

**THE DAWN OF VAVILOV, THE TWILIGHT OF DORÉ:
REMEDIAL PATHS IN JUDICIAL REVIEW OF
RIGHTS-AFFECTING ADMINISTRATIVE DECISIONS
AND THE UNIFICATION OF CANADIAN PUBLIC LAW**

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This article examines Canada's position on the debate among comparative administrative law theorists about whether a court should apply the principle of proportionality to adjudicate allegations that an administrative agency has unjustifiably infringed human rights. On first impression, it would appear that decades ago, the Supreme Court of Canada affirmed the use of proportionality on judicial review of administrative decisions that allegedly limit rights that are explicitly protected under the Canadian Charter of Rights and Freedoms. It would then appear to be an open question whether or not the Supreme Court should "unify" Canadian public law by extending proportionality to cases where it is alleged that a decision has negatively impacted individual interests that do not enjoy constitutional protection. I argue that this framing of the debate from a Canadian perspective wrongly assumes that, by applying proportionality to adjudicate alleged infringements of Charter rights, the Supreme Court has applied it to all cases where an administrative decision has allegedly infringed human rights. In reality, the Supreme Court has applied proportionality only to cases where a person seeks a constitutional remedy for a violation of her Charter rights, not to cases where a person seeks an administrative law remedy traditionally available at common law for a negative impact on her human rights that are protected at common law. I argue that only more recent Supreme Court decisions can be interpreted as "unifying" Canadian public law by applying proportionality where a person seeks a common law remedy. Moreover, these conclusions suggest that the older legal doctrines the Supreme Court has developed applying proportionality where a person seeks a constitutional remedy should be substantially reformed.

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I. INTRODUCTION

This article examines the legal framework for adjudicating claims that an administrative agency has made a decision whose substance unjustifiably infringes human rights, such as rights protected by the *Canadian Charter of Rights and Freedoms*¹ or fundamental interests

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

protected at common law.² Its inquiry is situated against the backdrop of a debate amongst comparative administrative law theorists about whether a court, on an application for judicial review, ought to apply the principle of proportionality to address such claims. This principle, as standardly formulated, requires a court to determine whether the impugned administrative decision in fact limits the applicant's right and, if so, whether the limit is rationally connected to a legitimate public interest, impairs the relevant right as minimally as possible, and has beneficial effects that outweigh its detrimental effects.³

It is plausible that proportionality should be used in judicial review of administrative decisions that allegedly limit rights enjoying explicit constitutional protection. But it is controversial whether it should also apply where an applicant alleges that the decision-maker has committed a public wrong other than by infringing a constitutional right. Those who endorse a "bifurcated" vision of public law maintain that, instead of proportionality review, traditional common law principles of judicial review — particularly the principle that administrative bodies are owed curial deference such that their decisions must stand unless they are unreasonable⁴ — should apply in "pure," non-constitutional-rights-based public wrongs cases.⁵ Those who endorse a "unified" view hold that proportionality should constitute an at-large, freestanding ground of substantive review available in all cases.⁶

² Thus, I will leave unexamined the framework for adjudicating allegations that a decision's procedure infringes fundamental rights, except to the extent that this framework is relevant to discussing substantive review. For discussion, see *Nicholson v Haldimand-Norfolk Regional Police Commissioners* (1978), [1979] 1 SCR 311 at 328–30; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 838–40 [*Baker*]; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9. See also Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011), ch 7; Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law Part I: Procedural Fairness" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2018) [Flood & Sossin, *Administrative Law*], ch 6.

³ See e.g. David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 163; Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 UTLJ 383 at 387–88; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012), ch 9–12; Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013) at 2.

⁴ I set aside the use of proportionality in non-deferential correctness review of decisions by an administrative agency involving questions of human rights, such as whether the agency's enabling statute unjustifiably infringes human rights. For discussion of this matter in the Canadian context, see Freya Kristjanson & Morgana Kellythorne, "Charter Cases Before Administrative Tribunals and on Judicial Review" (2008) 25 NJCL 217; John C Kleefeld, "Administrative Tribunals and the Constitution: Reclaiming the Grail" (2004) 29:1 Adv Q 54; Christopher D Bredt & Ewa Krajewska, "*R. v. Conway*: Simplifying the Test for Administrative Tribunal's Jurisdiction to Consider Charter Issues" (2011) 29 NJCL 189; Christopher D Bredt & Ewa Krajewska, "*R. v. Conway*: UnChartered Territory for Administrative Tribunals" (2011) 54 SCLR (2d) 451; Matthew Lewans, "Administrative Law, Judicial Deference, and the *Charter*" (2014) 23:2 Const Forum Const 19 at 22–25. See also *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54; *R v Conway*, 2010 SCC 22.

⁵ See e.g. Michael Taggart, "Proportionality, Deference, *Wednesbury*" (2008) 3 NZLR 423; Susan L Gratton, "Standing at the Divide: The Relationship Between Administrative Law and the *Charter* Post-Multani" (2008) 53:3 McGill LJ 477 at 507–13; Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012), ch 5 [Daly, *A Theory of Deference*]; Jason NE Varuhas, "Against Unification" in Hanna Wilberg & Mark Elliott, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart, 2015) 91 [Wilberg & Elliott, *Scope and Intensity*].

⁶ See e.g. David Dyzenhaus, Murray Hunt & Michael Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1:1 OUCJLJ 5 at 31–32; Murray Hunt, "Against Bifurcation" in David Dyzenhaus, Murray Hunt & Grant Huscroft, eds, *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart, 2009) 99; David Dyzenhaus, "Proportionality and Deference in a Culture of Justification" in Grant Huscroft, Bradley W Miller & Gregoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 234 [Dyzenhaus, "Proportionality and Deference"]; Mark D Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Wilberg & Elliott, *Scope and Intensity*, *ibid*, 395; Joseph J Arvey,

One tempting way to depict Canadian public law relative to this comparative debate is to claim that the Supreme Court of Canada committed to proportionality as a tool for adjudicating allegations that administrative decisions infringe human rights in *Slaight Communications Inc. v. Davidson*,⁷ affirmed this commitment in *Multani v. Commission scolaire Marguerite-Bourgeois*,⁸ and blended administrative law principles of deference and reasonableness into the proportionality analysis in *Doré v. Barreau du Québec*⁹ and subsequent cases,¹⁰ thereby effecting a kind of “administrativization [sic] of constitutional law.”¹¹ Under this depiction, the only remaining question for Canadians would appear to be whether we ought to correspondingly constitutionalize administrative law by explicitly adopting a unified public law and incorporating proportionality reasoning in pure public wrong cases or whether we ought to explicitly adopt a bifurcated position. Weighing in on this question, some Canadian scholars have suggested that unification is already implicit in our law of deference and reasonableness review.¹²

I argue that this seemingly uncontroversial account of how the unification/bifurcation dispute plays out from a Canadian perspective is inaccurate. Although the Supreme Court has not squarely addressed the matter, the *Slaight* line of cases, contrary to first impression, cannot be understood as establishing proportionality as the framework for adjudicating any and all claims that an administrative decision has infringed human rights, broadly speaking. It rather only established proportionality for the narrower range of cases where an applicant for judicial review seeks a remedy for a violation of a *Charter* right under section 24(1) of the *Charter*.¹³ It did not do that for cases where an applicant seeks only a traditional common law remedy, like certiorari, for an administrative decision that allegedly violates constitutionally recognized interests protected at common law. In the latter cases, reasonableness has always governed albeit, perhaps, with proportionality exerting some implicit influence. Thus, before we decide whether proportionality should apply to all public wrong cases in Canada, we need to consider a prior, prefatory question, which is orthogonal to the unification/bifurcation dispute, of whether proportionality does or ought to apply to both applications for a constitutional remedy for violations of *Charter* rights and for a traditional administrative law remedy for violations of common law interests connected to *Charter* rights.

Sean Hern & Alison M Latimer, “Proportionality and the Public Law” (2015) 28:1 Can J Admin L & Prac 23; Kevin W Gray, “A Separate Head of Judicial Review: Divergent Paths in Common Law Rights Review” (2020) 33:3 Can J Admin L & Prac 305.

⁷ [1989] 1 SCR 1038 [*Slaight*].

⁸ 2006 SCC 6 [*Multani*].

⁹ 2012 SCC 12 [*Doré*].

¹⁰ Cf *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*LSBC v TWU*]; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [*TWU v LSUC*].

¹¹ Dyzenhaus, “Proportionality and Deference,” *supra* note 6 at 236.

¹² See e.g. Geneviève Cartier, “The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law – The Case of Discretion” in David Dyzenhaus, ed, *The Unity of Public Law* (Portland: Hart, 2004) 61 at 72–77 [Dyzenhaus, *Unity of Public Law*]; Evan Fox-Decent, “The Internal Morality of Administration: The Form and Structure of Reasonableness” in Dyzenhaus, *Unity of Public Law*, *ibid.*, 143 at 156–65; Guy Régimbald, “Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review” (2005) 31:2 Man LJ 239 at 273–74; David Mullan, “Proportionality – A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?” (2010) 2 NZLR 233 at 239–44 [Mullan, “Proportionality”].

¹³ *Charter*, *supra* note 1, s 24(1) (“Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”).

Reckoning with this nuance within the human rights category of administrative law cases has important doctrinal ramifications. I will argue that the Supreme Court's restatement in *Canada (Minister of Citizenship and Immigration) v. Vavilov*¹⁴ of how courts should perform reasonableness review at common law can be interpreted as extending proportionality reasoning, if not to all public wrong cases, at least to cases where an applicant seeks an administrative law remedy for a decision that limits common law interests connected to *Charter* rights, as opposed to a section 24(1) *Charter* remedy. If this is true, an applicant for judicial review can have a decision that violates human rights quashed, for example, on the basis of reasonableness review only, and there is little need for her to seek a specifically constitutional remedy for an unjustified limit on a *Charter* right. I suggest that the *Doré* test governing requests for a such a remedy, which the Supreme Court expressly declined to consider in *Vavilov*, should consequently fall into obsolescence.

That test has come under heavy criticism in recent years. It has been argued that it is under-protective of *Charter* rights and incorporates an overly vague concept of "*Charter* values."¹⁵ However, although I maintain that what I see as the common law proportionality analysis established by *Vavilov* should take centre stage when an applicant for judicial review seeks a common law remedy for an administrative body's limitation of her constitutionally-protected interests, I will argue that there nonetheless remains some doctrinal space to acknowledge situations where an applicant can seek a constitutional remedy for an administrative decision-maker's violation of *Charter* rights. In such cases, the *Doré* test should be abandoned and a different test should govern, one that focuses on the appropriateness of a remedy under section 24(1) of the *Charter* while still being shaped by the principle of proportionality.

In Part II, I clarify in greater detail the conceptual framework I employ to analyze the unification/bifurcation debate from a Canadian perspective. In Part III, I argue that the *Doré* proportionality test emerging from the *Slaight* line of cases applies only in cases where an applicant for judicial review seeks a section 24(1) *Charter* remedy for an administrative body's violation of a constitutional right, not a traditional common law remedy. In Part IV, I argue that, by importing into the common law of substantive reasonableness review considerations historically confined to review for procedural fairness, the method for performing reasonableness review outlined in *Vavilov* mandates a proportionality analysis in cases where an applicant seeks an administrative law remedy for a decision-maker's violation of *Charter*-protected common law interests without seeking a constitutional

¹⁴ 2019 SCC 65 [*Vavilov*].

