 2013 HRTO 180, at paras. 31-35 (O.H.R.T.). Upheld by the Ontario Divisional Court in [2014] O.J. No. 2591, 2014 ONSC 2169 (Ont. S.C.J.).

¹⁰⁹ [2013] O.H.R.T.D. No. 555, 2013 HRTO 569, at paras. 13-15 (O.H.R.T.). See also *C. (R.) v. District School Board of Niagara*, [2013] O.H.R.T.D. No. 1388, 2013 HRTO 1382 (O.H.R.T.).

Tribunal used reference to the Charter value of expressive freedom as a tool in interpreting the *Human Rights Code*.¹¹⁰

Most significantly, of course, expressive freedom was at issue in the *Doré* decision itself. Justice Abella recognized that “in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular”.¹¹¹ The Court concluded that in light of the egregious content and tone of the lawyer’s complaint about the judge, the Court’s balancing of expressive freedom with the statutory objectives of the Barreau’s Code of Ethics “cannot be said to represent an unreasonable balance”.¹¹²

(g) *Religious Freedom*

Freedom of religion was recently identified as a Charter value within the Aboriginal context. In *Ktunaxa Nation v. British Columbia*, the Minister of Forests, Lands and Natural Resource Operations approved the development of a ski resort on Crown land.¹¹³ The land was sacred to the Ktunaxa people and was central to their spirituality. According to the petitioners, the proposed site would denigrate the area. In addition to their arguments under section 35 of the *Constitution Act, 1982*,¹¹⁴ the Ktunaxa alleged that the Minister’s decision infringed their section 2(a) Charter rights because it violated their spiritual practices and beliefs.¹¹⁵

In assessing the petitioners’ arguments under section 2(a) of the Charter, the British Columbia Superior Court applied *Doré* to determine whether the decision-maker balanced the Charter value at stake — freedom of religion — with the statutory objectives of encouraging outdoor recreation and disposing Crown lands in the public interest, pursuant to the *Ministry of Lands, Parks and Housing Act* and *Land Act*,¹¹⁶ respectively. When balancing Charter values with these

¹¹⁰ R.S.O. 1990, c. H.19.

¹¹¹ *Doré*, *supra*, note 4, at para. 63.

¹¹² *Id.*, at para. 71.

¹¹³ *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2014] B.C.J. No. 584, 2014 BCSC 568 (B.C.S.C.) [hereinafter “*Ktunaxa Nation*”].

¹¹⁴ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹¹⁵ *Ktunaxa Nation*, *supra*, note 113.

¹¹⁶ *Ministry of Lands, Parks and Housing Act*; R.S.B.C. 1996, c. 307; *Land Act*, R.S.B.C. 1996, c. 245.

objectives, the Court noted that the Minister must “consider all relevant social, economic, and environmental factors”.¹¹⁷

The Court found that the Minister’s decision was a reasonable balancing of the Charter value of freedom of religion with the applicable statutory objectives. While the Minister did not directly address the Charter issue when making the decision, the Court recognized that the Minister “sincerely recognise[d] the genuinely sacred values at stake for the Ktunaxa leadership”.¹¹⁸ Furthermore, the Minister made several changes to the proposal in order to accommodate Aboriginal concerns. These accommodations could support the reasonableness of the decision:

[A]ny accommodation measure that addresses the substance of the asserted right in this case can be considered both in determining whether the duty to consult was met and in assessing whether the balancing of *Charter* values was proportionate. In saying this, I do not find the balancing of s. 2(a) to necessarily have the same procedural or substantive requirements as the duty to consult and accommodate in relation to an asserted aboriginal spiritual right. ...

... Though stated as in relation to the Ktunaxa’s asserted aboriginal spiritual right under s. 35, the same measures [accommodations] are germane to assessing whether the Minister’s decision represents a proportionate balancing of s. 2(a) with the applicable statutory objectives.¹¹⁹

Applying accommodations made pursuant to section 35 to discern the reasonableness of an administrative decision is unique to cases that require both Aboriginal and administrative law analyses. Nevertheless, the central role that religious freedom played in determining the reasonableness of the Minister’s decision suggests the solidification of “religious freedom” as a Charter value.

(h) *Privacy*

Privacy represents yet another Charter value which is likely to find application in administrative justice contexts and which exists outside of the context of a specific Charter right. In *M. (A.) v. Ryan*,¹²⁰ the Supreme

¹¹⁷ *Ktunaxa Nation*, *supra*, note 113, at para. 323.

¹¹⁸ *Id.*, at para. 306.

¹¹⁹ *Id.*, at paras. 308, 310.

¹²⁰ [1997] S.C.J. No. 13, [1997] 1 S.C.R. 157 (S.C.C.).

Court has employed Charter values to extend the scope of common law privilege to reflect changing “social and legal realities of our time”, and in particular the privacy of victims of sexual violence who seek psychiatric counselling.¹²¹

In *Gore v. College of Physicians and Surgeons (Ontario)*,¹²² for example, the appellant physicians disputed an investigation by the Registrar of the College of Physicians and Surgeons pursuant to the *Regulated Health Professions Act, 1991*.¹²³ The appellants argued that the regulation (and presumably, decisions made pursuant to the regulation) should be interpreted in light of the Charter values of protection of patient privacy and protection against self-incrimination. The Court ultimately chose not to invoke Charter values in deciding the case since the regulation was not ambiguous and a Charter values approach was thus unnecessary.¹²⁴ However, the Court neither confirmed nor disputed the existence of the Charter values raised.

3. Conclusion

The list above is not exhaustive, and should be seen as a dynamic rather than static aspect of the Charter’s application to administrative justice. We recognize that the scope of Charter values set out above is a somewhat subjective account of an ill-defined category. Other possible Charter values could be added, including, for example, mobility, mentioned in the context of *Khadr v. Canada (Attorney General)*.¹²⁵ In that case, the Federal Court reviewed the government’s decision to refuse Omar Khadr’s request for a passport. The Federal Court ruled that the “right to leave Canada is a sufficiently important aspect of an individual’s freedom” and constituted a Charter value.¹²⁶ The Court also

¹²¹ *Id.*, at para. 21.

¹²² [2009] O.J. No. 2833, 2009 ONCA 546 (Ont. C.A.) [hereinafter “*Gore*”].

¹²³ S.O. 1991, c. 18.

¹²⁴ *Gore*, *supra*, note 122, at para. 30.

¹²⁵ [2006] F.C.J. No. 888, 2006 FC 727 (F.C.) [hereinafter “*Khadr*”].

¹²⁶ *Id.*, at para. 69. Mobility was reinforced as a Charter value in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47 (S.C.C.) [hereinafter “*Divito*”]. In *Divito*, the applicant argued that the *International Transfer of Offenders Act*, S.C. 2004, c. 21 violated his section 6 rights because the statute gave the Minister of Public Safety discretion in consenting to a transfer of a Canadian offender. While the applicant did not seek review of the Minister’s decision to deny the transfer, the Court noted that had it been argued, the Minister’s decision would have to comply with relevant Charter values, presumably those embodied in section 6 (at para. 49).

argued that the issuance of a passport reflects the Charter value expressed by mobility rights.¹²⁷ We viewed this value as simply overlapping the mobility right as opposed to a distinct value that could constrain discretion or guide statutory interpretation.

Similarly, the Supreme Court in *Multani* highlighted the promotion of multiculturalism and diversity as consistent with the Charter although it did not characterize them as Charter values *per se*.¹²⁸ Even if not elevated to the status of a Charter value, in *Lalonde*, as noted above, the Ontario Court of Appeal held that respect for and protection of minorities constituted an unwritten constitutional principle.¹²⁹ Similarly, democracy was recognized as an unwritten constitutional principle in the *Secession Reference*,¹³⁰ and invoked as a Charter value in *Hutterian Brethren*, as set out above. While mobility is arguably too narrow to constitute a Charter value, multiculturalism and the enhancement of democracy may be overly broad to fulfil this function. Alternatively, it may be that values such as mobility and multiculturalism are still inchoate and through further refinement and development may be recognized as within the scope of Charter values delineated above.