¹⁵ These two objections are summarized in Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law Part II: Substantive Review" in Flood & Sossin, *Administrative Law*, *supra* note 2, ch 13. See also Christopher D Bredt & Ewa Krajewska, "Doré: All that Glitters is Not Gold" (2014) 67 SCLR (2d) 339 at 353–55, 357–59; Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67 SCLR (2d) 361 at 382–89; Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561 at 580–81 [Macklin, "Charter-Lite"]; Iryna Ponomarenko, "Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law" (2016) 21 Appeal 125 at 133–36; Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016) 66:1 UTLJ 121 at 164–69. For judicial criticism of the *Doré* approach, see *Gehl v Canada (Attorney General)*, 2017 ONCA 319, Lauwers and Miller JJA, concurring [Gehl]; *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893, Lauwers and Miller JJA, concurring [ET]. See also The Honourable Peter D Lauwers, "What Could Go Wrong with Charter Values?" (2019) 91 SCLR (2d) 1; Charlotte Baigent, "Undoing *Doré*: Judicial Resistance in Canadian Appellate Courts" (2020) 33:1 Can J Admin L & Prac 63.

remedy. Hence, an applicant need not pursue a constitutional remedy to vindicate these interests using the *Doré* test. She can have an administrative decision quashed or reconsidered simply by submitting that it is unreasonable under the *Vavilov* common law proportionality analysis. In Part V, I revisit the *Doré* test and set out problems for it that I submit offer decisive grounds for abandoning it altogether. This critique will suggest how to develop a distinct approach for addressing an applicant's request for a constitutional remedy for an administrative decision-maker's violation of *Charter* rights, one which assigns an enhanced role to section 24(1) of the *Charter* as the site for conducting a proportionality analysis. I will clarify and defend this approach from objections in Part VI. I conclude in Part VII by returning to discuss the Canadian perspective on the comparative unification/bifurcation debate.

II. REMEDIAL PATHS

To help frame the debate in question as it manifests in Canada, we can distinguish between two types of remedies an applicant may seek on judicial review for an administrative decision that allegedly infringes human rights. I will call these the "Remedial Paths" from which such an applicant may choose.

Under Remedial Path (A), the applicant may request an "appropriate and just" remedy pursuant to section 24(1) of the *Charter*.¹⁶ To succeed, she must demonstrate that the impugned administrative decision unjustifiably infringed a *Charter* right of hers.

Under Remedial Path (B), the applicant may request an administrative law remedy traditionally available at common law, such as certiorari, mandamus, or prohibition.¹⁷ To succeed, she must show that the impugned decision was substantively unreasonable in virtue of unjustifiably infringing upon a fundamental interest of hers that is ordinarily protected under the *Charter* and that ought to be similarly protected at common law, such as her interests in religious or expressive freedom, liberty, security of the person, privacy, and so on.

But an applicant can pursue Path (B) without alleging a violation of constitutionally recognized interests. She can alternatively submit that the impugned decision infringes an interest of hers that is not ordinarily protected under the *Charter* but that ought to receive some protection at common law, such as an economic or proprietary interest or an interest in maintaining employment or professional or commercial licensing.

The distinction between Paths (A) and (B) cuts across the categorization of cases involving the alleged infringement of human rights by an administrative agency. If an agency

¹⁶ See generally *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 55–59. See also Kent Roach, "Principled Remedial Discretion Under the Charter" (2004) 25 SCLR (2d) 101; Debra M McAllister, "Doucet-Boudreau and the Development of Effective Section 24(1) Remedies: Confrontation or Cooperation?" (2004) 16:1 NJCL 153; Brendan Brammall, "A Comment on *Doucet-Boudreau v. Nova Scotia (Minister of Education)* and *R. v. Demers*" (2006) 64:1 UT Fac L Rev 113.

¹⁷ In Canada, this remedial avenue was historically conceptualized under the aegis of the prerogative writs but in modern times has been streamlined by provincial judicial review procedure legislation. See e.g. *Judicial Review Procedure Act*, RSBC 1996, c 241, s 2(2); *Judicial Review Procedure Act*, RSO 1990, c J.1, s 2(1). See generally Cristie Ford, "Remedies in Administrative Law: A Roadmap to a Parallel Legal Universe" in Flood & Sossin, *Administrative Law*, supra note 2, 43 at 76–79.

has unjustifiably infringed a *Charter* right, thereby entitling the applicant to a section 24(1) remedy under Path (A), it has violated human rights. But it also has violated human rights if it has unjustifiably infringed a common law interest connected to *Charter* rights, thereby entitling the applicant to a common law remedy under Path (B). Thus, Paths (A) and (B) are each available to applicants in the category of cases involving alleged human rights violations.

The category of alleged public wrongs not involving human rights violations, that is, the “pure public wrongs” category, is different. It includes cases where an applicant alleges that an administrative agency commits a public wrong that is attributable, not to any inconsistency with an applicant’s interests, but to inconsistencies with “basic precepts of good administration”¹⁸ that ensure that public power is exercised properly, such as a failure to act within jurisdiction, to properly interpret applicable statutes, to exercise discretion in accordance with relevant considerations, or respond appropriately to the evidence put before it. We are concerned here only with cases in this category where the alleged public wrong is attributable to an unjustifiable limit on the applicant’s interests, albeit interests unconnected to *Charter* rights. In these cases, only Remedial Path (B) is available to the applicant.

Some examples may help illustrate the foregoing. In *Slaight*, the Supreme Court held that an order of a statutory labour adjudicator requiring an employer to write a positive recommendation letter for a former employee infringed the employer’s freedom of expression under section 2(b) of the *Charter*. The infringement was justified pursuant to the standard *Oakes* proportionality test under section 1 of the *Charter*.¹⁹ *Oakes* places a burden on a *Charter* claimant to prove that a *Charter* right of hers has been limited, and, if so, it shifts the burden to the governmental respondent to prove that the limit is proportionate. I argue below that the legal principles emerging from *Slaight* and its progeny only apply where an applicant seeks a section 24(1) remedy for violation of a *Charter* right under Remedial Path (A).

An example of a case involving the pursuit of Path (B) in light of the alleged violation of a *Charter*-protected common law interest is *Trinity Western University v. British Columbia College of Teachers*.²⁰ There, the Supreme Court upheld a common law order of mandamus requiring the British Columbia College of Teachers to approve Trinity Western University’s teacher education program, which was designed to reflect the university’s Christian worldview and included community standards that condemned same-sex partnerships. In denying approval, the college undermined the interests in religious freedom of members of

¹⁸ Varuhas, *supra* note 5 at 115.

¹⁹ *Slaight*, *supra* note 7 at 1057; *Charter*, *supra* note 1, s 1 (“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”); *R v Oakes*, [1986] 1 SCR 103 at 138–40. See also *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, McLachlin CJC [*Hutterian Brethren*]; *R v KRJ*, 2016 SCC 31, Karakatsanis J [*KRJ*]. For recent discussion, see Richard Stacey, “The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication” (2019) 67:2 *Am J Comp L* 435 at 449–54 [Stacey, “Magnetism”].

²⁰ 2001 SCC 31 [*TWU* 2001].

the university based on concerns about discriminatory practices, the harmful impact of which lacked an evidentiary foundation.²¹

Finally, Guy Régimbald references *Singh v. Canada (Attorney General)* as an example of proportionality operating where an applicant pursues Path (B) to vindicate a non-*Charter*-protected interest.²² In *Singh*, the Federal Court of Appeal quashed the decision of a Public Service Staff Relations Board adjudicator, holding that he had acted unreasonably in failing to consider whether an employee's termination, rather than reassignment, was a proportionate response to the revocation of a security clearance that the employee required to work in the federal public service.²³

Canadian courts have not carefully distinguished between allegations that an administrative agency has violated human rights, by violating either *Charter* rights and activating Path (A) or *Charter*-protected common law interests and activating Path (B), and allegations that the agency has violated non-*Charter* protected interests, thereby committing a pure public wrong and activating Path (B). Furthermore, litigants have also not always been careful to clearly specify the remedial path they are pursuing in their allegations. Admittedly, these distinctions are hard to maintain in practice and prone to conflation.²⁴

However, my contention is that, from an analytical point of view, they offer a useful conceptual map of the unification/bifurcation debate in Canada. Thus, it might be said that the *Slaight* line of cases established the use of proportionality for adjudicating allegations that an agency has violated either *Charter* rights or *Charter*-protected common law interests and that it therefore governs where an applicant pursues either Path (A) or (B) in all human rights cases. The remaining question is whether proportionality should also apply as a stand-alone ground of review in pure public wrong cases involving alleged violations of non-*Charter*-protected interests triggering Path (B) only. Friends of unification say yes while friends of bifurcation say no. I argue below that conceptualizing the unification/bifurcation debate using the remedial paths framework I have been sketching also has edifying implications for developing legal doctrine, such as when assessing the impact of *Vavilov* on *Doré*. I therefore suggest that courts may find it useful for drawing out those implications to impose the framework on litigants and encourage them to follow it themselves.

²¹ *Ibid* at para 43. For discussion, see MH Oglivie, "After the Charter: Religious Free Expression and Other Legal Fictions in Canada" (2002) 2:2 OUCIJ 219. See also *Chamberlain v Surrey School District No 36*, 2002 SCC 86. To be fair, there is some ambiguity in the *TWU* 2001 case about whether the Supreme Court's conclusion about the lack of an evidentiary foundation for a finding of discrimination made the college's decision unreasonable or incorrect, given that the Supreme Court refused to defer to the college's actual factual finding of discrimination (*TWU* 2001, *ibid* at para 19). Ordinarily, however, administrative decision-makers' factual findings attract curial deference: *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras 41–42.

²² *Singh v Canada (Attorney General)*, 2001 FCT 577, cited in Régimbald, *supra* note 12 at 276, n 159.

²³ *Ibid*. Compare *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455 at 462–65 cited in Walters, *supra* note 6 at 402, n 18. Some scholars have discerned the use of proportionality in jurisprudence on the doctrines of promissory estoppel or legitimate expectations as grounds of substantive judicial review (Arvay, Hern & Latimer, *supra* note 6 at 27–33). See also *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41, Binnie J.

²⁴ David Mullan has discussed a similar framework while acknowledging the difficulty of drawing lines between the various categories it distinguishes between (Mullan, "Proportionality," *supra* note 12 at 258–59). See also Mary Liston, "Administering the *Charter*, Proportioning Justice: Thirty-Five Years of Development in a Nutshell" (2016) 30:2 Can J Admin L & Prac 211 at 218.