Notwithstanding its tentative nature, we believe the scope of Charter values discussed above in Charter jurisprudence represents an important point of departure for the development of Charter values for administrative justice. While Charter values may be seen as limited simply to the text of Charter rights differently applied in administrative justice settings, this does not appear to be how the courts themselves have conceived of Charter values, nor would such a formalist approach be in keeping with the robust and adaptive administrative law framework invoked in *Doré*. That said, many of the values set out lack an important contextual dimension.

Administrative justice, unlike courts, must also take into consideration the policy mandate of a particular decision-making body

¹²⁷ *Khadr, id.*, at para. 113.

¹²⁸ *Multani, supra*, note 34, at para. 78. For discussion, see Vaughan Black, “Cultural Thin Skulls” (2009) 60 U.N.B.L.J. 186, at 203-204.

¹²⁹ *Lalonde, supra*, note 63, at paras. 187-188. See also Dickson C.J.C.’s reference to “Canada’s commitment to the values of equality and multiculturalism enshrined in ss. 15 and 27 of the Charter” in *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.) and “respect for cultural and group identity” as a Charter value mentioned in *Ross, supra*, note 13, at para. 19. On the implications of unwritten constitutional principles more generally, see Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s L.J. 389.

¹³⁰ *Secession Reference, supra*, note 79.

and the purposive nature of statutory or prerogative authority. As the Supreme Court recognized in the context of Charter remedies in *Conway*, while a court may do anything that is “just and appropriate” pursuant to section 24(1) remedies, a tribunal could only remedy Charter breaches by recourse to their statutorily mandated powers.¹³¹ The Charter cannot, in other words, be used by a tribunal to frustrate or usurp the role of the legislature in demarcating the boundaries of that tribunal’s authority or its reasons for being. A similar conceptual framework, we suggest, applies in the context of Charter values. While the Charter jurisprudence can shed light on the scope of Charter values, it remains for each tribunal to determine which Charter values will be relevant to its mandate, and how to balance those values against its policy mandate. For example, while personal autonomy may be a broadly recognized Charter value, it will necessarily mean something different in the context of a privacy commission than in the context of a parole board. The variability in the application of Charter values mirrors the variability of other administrative law frameworks (for example, procedural justice) as discussed further below. In other words, in the administrative justice sphere, variability may be part of the solution, not the problem.

While statutory and policy context are distinctly important for any analysis of the scope of Charter values in an administrative justice context, the Charter must continue to be a mechanism for advancing broader rights than those contained in a particular statutory or policy context. Charter values, in this sense, provide a bridge between fundamental and core values on the one hand, and the choices legislatures and executive government make on the other. Determining the scope of Charter values requires being attentive to both these dynamics in the diverse contexts of administrative justice. Further, the dilemmas accompanying the power of unelected judges to further policy aims and constrain democratic action through judicial review does not apply in the context of administrative justice.¹³² Here, the Charter cannot negate or “trump” legislative choices, but rather can be used to inform, refine, focus and interpret those choices.

In light of the analysis above, our discussion turns to how administrative decision-makers (and the courts that review those

¹³¹ *Supra*, note 3.

¹³² For a summary of these dilemmas, see Grant Huscroft & Ian Brodie, *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Canada, 2004). See also Grant Huscroft, “Constitutionalism from the Top Down” (2007) 45 Osgoode Hall L.J. 91.

decisions) may operationalize Charter values in a fashion that is coherent, transparent, consistent, workable, and principled.

III. OPERATIONALIZING CHARTER VALUES

After *Doré*, the Supreme Court confirmed that tribunals have the opportunity to imbue their decisions regarding the exercise of administrative discretion with Charter values and engage in a more active form of constitutional interpretation. At the same time, Charter values remain an important tool of statutory interpretation where competing approaches to a statutory power are available. In still other cases, Charter values may inform how common law rules are interpreted and applied. Charter values in each of these contexts will be relevant to administrative justice. How can the consistency and coherence of these interpretations of Charter values be assured? In short, how can Charter values be developed through administrative justice decision-making? Is it open to tribunals to identify new Charter values or extend existing ones? In this section, we examine how administrative justice decision-makers have approached the task of delineating and operationalizing Charter values.

In *Black*, the Ontario Securities Commission considered whether the right against self-incrimination and the right to make a full answer and defence constituted Charter values.¹³³ The Commission attempted to balance these competing values by considering their merits and how the privileging of one would compromise the other. However, the Commission did not offer a definitive test to help us reconcile these values in the end.¹³⁴

Since *Doré*, tribunals have yet to achieve greater methodological clarity. For example, in *C. (R.) v. District School Board of Niagara*, the Human Rights Tribunal of Ontario granted the Canadian Civil Liberties Association intervener status for the purposes of discussing “how values of the [Charter] including s. 2(a) (freedom of religion) and s. 15 (‘equality’) should inform the interpretation of the *Code*” in question.¹³⁵ While one can surmise that both “equality” and “freedom of religion” were Charter values for the purposes of *C. (R.)*, the case did not crystallize a method for testing the existence of these values in future

¹³³ *Black*, *supra*, note 61, at para. 191.

¹³⁴ *Id.*, at paras. 174-193.

¹³⁵ [2012] O.H.R.T.D. No. 1566, 2012 HRTO 1591, at para. 8 (O.H.R.T.) [hereinafter “*C. (R.)*”].

cases. In *Brandt Tractor*,¹³⁶ mentioned above, the British Columbia Labour Relations Board applied *Doré* in considering employees' applications for partial decertification from their union under the *Labour Relations Code*.

Operationalizing Charter values should be seen as part of a model of administrative justice referred to as "active adjudication".¹³⁷ This form of more flexible adjudication may be particularly important in contexts where one or more parties often will have no legal representation and where adjudicators often will not have legal training. Tribunals are less constrained by an adversarial model of adjudication, and have developed methods to accommodate the challenges that vulnerable parties coming before the tribunal may experience. In the context of Charter values, this more effective and efficient model may involve the adjudicators identifying rights issues where the parties do not have the background or capacity to do so and taking steps to obtain the information or submissions necessary to adjudicate them. This may involve mechanisms that range from retaining *amicus* counsel to engaging in inquisitorial questioning, or developing interpretive guidelines upon which parties and decision-makers can rely.¹³⁸

The methodology by which administrative decision-makers might integrate Charter values dates back to *Slaight Communications* and is fairly straightforward.¹³⁹ So, for example, where two interpretations are open to a tribunal member and one will advance a Charter value more than the other, it should be preferred. When a statute's meaning remains ambiguous, Charter values may be employed to inform the statutory language.¹⁴⁰ Given the diversity of settings and variety of Charter values elaborated above, however, a more textured methodology may be

¹³⁶ *Supra*, note 53.

¹³⁷ Active adjudication does not have a precise definition but usually connotes a mid-point between adversarial and inquisitorial models of adjudicative hearings. An active adjudicator will respect the right of parties to put forward their own positions on questions of law and fact but may supplement submissions by raising additional issues, seeking information or perspectives not provided by the parties, and redressing any asymmetries resulting from represented and unrepresented parties or parties of greater or lesser sophistication. The active adjudicator relies for guidance on the statutory objectives of administrative justice and how those objectives could most effectively be fulfilled through the adjudicative process. For a discussion of active adjudication, see L. Sossin & S. Green, "Administrative Justice and Innovation: Beyond the Adversarial/Inquisitorial Dichotomy" [hereinafter "Sossin & Green"] in L. Jacobs & S. Bagley, eds., *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey: Ashgate, 2013) 71.

¹³⁸ See Sossin & Green, *id.*, for further discussion of this range of mechanisms.

¹³⁹ *Supra*, note 2.

¹⁴⁰ *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, 2002 SCC 42 (S.C.C.).

required to give effect to the application of Charter values to administrative discretion in *Doré*. We suggest the following approach as an example of such a methodology.

1. Discretionary Authority or Interpretive Scope

First, the administrative decision-maker needs to identify a discretionary power, or a question of interpretation for which more than one approach would be plausible. As the courts have made clear in developing Charter values, this situation arises only where a decision-maker is exercising discretion. This is an important constraint on administrative decision-makers applying the *Doré* framework. Charter values cannot be used either to invalidate a statutory provision or to render it inoperative in the sense available to such decision-makers if a legislative provision is impugned under the Charter *per se*. Only the application of the Charter itself can trigger such a remedy, and in such circumstances, additional procedural steps (*e.g.*, issuing a notice of constitutional question) and substantive steps (*e.g.*, the application of the *Oakes* test) are triggered. Thus, the first logical step in the application of Charter values is to identify the nature and scope of the discretion at issue.