III. *DORÉ'S* REMEDIAL PATH

Before turning to the argument that the *Doré* proportionality test which emerged from the *Slaight* line of cases applies only when adjudicating allegations that an administrative decision has infringed a *Charter* right pursuant to Remedial Path (A), I will first retell the familiar story of how the test developed. In *Slaight*, Justice Lamer accepted the use of the *Oakes* test under section 1 of the *Charter* to adjudicate allegations of *Charter* violations against administrative bodies.²⁵ Chief Justice Dickson, while generally agreeing with Justice Lamer's discussion of how the *Charter* applies to administrative decision, further remarked that "in the realm of value inquiry" involving *Charter* rights, deferential administrative law reasonableness analysis "rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis" as the *Oakes* proportionality test used in constitutional adjudication.²⁶ These principles were affirmed in *Multani*, where Justice Charron, for a majority of the Supreme Court, held that a school board's decision to prohibit a Sikh boy from carrying a kirpan to school infringed the boy's religious freedom under section 2(b) of the *Charter* in a manner that could not be justified under section 1.²⁷ Whereas she maintained that the *Oakes* test applied to the decision,²⁸ Justices Deschamps and Abella held that the decision should be judicially reviewed on a common law deferential reasonableness standard.²⁹

Doré concerned a judicial review of a disciplinary body's decision to reprimand a lawyer for making uncivil comments to a judge. Justice Abella, writing for a unanimous court, held that, instead of the *Oakes* test, a proportionality test resembling it should be applied to determine whether the decision was substantively unreasonable in virtue of unjustifiably limiting the lawyer's freedom of expression, a value underlying section 2(b) of the *Charter*.³⁰ This form of proportionality analysis, unlike the *Oakes* test, does not require an applicant to show that a *Charter* right has been limited or infringed by the impugned administrative decision. Nor does it place the burden of justification on the decision-maker. Rather, it is couched in deferential reasonableness review in accordance with administrative law principles. It requires an applicant to show that the impugned decision is unreasonable because the decision-maker failed to balance any "*Charter* values" "engaged" by the decision against the importance of the statutory objectives the decision-maker is legislatively empowered to advance.³¹ In *Doré*, the Supreme Court concluded that the reprimand at issue constituted a reasonable limit on the lawyer's expressive freedom given the statutory objectives animating the regulation of the legal profession.³²

One reason Justice Abella took as motivating the shift from the *Oakes* constitutional proportionality test to the new, common law reasonableness proportionality test was that scholars had criticized the claim in *Slaight* that reasonableness review is too unstructured for conducting a value-based inquiry involving *Charter* rights or common law interests

²⁵ *Slaight*, *supra* note 7 at 1081.

²⁶ *Ibid* at 1049. See also *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 32 [*Ross*].

²⁷ *Multani*, *supra* note 8 at para 41.

²⁸ *Ibid* at paras 15–16.

²⁹ *Ibid* at paras 120–28.

³⁰ *Doré*, *supra* note 9.

³¹ *Ibid* at paras 53, 55.

³² *Ibid* at paras 70–72.

connected to *Charter* rights.³³ She joined these scholars in observing that cases like *Baker v. Canada (Minister of Citizenship and Immigration)*³⁴ and *TWU 2001* illustrate the capacity, which has never been explicitly acknowledged, for reasonableness review at common law to offer a type of sophisticated proportionality reasoning that is similar to the reasoning required by the *Oakes* test.³⁵

Now, in these inspirational common law cases, an applicant pursued Remedial Path (B) for an alleged violation of an interest that is connected to the *Charter*, such as the interest in the well-being of one's children at issue in *Baker* or the interest in religious freedom at issue in *TWU 2001*. Thus, it might be argued that *Doré* essentially imported the type of proportionality reasoning that scholars argued were implicitly undertaken in those cases into all administrative law cases involving value-laden inquiry and touching on human rights. The idea is that Justice Abella made no distinction between whether a case involves allegations of unjustifiable limits on *Charter* rights, which ordinarily lead to Remedial Path (A), and allegations of unjustifiable limits on fundamental common law interests connected to the *Charter* rights, which ordinarily lead to Remedial Path (B). So, by "administrativizing" constitutional law, *Doré* established a singular method for analyzing alleged infringements of both *Charter* rights and *Charter*-protected common law interests, now compendiously dubbed "*Charter* values."

But this reading of *Doré* is insufficiently nuanced. For one thing, nothing in *Doré* correlatively "constitutionalized administrative law" by holding that courts should perform the type of proportionality analysis the decision mandates in cases where an applicant pursues Remedial Path (B) for an unreasonable limit on her *Charter*-protected interests at common law. No such analysis is dictated by the approach to reasonableness review prevailing in the years immediately following *Doré*, that is, the approach set out in *Dunsmuir v. New Brunswick*.³⁶ While it may have been implicit in cases like *Baker* and *TWU 2001* at the time *Doré* was decided, as discussed in the next Part, it was not until *Vavilov* that this development came to explicit fruition.

More importantly, however, the problem that the entire *Slaight* line of cases tries to solve is how to adjudicate cases where an applicant on judicial review seeks a constitutional remedy for a violation of her *Charter* rights. A key doctrinal tenet that *Slaight* stands for, other than the application of the *Oakes* test to allegedly *Charter*-infringing administrative decisions, is the basic theory that the *Charter* applies to administrative bodies pursuant to

³³ See e.g. *Cartier*, *supra* note 12, cited in *Doré*, *supra* note 9 at para 26.

³⁴ *Baker*, *supra* note 2. In *Baker*, the Supreme Court held that an immigration officer's exercise of discretion to refuse the applicant an exemption from deportation on humanitarian and compassionate grounds was substantively unreasonable because the officer failed to consider the detrimental impact of the deportation on the applicant's children, which was an important factor in deportation decisions under international law. It is possible to see a person's interests in her child's well-being as connected to the *Charter* right against deprivations of psychological security of the person. Compare *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 67.

³⁵ *Doré*, *supra* note 9 at para 32.

³⁶ 2008 SCC 9. See also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 11–18; Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62:2 McGill LJ 527 at 551–63.

section 32(1).³⁷ For Justice Lamer, the *Charter* applied to the labour adjudicator at issue in *Slaight* because of how his discretionary powers were statutorily derived. Because courts should, absent express or implied indication to the contrary, interpret legislation consistently with the *Charter*, whenever a statute confers discretion on an administrative decision-maker, it cannot be interpreted as permitting the decision-maker to violate the *Charter*, such that any *Charter*-infringing conduct of the decision-maker is ultra vires and in excess of the decision-maker's jurisdiction. Accordingly, where an applicant alleges that a decision-maker's conduct infringes the *Charter*, the focus of constitutional adjudication should be on the relevant enabling statute if the statute confers a power to infringe the *Charter*, but if not, it should be on the conduct itself.³⁸ This differing focus has important remedial implications. If an unjustifiable limit on a *Charter* right is caused by legislation, the appropriate remedy is a declaration that the offensive provision is of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*.³⁹ If, however, the limit is caused by the conduct of a government actor acting ultra vires a statutory authorization that is otherwise *Charter* compliant, the appropriate remedy is a personal one under section 24(1) of the *Charter*.⁴⁰ Hence, if an administrative actor rather than a statute infringes a *Charter* right, the theory of how the *Charter* applies to such an actor under section 32(1) articulated in *Slaight* entails that the appropriate remedial path is Path (A).

Originally, in accordance with the *Slaight* theory, the *Oakes* proportionality test was meant to be used in situations where the *Charter* applies to such an actor. Because the *Doré* common law proportionality test was substituted for the *Oakes* test, it likewise governs where an applicant pursues Remedial Path (A) on judicial review. Thus, in *Multani*, Justice Charron held the school board's violation of section 2(a) of the *Charter* was justified under the section 1 *Oakes* test. She affirmed the difference between constitutional remedies mentioned above and held that the appropriate remedy was a declaration under section 24(1) that the prohibition on wearing the kirpan was null.⁴¹ *Doré*'s proportionality test, originally favoured by Justices Deschamps and Abella in their dissent in *Multani*, ultimately won a majority of the Supreme Court's favour, and it was introduced to replace the kind of approach favoured by the majority in *Multani*. It too should be understood as applying where an applicant pursues Remedial Path (A).

In *Doré*, Justice Abella referred to the Supreme Court's prior jurisprudence on *Charter* values in contexts other than administrative law.⁴² If we review that jurisprudence, we can see why an allegation that an entity to which the *Charter* applies has infringed the *Charter* is not appropriately adjudicated using a common law analysis or attracting a common law

³⁷ *Charter*, *supra* note 1, s 32(1) ("This *Charter* applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province").

³⁸ *Slaight*, *supra* note 7 at 1079–80. For commentary, see June M Ross, "Applying the *Charter* to Discretionary Authority" (1991) 29:2 *Alta L Rev* 382; Danielle Pinard, "Les seules règles de droit qui peuvent poser des limites aux droits et libertés constitutionnellement protégés l'arrêt *Slaight Communications*" (1991) 1 *NCJL* 79. See also Ross, *supra* note 26 at para 31; *Eldridge v British Columbia (Attorney General)*, [1997] 3 *SCR* 624 at para 21 [*Eldridge*].

³⁹ Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴⁰ *Eldridge*, *supra* note 38 at para 20; *R v Ferguson*, 2008 *SCC* 6 at paras 59–61 [*Ferguson*]; *Hutterian Brethren*, *supra* note 19 at para 67.

⁴¹ *Multani*, *supra* note 8 at paras 22, 81–82.

⁴² *Doré*, *supra* note 9 at paras 39–41.

remedy. In *RWDSU v. Dolphin Delivery Ltd.*, the Supreme Court held that, under section 32(1), the *Charter* does not apply to the common law when it is relied on by a party to private litigation.⁴³ Nevertheless, in this realm of the *Charter*'s non-application, "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."⁴⁴ The infusion of *Charter* values into common law analysis is therefore apt when adjudicating claims against an entity to whom the *Charter* does not apply, like a private litigant. A plaintiff cannot seek a *Charter* remedy for the human rights-infringing conduct of another private party because the *Charter* does not apply in this context. She is limited to seeking a common law remedy based on breach of a common law rule, but such a rule must be shaped with reference to *Charter* values. Conversely, then, if the *Charter* does apply to an entity pursuant to section 32(1), there is no basis for resorting to *Charter*-infused common law to adjudicate a claim of a litigant who invokes the *Charter*, instead of just the common law. Hence, because the *Charter* applies to administrative agencies, such a litigant must be understood as pursuing Remedial Path (A), and it is a mistake to import Remedial Path (B) into this scenario.⁴⁵

The difficulty is that in *Doré*, the Supreme Court did not address the issue of what remedy — constitutional or common law — would be appropriate for an administrative decision that is unreasonable in virtue of failing to proportionately balance the *Charter* values it engages against the decision-maker's statutory objectives.⁴⁶ It held that there was no such disproportionality on the facts, dismissing the appeal from the judgment of the Quebec Court of Appeal, which held that the reprimand was justified.⁴⁷ Similarly, in *LSBC v TWU*, the Supreme Court overturned the lower courts' judgments that the Law Society of British Columbia's refusal to approve a law school Trinity Western University proposed to open was disproportionate.⁴⁸ In *TWU v LSUC* it upheld the lower courts' judgments that the Law Society of Upper Canada's refusal to accredit Trinity Western's law school was proportionate.⁴⁹ In neither case did the question of remedy arise for decision.

This question was, however, pivotal in *Loyola High School v. Quebec (Attorney General)*.⁵⁰ *Loyola* was a judicial review of a refusal by the Quebec Education Minister to exempt the Catholic Loyola High School from a requirement to comply with a mandatory educational program that taught the beliefs and ethics of different world religions from a neutral, objective perspective.⁵¹ A majority of the Supreme Court applied the *Doré* test and

⁴³ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 597.

⁴⁴ *Ibid* at 603. See also *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 91–99; *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at paras 18–22. For academic discussion, see Lorraine E Weinrib & Ernest J Weinrib, "Constitutional Values and Private Law in Canada" in Daniel Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Portland: Hart, 2001) 43; Justice Aharon Barak, "Constitutional Human Rights and Private Law" (1996) 3:2 *Rev Const Stud* 218 at 247–49; Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights" (2003) 102:3 *Mich L Rev* 387 at 398–400; Horner, *supra* note 15 at 364–67.

⁴⁵ Justice Rowe made this very point in his concurrence in *Law Society of British Columbia v Trinity Western University*. See *LSBC v TWU*, *supra* note 10 at paras 167–68 ("Where the *Charter* applies by virtue of s. 32, however, there is no need to have recourse to *Charter* values").

⁴⁶ Hoi Kong and Mary Liston each point out *Doré*'s silence on the question of remedy. See Hoi L Kong, "Doré, Proportionality and the Virtues of Judicial Craft" (2013) 63 *SCLR* (2d) 501 at 517–18; Liston, *supra* note 24 at 221.

⁴⁷ *Doré*, *supra* note 9 at paras 70–71.

⁴⁸ *LSBC v TWU*, *supra* note 10 at paras 104–106.

⁴⁹ *TWU v LSUC*, *supra* note 10 at paras 42–43.

⁵⁰ *Loyola*, *supra* note 10 at paras 79–81.

⁵¹ *Ibid* at para 80.

held that the refusal was unreasonable in virtue of disproportionately limiting the *Charter* value of religious freedom. It quashed the Minister's decision and remitted the matter for reconsideration.⁵² The dissent, however, held that the decision violated the right to freedom of religion under section 2(a) of the *Charter* in a manner that could not be justified under the section 1 *Oakes* test.⁵³ Rather than remitting, it granted an exemption from the requirement to teach the mandatory program pursuant to section 24(1) of the *Charter*.⁵⁴

Audrey Macklin has suggested that the reason why the *Loyola* dissent preferred the traditional approach to *Charter* adjudication over the approach from *Doré* inspired by the common law is that only by using the traditional approach could the Supreme Court grant the exemption itself rather than remitting.⁵⁵ In my view, *Loyola* shows that the *Charter* proportionality test endorsed by the majority governs in situations where the *Charter* applies to an administrative body and the applicant on judicial review pursues Remedial Path (A). What the majority did in ordering a common law remedy was to erroneously import Path (B) into a scenario where Path (A) has always been properly applied.⁵⁶ Prior to *Doré*, an applicant could perhaps pursue Path (B) by submitting that an administrative decision was unreasonable in virtue of unjustifiably infringing a fundamental common law interest, assuming that proportionality was indeed implicitly operative in the common law of reasonableness review at the time, as it may have been in *Baker* and *TWU* 2001. When invoking the *Charter*, however, *Slaight* and *Multani* made clear that an applicant would have to argue that the impugned decision infringed a *Charter* right in a manner that could not be justified under *Oakes*, and Path (A) was applicable. *Doré* purported to change the law in the *second situation only*, without speaking at all to the first. Therefore, the majority's disposition in *Loyola* was mistaken in treating a Path (A) scenario as a Path (B) scenario. The dissent was alive to this problem when granting an exemption under section 24(1) of the *Charter*. But to some extent it is guilty of a similar mistake. If it wished to award a section 24(1) *Charter* remedy, it could have still applied the *Doré* proportionality test, rather than attempting to resurrect the discarded *Slaight/Multani* approach. Each was designed to govern where an applicant alleges that the *Charter* has been infringed by an administrative decision-maker to whom the *Charter* applies in accordance with section 32(1), thereby entitling the applicant to a section 24(1) remedy.

IV. THE DAWN OF VAVILOV

By contrast with *Doré*, the applicant in *Vavilov* pursued Remedial Path (B).⁵⁷ He was born in Canada, but his parents were undercover Russian spies. After he attempted to renew his passport, the Registrar of Citizenship decided to cancel his citizenship. The Federal Court of Appeal quashed this decision. In dismissing the appeal, the Supreme Court restated the

⁵² Compare *Gehl*, *supra* note 15, Sharpe JA.

⁵³ *Loyola*, *supra* note 10 at para 83.

⁵⁴ *Ibid* at paras 146–51.

⁵⁵ Audrey Macklin, "On Being Reasonably Proportionate" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds, *The Unity of Public Law? Doctrinal, Theoretical, and Comparative Perspectives* (Oxford: Hart, 2018) 79 at 97. See also Baigent, *supra* note 15 at 69.

⁵⁶ The error has been replicated in some appellate court cases. See e.g. *The Attorney General of Canada v Association of Justice Counsel*, 2016 FCA 92 [*Association of Justice Counsel*], rev'd on other grounds, 2017 SCC 55; *Gehl*, *supra* note 15; *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344.

⁵⁷ The same is also true of the companion case *Bell Canada v Canada (Attorney General)*, 2019 SCC 66.

legal principles for determining the appropriate standard of substantive review on an application for judicial review.⁵⁸

The Supreme Court affirmed a rebuttable presumption of a deferential standard of reasonableness out of “respect for the legislature’s institutional design choice to delegate certain matters to non-judicial decision makers through statute.”⁵⁹ Recognition of the legitimate democratic authority of administrative agencies also informs the method for how reviewing courts should perform reasonableness review.⁶⁰ A court must focus respectful, deferential attention on the reasoning process the agency undertook, rather than deciding only whether it agrees with the process’s outcome. In turn, the agency’s reasons must demonstrate to the court that its decision is justified such that its exercise of democratic authority is indeed legitimate and entitled to deference.⁶¹ The applicant has the burden to show that they do not. For example, they may be internally incoherent, irrational, or illogical.⁶² Or, they may be incongruent with certain “constraints” imposed on the decision-maker depending on the context, such as applicable statutory provisions and interpretive rules, the parties’ submissions, evidence put before the decision-maker, or past administrative decisions and practices.⁶³

Now, the Supreme Court declined to consider the implications of its judgment for *Doré*.⁶⁴ However, I argue that the method of reasonableness review it outlined finally fulfills the promise of the common law cases that inspired Justice Abella in *Doré*, like *Baker* and *TWU* 2001. That is, it injects a form of proportionality analysis resembling the *Oakes* test into reasonableness review where an applicant pursues Remedial Path (B) for an alleged violation of a fundamental interest connected to *Charter* rights. It thus achieves the constitutionalization of administrative law in Canada.

This is evident in one of the contextual constraints on a decision-maker’s reasoning process subject to curial scrutiny. The reasons must demonstrate sensitivity to a decision’s impact on an affected individual, including the severity of the impact on a person’s “rights and interests”⁶⁵ or any “consequences that threaten an individual’s life, liberty, dignity or livelihood.”⁶⁶ Administrative bodies are often entrusted with authority to make decisions that can have seriously detrimental effects on people. As a corollary, “[t]he principle of responsive justification” requires that exercises of this authority can be legitimate only if the

⁵⁸ For general discussion of *Vavilov*, see e.g. Paul Daly, “The *Vavilov* Framework and the Future of Canadian Administrative Law” (2020) 33:2 Can J Admin L & Prac 111.

⁵⁹ *Vavilov*, *supra* note 14 at para 26. The non-exhaustive circumstances where the presumption can be rebutted include where: (i) a legislative provision expressly prescribes a standard of review other than reasonableness; (ii) there is a statutory appeal mechanism from the impugned decision, in which case appellate standards of review apply; (iii) the decision under review concerns the constitutionality of the decision-maker’s enabling statute; (iv) the decision raises a general question of law of central importance to the legal system as a whole; or (v) the decision raises a question regarding the jurisdictional boundaries (*ibid* at paras 33–72).

⁶⁰ Assuming that the presumption is not displaced and that the administrative body under review gave reasons for the decision (*ibid* at paras 82–85).

⁶¹ *Ibid* at para 84.

⁶² *Ibid* at paras 102–104.

⁶³ *Ibid* at paras 105–32.

⁶⁴ *Ibid* at para 57.

⁶⁵ *Ibid* at para 133.

⁶⁶ *Ibid*.

reasons for the decision “reflect the stakes”;⁶⁷ they must explain why any negative effects it causes are justified in light of the legislative objective the body is statutorily empowered to implement.⁶⁸ Absent such an explanation, there is a concern that these effects are imposed arbitrarily.⁶⁹

This requirement to justify a decision’s impact on an affected individual is imported into reasonableness review from existing rules governing the level of procedural fairness with which an administrative decision must comply.⁷⁰ The Supreme Court cites *Baker* for the proposition that the requirement of fairness is more demanding where the decision is particularly important to an affected individual or has a greater impact on her.⁷¹ In the paragraph of *Baker* to which the Supreme Court refers, Justice L’Heureux-Dubé cited with approval cases holding that a higher level of fairness is required for administrative decisions that negatively impact a person’s interest in maintaining employment or professional licencing.⁷² This may explain why in *Vavilov* the Supreme Court remarked that a decision threatening a person’s “livelihood” demands responsive justification in addition to one that threatens a person’s “life,” “liberty,” or “dignity.”⁷³

Vavilov thus reinforces a shift towards a “culture of justification” in Canadian administrative law that is often associated with the *Oakes* section 1 proportionality test or the *Doré* common law proportionality test.⁷⁴ Of course, the sort of proportionality required under *Vavilov* between an administrative decision’s impact on a person and relevant legislative objectives does not replicate the limitation/justification structure of the *Oakes* test under section 1 of the *Charter*. It also places the burden of justification on an applicant for judicial review to show that decision is unreasonable given that its impact on her rights or interests is not justified by the decision-maker’s reasons. Hence, it resembles the *Doré* test more closely than the *Oakes* test. But the culture of justification associated with proportionality is not manifested primarily in a particular doctrinal test having any particular requisite structure. It is manifested more basically in the activity of the giving of reasons that are responsive to the stakes a decision has for a person. This activity, not any particular form it may take, is what confers legitimacy on an otherwise democratically authoritative administrative decision and marks a departure from the “culture of authority” that is

⁶⁷ *Ibid.*

⁶⁸ *Ibid* at paras 133, 135.

⁶⁹ *Ibid* at para 134. For further discussion, see Lorne Sossin, “The Impact of *Vavilov*: Reasonableness and Proportionality” (2021) 100 SCLR (2d) 265.

⁷⁰ *Ibid* at para 133. See also Lorne Sossin & Colleen M Flood, “The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law” (2007) 57:2 UTLJ 581 at 598–605. Paul Daly argued prior to *Vavilov* that “disproportionality” — “where the means employed to attain a given aim impose costs on an individual that are out of proportion to the wider benefit the delegated decision-maker hopes to achieve” — should function as an “indicium” of unreasonableness, although he rejects the claim that proportionality should function as a freestanding ground of substantive review (Daly, *A Theory of Deference*, *supra* note 5 at 143–44).

⁷¹ *Vavilov*, *supra* note 14 at para 133, citing *Baker*, *supra* note 2 at para 25.

⁷² See e.g. *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1113.