While it is beyond the scope of this paper to elaborate on what constitutes a “discretion”, suffice it to say that it may only arise where the wording or context of legislation makes clear that its application depends on the judgment of the person authorized to apply it, and where there is more than one possible option available to that authorized person.¹⁴¹

2. Identification of Potential Charter Value

Second, the administrative decision-maker must conclude that the identified discretion engages a recognized Charter value (or, potentially, a novel value analogous to an existing Charter value). Administrative decision-makers cannot be expected to be intuitively aware of the range of Charter values; rather, tribunals should develop training and, ideally, guidelines, which highlight the Charter values most relevant to the

¹⁴¹ For discussion, see L. Pottie & L. Sossin, “Demystifying the Boundaries of Public Law: Policy, Discretion and Social Welfare” (2005) 38 U.B.C. L. Rev. 147.

subject matter of the tribunal.¹⁴² For example, equality and expressive freedom might play a significant role in an education tribunal while privacy, autonomy and fairness might play a more significant role in a social benefits tribunal.

While administrative decision-makers should be open to and consider submissions from the parties on Charter values, it is important to emphasize that fulfilling the goals of Charter values may require “active adjudication” on the part of decision-makers. Active adjudication in this context may involve a decision-maker raising a Charter value on her own (even if it is not raised by the parties).

3. Balancing from *Doré* of the Value against the Statutory Objectives as Set Out in *Doré*

Third, as set out by the Supreme Court in *Doré*, the next stage of the methodology would be the balancing exercise where the value of the Charter value is weighed against the objectives of the discretionary authority:

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. In *Lake*, for instance, the importance of Canada’s international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the “twin goals of public safety and fair treatment” grounded the assessment of whether an infringement of an individual’s liberty interest was justified (para. 19).

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

¹⁴² The importance of training and enhancing tribunals’ capacities in relation to Charter application has been highlighted by Sheila Wildeman in her presentations, including the Canadian Institute for the Administration of Justice (CIAJ) Roundtable on Administrative Law held in Toronto on May 24, 2013, and forthcoming research on Charter values. See correspondence from Professor Wildeman, June 20, 2013, on file with the authors.

balance the severity of the interference of the *Charter* protection with the statutory objectives.¹⁴³

While the Court has been explicit in stating this is not simply a different venue for the application of the *Oakes* approach, it is likely that administrative decision-makers will search for an analogous proportionality framework in order to provide some degree of transparency and rigour in this balancing process. Tellingly, the early applications of *Doré* have not yielded innovative templates for this balancing.

One balancing template consistent with Abella J.'s invocation of enriching the administrative law approach would be to adapt the framework developed by the Supreme Court in *Baker* (and applied to Charter settings in *Suresh*) in order to determine the degree of fairness appropriate to particular settings. In other words, when considering how to reconcile statutory objectives with Charter values, the administrative decision-maker should look to the nature and purpose of the statute, the nature of the discretion at issue, the importance of the decision to affected parties, the legitimate expectations of those affected and any specialized procedures — such as applicable guidelines — which may guide the decision-maker. While the proportionality exercise in fairness determinations is of a different kind than that contemplated in *Doré*, the contextual nature of such determinations seems well suited to working through how Charter values should inform constrains on the exercise of discretion.

For example, where the Charter values amplify the statutory objectives, or where such values are of particular importance for affected vulnerable parties, those Charter values might be given more weight. I would suggest this framework captures the approach Abella J. adopted in *Doré*. She acknowledged the importance of expressive freedom and the scope for a lawyer to criticize a judge. She then considered the nature of the statute in question and the importance of the Code of Ethics in promoting public confidence in the administration of justice and civility among lawyers. Further, she considered the nature of the disciplinary committee's discretion, which is expansive. She noted the impact on *Doré* himself, highlighting that only a reprimand was at stake. Finally, she acknowledged the Committee's deliberative process in determining

¹⁴³ *Doré, supra*, note 4, at paras. 55-56.

that Doré’s conduct “overstepped” generally accepted norms of “moderation and dignity”.¹⁴⁴

We would suggest that such an approach has the added advantage of being familiar and accepted as a legitimate framework among administrative decision-makers, judges and administrative law advocates alike, and where a rich and textured body of jurisprudence and commentary already exists on which to build.