⁷³ *Vavilov*, *supra* note 14 at para 133.

⁷⁴ Katherine Hardie, “Deference after the Trilogy: What is the Impact of a ‘Culture of Justification?’” (2020) 33:2 Can J Admin L & Prac 145; Mark Mancini, “*Vavilov*’s Rule of Law: A Diceyan Model and its Implications” (2020) 33:2 Can J Admin L & Prac 179 at 187–89; Mark Mancini, “The Conceptual Gap Between *Doré* and *Vavilov*” (2020) 43:2 Dal LJ 793 at 808–10; Richard Stacey, “A Unified Model of Public Law: *Charter* Values and Reasonableness Review in Canada” (2021) 71:3 UTLJ 338 [Stacey, “Unified Model”]; Paul Daly, “*Vavilov* and the Culture of Justification in Contemporary Administrative Law” (2021) 100 SCLR (2d) 279.

antithetical to the culture of justification.⁷⁵ In *Doré*, Justice Abella was at pains to emphasize the “conceptual harmony”⁷⁶ between the common law proportionality test she endorsed and the *Oakes* test, writing that the two tests exercise the same “justificatory muscles.”⁷⁷

It is actually hard to see what difference there is between the cases where the common law *Doré* proportionality test applies and those where *Vavilov* proportionality applies. I have argued that *Doré* governs only where an applicant pursues Remedial Path (A) for a human rights violation. *Vavilov* clearly governs where she pursues Path (B). So, if an applicant seeks a constitutional remedy, she must argue under *Doré* that an administrative decision is unreasonable because it unjustifiably limits a *Charter* value it engages. If she seeks a traditional common law remedy, she must argue under *Vavilov* that a common law interest of hers, such as one connected to the *Charter*, is impacted by a decision, and the decision is unreasonable because the decision-maker’s reasons do not explain why the impact is justified in light of the relevant statutory objective. However, the sorts of interests that trigger *Vavilov* proportionality overlap with the *Charter* values whose engagement triggers *Doré* proportionality (they likely extend even further than interests connected to *Charter* rights, provided that a deprivation of one of such an interest seriously threatens one’s livelihood). This is illustrated by the examples the Supreme Court gave in *Vavilov* of how an impact on individual interests in life, liberty, and dignity demands responsive justification in an administrative body’s reasoning process. It is hard to see what differentiates these interests from the *Charter* values underlying section 7 of the *Charter*.⁷⁸ On the facts of *Vavilov*, the Supreme Court held that the Registrar’s decision to cancel the applicant’s citizenship was unreasonable partly because the Registrar’s reasons failed to justify the severe impact on the applicant’s interest in maintaining citizenship.⁷⁹ The Supreme Court emphasized the great importance of that interest, describing it as a “right to have rights,” as “fundamental to full membership in Canadian society ... valued as highly as liberty,”⁸⁰ and something whose deprivation results in “political death”⁸¹ by depriving a person of the right to vote or the right to remain in Canada. There are clear parallels here with values animating sections 3,⁸² 6(1),⁸³ and 7 of the *Charter*.⁸⁴

These parallels entail that, if an applicant wishes to vindicate her human rights following an alleged violation by an administrative agency, she can do so simply by having the agency’s decision quashed or reconsidered under common law principles, provided that she

⁷⁵ David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14:1 SAJHR 11 at 31–36. Richard Stacey argues, against Daly, that the differences between *Doré*-type and *Oakes*-type proportionality are not as significant as is commonly assumed (Stacey, “Unified Model,” *ibid* at 353–57).

⁷⁶ *Doré*, *supra* note 9 at para 57.

⁷⁷ *Ibid* at para 5.

⁷⁸ *Charter*, *supra* note 1, s 7 (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”).

⁷⁹ *Vavilov*, *supra* note 14 at para 193.

⁸⁰ *Ibid* at para 191.

⁸¹ *Ibid* at para 193.

⁸² *Charter*, *supra* note 1, s 3 (“Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein”).

⁸³ *Ibid*, s 6(1) (“Every citizen of Canada has the right to enter, remain in and leave Canada”).

⁸⁴ For discussion of post-*Vavilov* cases illustrating the overlap between interests demanding responsive justification and *Charter* values, see Hardie, *supra* note 74 at 154–55, citing *Coldwater Indian Band v Attorney General of Canada*, 2020 FCA 34; Stacey, “Unified Model,” *supra* note 74 at 351, citing *Alsalousi v Canada (Attorney General)*, 2020 FC 364.

can show that the reasons do not adequately explain why the impact on her fundamental interests was justified. This sort of remedy under Path (B) may be all that she needs to vindicate her human rights, even if it is not a specifically constitutional remedy under Path (A) pursuant to section 24(1) of the *Charter*. Recall that the majority in *Loyola* held that it was sufficient to vindicate the school's religious freedom to simply quash the decision to refuse exemption from the mandatory educational program and remit to the Minister for reconsideration, even though it did this under the aegis of *Doré* proportionality, which should have led to Path (A). Even the dissent's remedial outcome of granting an exemption from the program could have been achieved through Path (B) through the device of mandamus if it remitted and mandated the board to exempt the school from the program. This is similar to the remedy the Supreme Court upheld in *TWU 2001* requiring the teachers' college to approve of the university's teacher education program. Having said this, I do not deny that there may be exceptional circumstances where the only way for an applicant to vindicate her rights is to access the flexible remedial scheme under section 24(1) of the *Charter*. For example, she may wish to obtain damages against an administrative decision-maker.⁸⁵ We will return to discuss this issue later. But it seems plausible that in the ordinary course the administrative law remedies traditionally available at common law provide adequate alternatives to a constitutional remedy.

The result of *Vavilov*'s extension of proportionality into Remedial Path (B), where an applicant seeks to remediate a violation of a fundamental interest connected to the *Charter*, is to diminish the salience of *Doré* proportionality and Path (A) within the category of cases where an administrative decision affects human rights. Consider a concrete example. Prior to *Vavilov*, a Catholic denominational law school would have had to rely on *Doré* and pursue Path (A) to remedy an alleged violation of the value of religious freedom under section 2(a) of the *Charter* caused by a law society's refusal of accreditation. But after *Vavilov*, if it wanted to have an accreditation refusal quashed, it would only have to pursue Path (B) and argue that the refusal was unreasonable because the law society's reasons did not adequately justify the impact on the school's interest in religious freedom. Again, this does not mean that Path (A) should fall into desuetude, even if it may suggest that, to serve a function that is independent of that served by reasonableness review under *Vavilov*, the approach to Path (A) established in *Doré* should be reshaped in a manner that addresses the trenchant criticism the approach has attracted. I only claim that *Vavilov* proportionality and Path (B) should take centre stage where an applicant for judicial review seeks to vindicate her human rights. After all, they will offer the framework for adjudicating all other applications for substantive review, including pure public wrong cases involving alleged inconsistencies with basic precepts of good administration, and probably even cases where the alleged public wrong is said to derive from a disproportionate impact on individual interest that is not ordinarily protected under the *Charter*, such as an interest in maintaining employment or professional licensing. It is simpler and more elegant to organize any unification of constitutional and administrative law in Canada around *Vavilov* alone rather than the combination of *Doré* and *Vavilov*, that is, to channel all human rights cases as well as all pure public wrong cases into Path (B) rather than dispersing human rights cases across Paths (A) and (B).

⁸⁵

The Supreme Court seems to have left the question of the availability of *Charter* damages against an administrative tribunal under section 24(1) ambiguous. See *Ernst v Alberta Energy Regulator*, 2017 SCC 1. See also David Mullan, "Roncarelli v. Duplessis and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?" (2010) 55:3 McGill LJ 587.

But it might be thought that the utility of *Vavilov* proportionality in this respect is threatened by the very criticisms that have been levelled against *Doré*. A main concern expressed about the *Doré* proportionality test is that it is under-protective of *Charter* rights in the administrative law context. We have seen that it departs from the limitation/justification structure of *Oakes*, whereby an applicant's burden is only to demonstrate a limit on a *Charter* right and the burden then shifts to the governmental respondent to justify the limit under section 1. It instead puts the burden entirely on the applicant to show that an administrative decision is unreasonable in virtue of unjustifiably limiting *Charter* values. It is said that *Doré* proportionality thus improperly abandons the standard assumption that unremitting protection of *Charter* rights is the norm such that limits on them demand justification by the state. And it purportedly dilutes *Charter* rights by treating their scope and breadth as determinable by administrative decision-makers whose determinations are owed judicial deference.⁸⁶

The rejoinder to these concerns is that while they may well raise serious problems for *Doré*, they are not as forceful against *Vavilov* proportionality. *Doré* governs where an applicant seeks a constitutional remedy under Remedial Path (A) for governmental conduct that is inconsistent with the *Charter*. Hence, it is indeed concerning if *Doré* proportionality under-protects *Charter* rights. But *Vavilov* proportionality applies where an applicant seeks a non-constitutional, common law remedy under Path (B) for an administrative decision's unreasonable impact on her fundamental common law interests that are connected to *Charter* rights. In this context, the *Charter* is nowhere in sight. No constitutional remedy is being sought for an inconsistency with the *Charter*, and it does not matter whether such an inconsistency is caused by the conduct of an entity to which the *Charter* applies under section 32(1). We are therefore outside the formal framework of constitutional adjudication, even if the common law administrative framework is enriched or "constitutionalized" by the insinuation of proportionality analysis. Hence, concerns about *Vavilov* proportionality diluting *Charter* rights or undermining their normative priority are less acute than identical concerns about *Doré* proportionality.

V. THE TWILIGHT OF *DORÉ*

If it should not be jettisoned wholesale after *Vavilov*, what role should Remedial Path (A) play in adjudicating allegations that an administrative decision has violated human rights? To answer this question, we must consider whether *Doré* should remain controlling in this context.

We have encountered concerns about *Doré* proportionality's under-protectiveness of *Charter* rights. It has also been said that the concept of *Charter* values is unworkably vague and indeterminate. There is no objective doctrinal guidance for courts to rely on to identify and apply them. I argue here that, even if we can manage to allay these concerns, there are other objections that provide decisive grounds for rejecting *Doré* proportionality rather than attempting to rehabilitate it. These objections will point the way towards a different doctrinal approach to Remedial Path (A).

⁸⁶ Bredt & Krajewska, *supra* note 15 at 353–59; Macklin, "Charter-Lite," *supra* note 15 at 580–81; Ponomarenko, *supra* note 15 at 133–36; Hickman, *supra* note 15 at 164–70.

In his concurrence in *LSBC v. TWU*, Justice Rowe referenced vagueness concerns about *Charter* values raised by Justices Lauwers and Miller of the Ontario Court of Appeal.⁸⁷ In their own concurrence in *Gehl*, Justices Lauwers and Miller wrote as follows:

Charter values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective — and value laden — nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.⁸⁸

As this passage indicates, the potential problem with the vagueness of *Charter* values is that determining whether a value is engaged and proportionately balanced by an administrative decision-maker against statutory objectives is ultimately dependent on the arbitrary and subjective moral reasoning of a reviewing court. This is anathema to rule of law requirements of certainty, predictability, and consistency in the judicial application of legal norms.⁸⁹

A potential reply to this criticism builds on the majority’s comment in *Loyola* that *Charter* values “help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives.”⁹⁰ The routine invocation of *Charter* values in constitutional adjudication to define the scope of *Charter* rights, determine whether a right is limited, and assess the severity of the limit when considering its justification under the section 1 *Oakes* test may prove that *Charter* values are not intractably indeterminate but standard fare for guiding judges and constraining their moral reasoning.⁹¹

My aim here is not to assess this reply. It suffices to say that, if the worry about *Charter* values’ vagueness pointed out in *Gehl* is essentially a worry about how excessive judicial subjectivity endangers the rule of law, the claim that *Charter* values are objectively tractable given the role they customarily play in the *Oakes* test is cold comfort to those who believe that proportionality reasoning is itself excessively subjective.⁹² Be that as it may, it does seem true that courts often put *Charter* values to work when formulating the doctrinal test for whether a *Charter* right is limited by a law or government conduct. For example, the values of liberty and democracy inform the test for a violation of the section 2(b) *Charter* right to freedom of expression,⁹³ the value of joining together with others to resist imbalances of power informs the test for a violation of the section 2(d) *Charter* right to freedom of

⁸⁷ *LSBC v TWU*, *supra* note 10 at para 171.

⁸⁸ *Gehl*, *supra* note 15 at para 79. See also *ET*, *supra* note 15 at paras 103–104; Fox-Decent & Pless, *supra* note 15; Lauwers, *supra* note 15.

⁸⁹ For discussion, see *ibid*; Stacey, “Magnetism,” *supra* note 19 at 446–49.

⁹⁰ *Loyola*, *supra* note 10 at para 36.

⁹¹ See also Lorne Sossin & Mark Friedman, “*Charter* Values and Administrative Justice” (2014) 67 *SCLR* (2d) 391 at 403–404; Stacey, “Unified Model,” *supra* note 74 at 357.

⁹² Gregoire CN Webber, “Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship” (2010) 23:1 *Can JL & Jur* 179 at 191–200; Timothy Endicott, “Proportionality and Incommensurability” in Huscroft, Miller & Webber, *supra* note 6, 311; Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017), ch 7–8.

⁹³ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 *SCR* 927 at 976–77 [*Irwin Toy*]; *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 *SCC* 2 at paras 32–38 [*CBC*].

association,⁹⁴ and the value of privacy informs the test for a violation of the section 8 *Charter* right against unreasonable search and seizure.⁹⁵ In general, when developing tests such as these, the text of *Charter* rights must be interpreted “purposively,” that is, “in the light of the interests it was meant to protect.”⁹⁶ These interests may be understood as *Charter* values, which the majority in *Loyola* described as “values that underpin each right and give it meaning.”⁹⁷

However, it is the design, promulgation, and adherence to jurisprudence on the scope of a *Charter* right — the doctrinal test for a right’s violation established through precedent — that provides courts with the guidance, certainty, and objectivity required for maintaining the rule of law, not the invocation of *Charter* values involved in developing and applying the test.⁹⁸ Put differently, it is not, for instance, the regular appeal to values such as “respect for individual conscience and the valuation of human dignity”⁹⁹ that helps eliminate subjectivity from constitutional adjudication over religious freedom. What does so is consistently following the test developed in the jurisprudence on interpreting section 2(a) of the *Charter*, which requires courts to consider whether state action non-trivially interferes with a sincere religious belief a claimant has.¹⁰⁰

The difficulty with the *Doré* proportionality test is that, by only requiring reviewing courts to consider whether *Charter* values are reasonably “engaged,” it absolves them of having to apply the doctrinal test for a violation of a *Charter* right. And this threat to objectivity is quite independent of how eschewing the standard *Oakes* limitation/justification structure of adjudication puts the burden on a *Charter* claimant to demonstrate that *Charter* values are engaged unreasonably by an administrative decision, thereby under-protecting *Charter* rights. To wit, it would persist even if a claimant’s burden were only to show that the decision engages a value, and if the burden were to then shift to the government to show that the engagement is reasonable.

In *Doré* and its progeny, the Supreme Court never explained what precisely is involved when a reviewing court sets out to identify whether a *Charter* value is engaged. But the threshold for finding an engagement appears to be less stringent than the threshold for finding a limitation of a *Charter* right. In particular, it does not appear to involve applying the test for a limitation of a right. In *Doré*, for example, Justice Abella never applied the standard test from *Irwin Toy* for a violation of section 2(b) of the *Charter* to decide whether the disciplinary body’s decision engaged freedom of expression.¹⁰¹ And in *Loyola* the majority never applied the standard test from *Syndicat Northcrest v Amselem* for a violation

⁹⁴ *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 58.

⁹⁵ *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 160; *R v Reeves*, 2018 SCC 56 at paras 11–14.

⁹⁶ *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 344 [*Big M*]. See also Benjamin J Oliphant, “Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the *Canadian Charter of Rights and Freedoms*” (2015) 65:3 UTLJ 239.

⁹⁷ *Loyola*, *supra* note 10 at para 36.

⁹⁸ Cf The Honourable Justice David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016) 42:1 Queen’s LJ 27 at 33–34.

⁹⁹ *Big M*, *supra* note 96 at 346.

¹⁰⁰ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 56–59.

¹⁰¹ *Irwin Toy*, *supra* note 93.

of section 2(a) to decide whether the mandatory education engaged freedom of religion (although the test was adverted to by the majorities in the 2018 *TWU* cases¹⁰²).

A possible explanation for why the distinction between engagement of a value and limitation of a right has not been addressed by the Supreme Court is that, in *Doré* and all subsequent cases in which the Supreme Court applied *Doré*, the issue did not arise for decision. This is because in all these cases it was alleged that the values of expressive and religious freedom were unreasonably engaged by the impugned administrative decision. The threshold for satisfying the doctrinal test for a finding that the sections 2(a) and (b) *Charter* rights have been limited is historically very low, and the bulk of a court's analysis occurs when applying *Oakes*.¹⁰³ It is so low that, practically speaking, the distinction between limitation and engagement becomes negligible.

But we can witness the level of uncertainty surrounding the distinction in cases where it is alleged that an administrative body has engaged a *Charter* value underlying an "internally limited"¹⁰⁴ *Charter* right, since the test for a violation of such a right is harder for a claimant to satisfy than the tests under sections 2(a) and (b). For example, in *Gehl* it was submitted that a decision of the Registrar for Aboriginal Affairs and Northern Development Canada to not renew the claimant's status under the *Indian Act*, given that it was unknown whether her grandfather had status, unreasonably engaged the value of equality under section 15(1) of the *Charter*. Justice Sharpe applied the common law *Doré* proportionality test and held that it did. In his reasons, he outlined the prevailing internally limited doctrinal test for a violation of section 15(1) *Charter* rights. But he did not rigorously apply the test's usual steps in holding that the Registrar failed to take into account "the equality-enhancing values and remedial objectives"¹⁰⁵ underlying the *Indian Act* by imposing too high a burden on the claimant to prove her grandfather's status. That Justice Sharpe's reasons exhibited this ambiguity is reflective of the ambiguity that *Doré* created over the distinction between engaging *Charter* values and limiting *Charter* rights according to the relevant doctrinal test.¹⁰⁶ If he was correct in apparently thinking that the test for the violation of a right does not have to be explicitly followed when determining whether a value is unreasonably engaged under *Doré*, this view raises concerns about excessive subjectivity.

I thus submit that, to curb judicial subjectivity and avoid under-protecting *Charter* rights, the burden on an applicant who pursues Remedial Path (A) should be to show that a *Charter* right of hers was limited by the impugned administrative decision, not to show that a *Charter* value was unreasonably engaged by the decision as directed by *Doré*. If we abide by the

¹⁰² *LSBC v TWU*, *supra* note 10 at para 63; *TWU v LSUC*, *supra* note 10 at para 32.

¹⁰³ Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights" (2002) 40:3 *Osgoode Hall LJ* 337 at 339–40; Benjamin L Berger, "Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 *SCLR* (2d) 25 at 31.

¹⁰⁴ Dale Gibson, "Reasonable Limits under the *Canadian Charter of Rights and Freedoms*" (1985) 15:1 *Man LJ* 27 at 28–29; Stephen Gardbaum, "Limiting Constitutional Rights" (2007) 54:4 *UCLA L Rev* 789 at 801.

¹⁰⁵ *Gehl*, *supra* note 15 at para 53.

¹⁰⁶ The Federal Court of Appeal has held that an administrative decision-maker erred in applying the *Doré* proportionality test by failing to apply the usual multi-step test for a violation of the internally limited section 7 *Charter* right (*Association of Justice Counsel*, *supra* note 56 at paras 43–47).

Oakes limitation/justification adjudicative structure, the burden should then shift to the respondent to justify the limit.

It might be objected, however, that this approach is untenable given that we cannot construe a limit on a *Charter* right caused by an administrative decision as “prescribed by law” within the meaning of section 1 of the *Charter*. It would thus be impossible for a respondent to discharge its justificatory burden, and proportionality analysis must instead be somehow inserted into the applicant’s burden. Justice Abella endorsed this line of reasoning in *Doré*, writing that the prescribed by law requirement is “poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers.”¹⁰⁷ She had set it out in greater detail in her concurrence with Justice Deschamps in *Multani*. The claim made there was that the requirement refers to a “norm or rule of general application” and cannot embrace an administrative decision, which “determines an individual’s rights in relation to a particular issue.”¹⁰⁸

There has been caselaw suggesting that an administrative decision cannot be prescribed by law for the purpose of applying *Oakes*.¹⁰⁹ But this position appears to be inconsistent with *Slaight* and *Multani*, where a majority of the Supreme Court in each case had no difficulty applying *Oakes* to an administrative decision.¹¹⁰ It has also been met with substantial academic criticism.¹¹¹ I argue that ultimately it is defensible, although not for the reasons endorsed by Justice Abella in *Doré*. Moreover, if we accept it, the conclusions we should draw are very different from those drawn in *Doré*.

Here is why the position is defensible. If applicants pursuing Path (B) have a burden to prove a limit on a *Charter* right according to the relevant doctrinal test, it is paradoxical to also accept that the limit can be prescribed by law if it is imposed by an administrative decision. According to Justice Lamer in *Slaight*, an applicant pursuing Path (B) properly alleges that the discretionary conduct of a state actor has violated the *Charter*, not that the statute that confers the discretion has. Courts should not interpret legislation as inconsistent

¹⁰⁷ *Doré*, *supra* note 9 at para 37.

¹⁰⁸ *Multani*, *supra* note 8 at paras 112–13. It is interesting that there are other contexts involving *Charter* claims against government conduct, such as police conduct that allegedly limits *Charter* rights, where the apparent inability for a limit on a *Charter* right to be justified under section 1 because it is not “prescribed by law” has led the Supreme Court to conduct proportionality reasoning outside the formal limitation/justification structure of *Oakes*, and this tendency has attracted the same sort of criticisms that *Doré* has attracted. See e.g. *Fleming v Ontario*, 2019 SCC 45 at para 54; Vanessa A MacDonnell, “*R v Sinclair*: Balancing Individual Rights and Societal Interests Outside of Section 1 of the *Charter*” (2012) 38:1 Queen’s LJ 137; Vanessa MacDonnell, “Assessing the Impact of the Ancillary Powers Doctrine on Three Decades of *Charter* Jurisprudence” (2012) 57 SCLR (2d) 225 [MacDonnell, “Impact”]. See also Richard Jochelson, “Ancillary Issues with *Oakes*: The Development of the *Waterfield* Test and the Problem of Fundamental Constitutional Theory” (2012) 43:3 Ottawa L Rev 355. For one author who has drawn a similar link between *Doré* and *Charter* claims against police conduct, see Michael Plaxton, “Police Powers After *Dicey*” (2012) 38:1 Queen’s LJ 99 at 128–29.