Whatever approach is adopted by a decision-maker, it will be a challenge for parties and advocates to predict at the outset how Charter values might affect their positions in an administrative adjudication. As with the development of procedural fairness within administrative justice, clarity will follow experience, as different administrative decision-makers sort out the proper application of the *Doré* framework in their statutory context. The courts will have a role to play here as well, both to establish some key parameters and through appropriate deference, to recognize and validate the necessary space for administrative decision-makers to develop an approach to the Charter commensurate with their perspective, expertise and experience.

The proper balancing of Charter values and the objectives of the statute will also depend on the adoption by administrative decision-makers of “active adjudication” strategies. In this sense, while decision-makers may benefit from the submission of parties, they cannot depend solely on such submissions in settings where most parties are unrepresented and cannot be expected on their own to identify and argue Charter values. Further, the importance of active adjudication to the effectiveness of the *Doré* framework once again demonstrates the importance of tribunal training and resources such as guidelines on tribunal-specific Charter values.

4. Explanation of Process and Results of Balancing in Clear Reasons

Having engaged in the balancing exercise outlined above, the fourth stage of the Charter values methodology involves setting out a clear explanation for the conclusion reached above. The importance of reasons in this context cannot be overstated. Because of the inherently subjective aspect of the balancing exercise envisioned in *Doré*, reasons play a dual role. First, reasons will contribute to the credibility and legitimacy of the

¹⁴⁴ *Id.*, at para. 70.

development of Charter values rooted in the realities of administrative justice. Second, reasons perform an accountability function, confirming both the soundness of the rationale underlying a decision-maker's decision, and assuring a greater degree of consistency and oversight.

The methodology set out above can be adapted to the diverse range of administrative decision-making contexts. Over time, if followed, this methodology would generate a body of training materials, guidelines and reasons on Charter values which, if paired with thoughtful and considered judicial commentary on judicial reviews of such decisions, could result in a constructive and principled framework for the application of discretionary authority in the era of the Charter.

While it is beyond the scope of this paper to explore in detail the deference contemplated by the Supreme Court in *Doré* applicable to decisions by administrative adjudicators as to Charter values, it follows that the rationale for such deference is the distinctive and different lens on the Charter's application to administrative justice that such adjudicators use.¹⁴⁵ It is important, through reasons, to see how this lens will come to view the Charter in distinctive terms. Moreover, the standard of reasonableness to be applied to such determinations will depend on reasons in order to ensure meaningful oversight of administrative decision-makers by the courts.¹⁴⁶

IV. CONCLUSION

In this exploratory analysis, we have sought to advance the view of a sphere of Charter justice that is distinctly suited to administrative justice. We have discussed the ways in which the Charter and administrative law doctrines have been reconciled in the jurisprudence leading up to *Doré*. We have canvassed the sources of Charter values, and offered a tentative summary of the scope of Charter values to this point in time. Finally, we have discussed how a framework of Charter values could be operationalized with the diverse contexts of administrative justice.

In a sense, the *Doré* framework opens up the possibility of a new and different kind of Charter dialogue, between administrative decision-makers

¹⁴⁵ *Id.*, at paras. 36 and 48.

¹⁴⁶ For discussion of the relationship between reasons and reasonableness, see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, 2011 SCC 62 (S.C.C.).

and courts, in which expertise in policy-specific decision-making contexts may inform the development of Charter values and *vice versa*.

Our focus has been both on the conceptual coherence of Charter values and on how the Charter can be adapted to the distinct realities of administrative justice. In developing an approach to the Charter rooted not in courts and the formal determination of rights, but in the realm of discretionary decision-making and the oversight of such decisions, we believe the promise of the Charter to protect those affected by the exercise of public authority can at last be meaningfully fulfilled.