¹⁰⁹ See e.g. *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors*, (1983) 41 OR (2d) 583 at 592 (Div Ct), *aff’d* (1984) 45 OR (2d) 80 (CA). See also Ross, *supra* note 38 at 399–404.

¹¹⁰ See also *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 244–45 [*Committee for the Commonwealth*]. Having said this, in *Eldridge*, *supra* note 38 at para 84, the Supreme Court treated the issue of whether a limit on a *Charter* right imposed by an administrative decision is prescribed by law as unresolved, assuming without deciding that it is.

¹¹¹ Gratton, *supra* note 5 at 491–94; Kong, *supra* note 46 at 510–11; Paul Daly, “Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the *Canadian Charter of Rights and Freedoms*” in Graham Mayeda & Peter Oliver, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron* (Markham: LexisNexis, 2014) [Daly, “Prescribing Greater Protection”]. See also Robert Leckey, “Prescribed by Law/Une Règle De Droit” (2007) 45:3 Osgoode Hall LJ 571.

with the *Charter*, and they must interpret provisions conferring discretionary power on administrative bodies as not empowering the agent to unjustifiably violate *Charter* rights. Now, assume that, once an applicant pursuing Path (B) succeeds in showing that the impugned administrative decision limits a *Charter* right, the burden shifts to the respondent to justify the limit under the section 1 *Oakes* test. If the respondent fails to discharge its justificatory burden, the decision-maker has exceeded its statutory authority and acted ultra vires. If that has happened, however, its decision was never prescribed by law. It was thus never capable of justification under the section 1 *Oakes* test in the first place. We have reached a conclusion by going through an analytical process that conceptually we were never supposed to go through at all. Similarly, if the respondent is able to show that the limit on the applicant's right is justified, by doing so it would retroactively bootstrap its decision into having been prescribed by law all along. It would do so by establishing a conclusion that it should conceptually be able to establish only if its decision was prescribed by law in the first place.

This marginalization of the prescribed by law requirement is not merely a problem of logic. It also underestimates the requirement's importance relative to the *Oakes* proportionality test in serving an accountability function. By requiring any limit on a *Charter* right to be explicitly promulgated through a clearly ascertainable legal rule, it forces the state to squarely confront and accept responsibility for the moral, social, and political costs that accrue from limiting *Charter* rights as a condition precedent to being able to justify the limit under section 1 in the context of adjudication before a court.¹¹² This function is lost if we allow courts to entertain and deliberate upon the purported justification for a limit on a *Charter* right while the prescribed by law question remains open or if we permit normatively secondary conclusions on justification to dictate normatively primary conclusions on prescribed by law.

To avoid these problems, we should accept that an administrative decision that limits *Charter* rights is not prescribed by law, in which cases *Oakes* is unavailable. In light of the "awkward fit"¹¹³ of section 1 of the *Charter* in cases where an administrative decision is challenged, in *Doré* Justice Abella opted to "administrativize" constitutional law by formulating a proportionality test resembling *Oakes* for assessing whether an applicant who pursues Path (A) has discharged her burden of showing that the impugned decision is unreasonable. This, as we have seen, creates ambiguity between limitation of *Charter* rights and engagement of *Charter* values. To avoid this ambiguity, the more straightforward approach is for the Supreme Court to simply follow the view that an administrative decision is not prescribed by law to its logical conclusion. The Supreme Court should acknowledge the inability of a governmental respondent to justify a limit on a *Charter* right imposed by such decision. The analysis should therefore proceed directly to considering the appropriateness of a section 24(1) remedy.

¹¹² Lorraine Eisenstat Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 SCLR (2d) 469 at 477–478. See also Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41:1 Osgoode Hall LJ 1 at 17–18.

¹¹³ *Doré*, *supra* note 9 at para 4.

The majority in *Multani* touched on this approach when distancing itself from the dissenting approach of Justices Deschamps and Abella. It recited the theory that the *Charter* applied to the school board's decision to prohibit Gurbaj Singh Multani from carrying a kirpan and stated that he was potentially entitled to a section 24(1) *Charter* remedy.¹¹⁴ It stated that if the decision was *intra vires* the board's enabling legislation, any limit on section 2(a) of the *Charter* it imposed was prescribed by law such that section 1 and *Oakes* were available. By contrast, had the decision been *ultra vires* the board's statutory grant of authority, it could not be prescribed by law, and the limit in question could therefore not be justified under section 1.¹¹⁵ The latter scenario, the majority wrote, is illustrated by *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, where the Supreme Court held that federal customs officials infringed section 15(1) of the *Charter* by seizing gay and lesbian erotica as obscene material in a manner that was not authorized by the definition of obscenity in the *Customs Act*.¹¹⁶ According to Justice Binnie in *Little Sisters*, "[v]iolative conduct by government officials that is not authorized by statute is not 'prescribed by law' and cannot therefore be justified under s. 1."¹¹⁷ He proceeded directly to analyzing whether it was appropriate and just to award a section 24(1) remedy, concluding that it was not.¹¹⁸ The majority in *Multani* characterized the case as distinct from the *Little Sisters* scenario because it was agreed by all parties that the school board's decision was *intra vires*.¹¹⁹ Having found that decision limited the section 2(a) *Charter* right to religious freedom, it applied the *Oakes* test and held that that the limit was unjustified.¹²⁰ It then nullified the decision as a remedy under section 24(1).¹²¹

In my view, the majority's reasoning in *Multani* went astray in holding that an *intra vires* administrative decision that limits a *Charter* right can be prescribed by law and capable of section 1 justification. From the majority's conclusion that the school board's decision could not be justified, it should follow from the theory of how the *Charter* applies to administrative bodies that the decision was *ultra vires* all along and always incapable of section 1 justification. This invites paradox. Worse, it hijacks the normatively secondary *Oakes* proportionality test to circumvent the normatively primary prescribed by law requirement. The same problems would have been present had the majority held that the decision was justified under section 1. If instead we maintain that an administrative decision that limits a *Charter* right cannot be prescribed by law and justified under section 1, we are led to the scenario contemplated in *Little Sisters*, and we should proceed directly to section 24(1).

VI. OBJECTIONS AND REPLIES

I have thus far raised objections to the Supreme Court's approach in *Doré*. Together with objections others have raised (and with the *Doré*'s displacement by *Vavilov*), these seem sufficient to reject it as controlling the adjudication of cases where an applicant pursues Remedial Path (A). In what follows, I reply to objections that may be raised against the

¹¹⁴ *Multani*, *supra* note 8.

¹¹⁵ *Ibid* at para 22.

¹¹⁶ 2000 SCC 69 [*Little Sisters*].

¹¹⁷ *Ibid* at para 141.

¹¹⁸ *Ibid* at paras 157–58.

¹¹⁹ *Multani*, *supra* note 8 at para 23.

¹²⁰ *Ibid* at para 79.

¹²¹ *Ibid* at para 82.

alternative I have advanced that deemphasizes section 1 of the *Charter* and highlights section 24(1) remedies.

Paul Daly has referred to the view that a limit on a *Charter* right imposed by an administrative decision is not justifiable under section 1 as “over-protective” and liable to generate “absurd and unrealistic results.”¹²² Specifically, the statutory delegation of discretionary decision-making power to executive officials is a desirable feature of law-making that enables legislators to install flexibility and adaptability into laws to manage unforeseeable contingencies in a law’s application.¹²³ Exercises of this delegated power will inevitably limit *Charter* rights. If *Oakes* is unavailable when they do, it would be “unduly difficult” for governments to justify a limit when it may be necessary to do so.¹²⁴

Although we should not be quick to deter legislators from realizing the advantages of delegating discretionary power, I argue that, on the contrary, withholding *Oakes* from discretionary decisions incentivizes government to behave in a manner that enhances the legitimacy of public administration. This is because it encourages government, as a prerequisite to accessing justificatory arguments under section 1 of the *Charter*, to create “soft law,”¹²⁵ such as written, publicly available operational or interpretive policy guidelines, manuals, rules, codes, or memoranda, which function to confine, structure, and check exercises of discretionary power. And, as Daly himself recognizes,¹²⁶ the dissemination of soft law instruments increases the fairness of administrative decisions by increasing their consistency and predictability, which are fundamental rule of law values.¹²⁷

Historically, soft law has not been subject to constitutional review.¹²⁸ For example, in *Little Sisters*, the Supreme Court accepted evidence that the customs officials’ decision to label the gay and lesbian erotica as obscene was heavily influenced by their practice of following an internal interpretive memorandum on the definition of obscenity.¹²⁹ But the memorandum could not be characterized as a “law,” and the limit on section 15(1) of the *Charter* imposed by the customs officials’ decision in reliance on the memorandum was therefore not prescribed by law. According to Justice Binnie, it is “not feasible for the courts

¹²² Daly, *A Theory of Deference*, *supra* note 5 at 192.

¹²³ For discussion of the role of discretion in legal governance, see Gratton, *supra* note 5 at 481–88; Geneviève Cartier, “Administrative Discretion and the Spirit of Legality: From Theory to Practice” (2009) 24:3 C.J.L.S. 313; Lorne Sossin, “The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law” (2010) 55:3 McGill LJ 661.

¹²⁴ *Committee for the Commonwealth*, *supra* note 110 at 245.

¹²⁵ See generally Lorne Sossin, “Discretion Unbound: Reconciling the Charter and Soft Law” (2002) 45:4 Can Pub Admin 465; Lorne Sossin, “The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada” in Marc Hertogh & Simon Halliday, eds, *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2004) 129; Justice Lorne Sossin & Chantelle van Wiltenburg, “The Puzzle of Soft Law” (2021) 58:3 Osgoode Hall LJ 623.

¹²⁶ Daly, “Prescribing Greater Protection,” *supra* note 111.

¹²⁷ France Houle & Lorne Sossin, “Tribunals and Guidelines: Exploring the Relationship Between Fairness and Legitimacy in Administrative Decision-Making” (2006) 49:3 Can Pub Admin 282 at 290–300; France Houle & Lorne Sossin, “Tribunals and Policy-Making: From Legitimacy to Fairness” in Laverne A Jacobs & Justice Anne L Mactavish, eds, *Dialogue Between Courts and Tribunals: Essays in Administrative Law and Justice 2001-2007* (Montreal: Les Éditions Thémis, 2008) 93 at 102–12.

¹²⁸ Lorne Sossin & Charles W Smith, “Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government” (2003) 40:4 Alta L Rev 867 at 884–92; Laura Pottie & Lorne Sossin, “Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare” (2005) 38:1 UBC L Rev 147 at 163–73.

¹²⁹ *Little Sisters*, *supra* note 116.

to review for *Charter* compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials.”¹³⁰ More recently, however, the Supreme Court has been willing to recognize a limit on a *Charter* right imposed by soft law as amenable to section 1 justification.¹³¹ In *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, for example, the Supreme Court held that a limit on the section 2(b) *Charter* right imposed by municipal transit authorities’ internal advertising policies was prescribed by law.¹³² The policies were “rules that establish the rights of the individuals to whom they apply” and “general in scope, since they establish standards which are applicable to all who want to take advantage of the advertising service rather than to a specific case.”¹³³ They also constituted “laws” that could be subject to a declaration of invalidity under section 52(1) of the *Constitution Act, 1982*.¹³⁴

My claim is that withholding *Oakes* from administrative decisions that violate *Charter* rights, and directly exposing such decisions to a section 24(1) remedy, have the potential to encourage legislators and executive officials to establish soft law instruments that, like the policies in *GVTA*, can be regarded as limiting rights in a manner that is prescribed by law. The dissemination of these instruments has the benefit of adding structure to the exercise of discretionary power, thereby enhancing the legitimacy and fairness of public administration and upholding the rule of law.¹³⁵ In practice, it would result in applicants who would otherwise seek a personal section 24(1) remedy under Remedial Path (A) for an administrative decision that is inconsistent with the *Charter* instead seeking a general section 52(1) declaration to invalidate a soft law instrument if the instrument was followed in making the impugned decision. The advantage of this shift in practice is that, whereas a section 24(1) remedy only benefits the specific applicant before the court, a section 52(1) declaration that the offensive instrument is invalid gets the instrument “off the books,” so to speak, and thus eliminates its *Charter* limiting effects for all those to whom it may apply other than the applicant.¹³⁶

But there is a different way of cashing out the over-protectiveness objection. If the adjudication of allegations under Remedial Path (A) proceeds by applying the doctrinal test for violation of a *Charter* right, but it then focuses on the appropriateness of a section 24(1) remedy rather than *Oakes*, we disregard the ability of administrative bodies to show that any

¹³⁰ *Ibid* at para 85.

¹³¹ Susan L Grattan & Lorne Sossin, “In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court” in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 145.

¹³² *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 72 [GVTA].

¹³³ *Ibid*.

¹³⁴ *Ibid* at para 90. See also *CBC*, *supra* note 93 at paras 58–63.

¹³⁵ A similar proposal has been made to replace the use of proportionality reasoning in order to create new police powers at common law. The argument is that, when it is claimed that police conduct limits a *Charter* right, it is an abdication of the proper judicial role and courts’ institutional competence to consider whether to create a police power that justifiably limits that right. Courts should instead hold that, if no such power exists, such a limit is not prescribed by law and cannot be justified under section 1 of the *Charter*. This fosters a dialogue between courts and legislatures that induces legislators to create the relevant police power through appropriate democratic processes. The resulting statutory provision creating that power, rather than any police conduct, may then be challenged before the courts. See James Stribopoulos, “A Failed Experiment? Investigative Detention: Ten Years Later” (2003) 41:2 *Alta L Rev* 335; James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*” (2005) 31:1 *Queen’s LJ* 1; MacDonnell, “Impact,” *supra* note 108; Jochelson, *supra* note 108.

¹³⁶ *GVTA*, *supra* note 132 at para 87, citing *Ferguson*, *supra* note 40 at paras 65–66.

limit on a *Charter* right is proportionate to their statutory objectives. We also ignore the need for curial deference to the legitimate democratic authority of administrative decision-making. David Mullan, for example, has criticized the majority's decision in *Multani* for seeming to affirm that, where it is alleged under Path (A) that an administrative decision-maker has infringed the *Charter*, the allegation should be reviewed on a non-deferential correctness standard that does not consider whether the decision-maker attempted to balance *Charter* rights or values against the relevant statutory objectives.¹³⁷ The alternative to *Doré's* approach to Path (A) I have been defending is open to the same criticism. All it requires for an applicant to be entitled to a section 24(1) remedy is that the impugned administrative decision limited a *Charter* right according to the applicable doctrinal test. This is question that would appear to attract correctness review.

In response, even if principles of deference and proportionality play no role before courts proceed to consider section 24(1) of the *Charter*, there is no obstacle to regarding section 24(1) as a proper site for courts to apply these principles. As Kent Roach argues, proportionality is often implicit in courts' analysis of what constitutional remedies to award in light of an unjustifiable *Charter* infringement.¹³⁸ For example, once a court identifies the purpose of awarding a remedy for such an infringement, it often considers whether any remedies that are less intrusive or drastic than the remedy sought by the applicant would achieve this purpose; a declaration may be less intrusive than an injunction.¹³⁹

Moreover, the guidance the Supreme Court offered in *Vancouver (City) v. Ward* for deciding whether damages are an appropriate and just remedy under section 24(1) remedy also incorporates a “‘mini s. 1’ exercise”¹⁴⁰ that mimics the *Oakes* test.¹⁴¹ *Ward* first requires a court to consider whether damages would serve the purposes of *Charter* remedies by compensating the applicant, vindicating *Charter* rights, or deterring future breaches. It then requires consideration of “countervailing factors,” including whether there are adequate alternative remedies that meet one of these purposes just as well or whether damages unduly interfere with “good governance.”¹⁴² Roach stresses that a proportionality approach resembling *Oakes* should extend to all constitutional remedies, with the governmental respondent bearing the burden of demonstrating that the remedy sought by the applicant should be awarded:

As under s. 1 of the *Charter*, determinations of overall balance will be the most challenging and contextual of the various stages of proportionality analysis. Nevertheless, the overall balance stage allows the court to

¹³⁷ David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues After *Multani*” (2006/2007) 21 NJCL 127 at 143–44.

¹³⁸ Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021), ch 3 at 3:16 [Roach, *Constitutional Remedies*], citing *Mazraani v Industrial Alliance Insurance and Financial Services Inc*, 2018 SCC 50 at para 52.

¹³⁹ *Ibid.* See also Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (Cambridge: Cambridge University Press, 2021) at 62–63 [Roach, *Remedies for Human Rights Violations*].

¹⁴⁰ Roach, *Constitutional Remedies*, *ibid* at ch 3, 3:17.

¹⁴¹ 2010 SCC 27 [Ward].

¹⁴² *Ibid* at paras 24–57. See also Kent Roach, “A Promising Late Spring for *Charter* Damages: *Ward v. Vancouver*” (2010) 29 NJCL 135; Robert E Charney & Josh Hunter, “Tort Lite? — *Vancouver (City) v. Ward* and the Availability of Damages for *Charter* Infringements” (2011) 54 SCLR (2d) 393; Kent Roach, “The Disappointing Remedy? Damages as a Remedy for Violations of Human Rights” (2019) 69:1 UTLJ 33; Roach, *Remedies for Human Rights Violations*, *supra* note 139, ch 6.

focus not simply on the necessity of limiting the remedy from the government's perspective, but also to take a last look at the harmful effects of limiting the remedy on the successful *Charter* applicants and others similarly situated ... The issue of overall balance may be even more important in remedial balancing given that balancing the affected interests has been a theme that runs through the jurisprudence of constitutional remedies. Courts should ensure that an overall balance is struck between on the one hand achieving the various purposes of remedies such as compensation, vindication and ensuring future compliance with the Constitution, and on the other hand achieving an open-ended list of good governance concerns that justify limiting remedies.¹⁴³

Thus, if a limit on a *Charter* right caused by an administrative decision is not prescribed by law, when a court considers whether to award the remedy the applicant requests under Remedial Path (A), it should consider whether the decision-maker's reasons, if there are any, rationally explain why the limit on the applicant's right is proportionate to the decision-maker's statutory objectives, which is a countervailing good governance consideration. Deference may be paid to the reasons provided that the explanation is sound, just as courts show deference to government under section 1 of the *Charter* and when awarding section 24(1) remedies in other contexts.¹⁴⁴ If it is, a less drastic remedy than the one requested by the applicant may be appropriate and just, such as a declaration that the applicant's *Charter* rights were unjustifiably limited. This is what occurred in *Ward*, where the Supreme Court held that damages were not justified under section 24(1) for a police seizure of a vehicle in violation of section 8 of the *Charter* and awarded a declaration instead.¹⁴⁵

Crucially, this approach recognizes and maintains the role of administrative agencies in contributing to a culture of justification by, on the one hand, respecting their legitimate authority in public administration while, on the other hand, demanding responsive justification for their exercise of authority as a condition of its legitimacy. The only difference is that it does so under section 24(1) of the *Charter*, rather than under other sites of *Charter* adjudication or at common law.

VII. CONCLUSION

Where does all this leave us when we think about Canada's position on the unification/bifurcation debate in comparative administrative law? I have argued that contrary to first impression, *Slaight*, *Multani*, and *Doré* did not establish a unified principle of proportionality for adjudicating all cases where an applicant for judicial review seeks a public law remedy for a violation of her human rights. These cases only affirmed proportionality for situations where an applicant seeks a section 24(1) *Charter* remedy pursuant to what I have called Remedial Path (A). The principle was not explicitly imported in human rights cases where an applicant seeks a traditional administrative law remedy at common law pursuant to Remedial Path (B) until *Vavilov*.

But *Vavilov* is capable of subsuming within Path (B) scenarios where *Doré* typically governs under Path (A). And an applicant is likely able to obtain an adequate remedy for a

¹⁴³ Roach, *Constitutional Remedies*, *supra* note 138 at ch 3, 3:17.

¹⁴⁴ *KRJ*, *supra* note 19 at para 67, citing *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 97; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 39–43.

¹⁴⁵ *Ward*, *supra* note 141 at paras 76–78.

violation of her human rights under Path (B) without resorting to Path (A). Therefore, there is little need for applicants to invoke *Doré* proportionality under Path (A) to vindicate their human rights when such vindication is readily available under Path (B). There are also independent objections to *Doré* proportionality that favour its abolition and replacement with a new approach to Path (A) that applies proportionality analysis under section 24(1) of the *Charter*.

What is more, I have suggested that, according to *Vavilov*, proportionality reasoning likely applies where an applicant seeks a Path (B) common law remedy for an unjustified negative impact on both interests that overlap with the interests underlying *Charter* rights and interests that *do not* so overlap. That is, it likely applies both in human rights cases outside the *Charter* context and in public wrong cases involving a negative impact on interests unconnected to the *Charter*. Hence, if *Vavilov* ushers in proportionality as a unified adjudicative principle, it does so across all Path (B) cases affecting fundamental rights or interests, rather than linking up with Path (A) scenarios where *Doré* currently governs. Since the rules for performing reasonableness review outlined in *Vavilov* govern uniformly across Path (B) cases, it seems fitting and proper for it, rather than *Doré* proportionality, to represent the site for unification in Canadian public law, particularly given the availability of adequate remedies for unjustified limits on *Charter*-protected interests under Path (B).

It might be said that as we speak Canadian public law is unified across Paths (A) and (B), at least if *Doré* remains controlling in Path (A) cases. In a way this is objectionable, as I have argued that *Doré* proportionality seems too problematic to retain. But in another way, it is not. I have also argued that proportionality principles should be applied according to the alternative approach to Path (B) I have sketched that emphasizes section 24(1) *Charter* remedies. If this approach is accepted, it may be demonstrative of the inevitability of unification in Canada, not to mention its desirability.