THE *DORÉ* DUTY: FUNDAMENTAL RIGHTS IN PUBLIC ADMINISTRATION

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In this paper I consider an important and heretofore understudied aspect of the Supreme Court of Canada's 2012 decision in Doré v Barreau du Québec: the imposition of a procedural duty on decision-makers to consider "Charter values" before rendering decisions. I define Charter values and procedural duties. Charter values are best understood, I suggest, as general principles which are manifested in specific provisions of the Charter. In administrative law, a procedural duty is a duty to take certain matters into account before rendering a decision, failing which the underlying decision is invalidated. With Charter values and procedural duties defined, I turn to outline the scope of the "Doré Duty", explaining when it is triggered, the range of decisions it is applicable to and the demands it places on decision-makers. In principle, the duty applies to all administrative decisions which engage Charter values, be they exercises of discretion, individualized assessments, policy-making or statutory interpretation exercises. In order to discharge the Doré duty, a decision-maker must demonstrate that they were alive to the relevant Charter values: this will be assessed by applying the Vavilov framework for judicial review, typically under the rubric of reasonableness review. Failure to do can result in the decision being invalidated. Ultimately, I suggest, the Doré duty should not be understood as a limit on administrative decision-makers. Rather, its animating purpose is to empower decision-makers by prompting them to take account of Charter values in an informal, good faith way. The goal is not to unmoor the Charter from its textual anchors but rather to enrich our collective understanding of foundational values in Canadian public law.

Dans cet article, l'auteur analyse un point important, jusqu'à présent peu étudié, de l'arrêt Doré c. Barreau du Québec rendu par la Cour suprême du Canada en 2012 : l'imposition d'une obligation procédurale de tenir compte des « valeurs de la Charte » avant de rendre une décision. L'auteur y présente une définition des valeurs de la Charte et des obligations procédurales. Concernant les premières, il avance qu'elles sont les mieux comprises en tant que principes généraux qui se manifestent dans des dispositions

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particulières de la Charte. Quant aux deuxièmes, en droit administratif, elles consistent à tenir compte de certaines questions avant de rendre une décision, faute de quoi cette décision est invalide. Après l'exposé de ces définitions, il se penche sur la portée de l'« obligation Doré », expliquant dans quels cas elle s'applique, les types de décisions visés et les implications qui en découlent pour les décideurs. En principe, cette obligation s'applique à toute décision administrative en lien avec les valeurs de la Charte, qu'il s'agisse de l'exercice d'un pouvoir discrétionnaire, d'une évaluation adaptée au cas soumis, de l'élaboration d'une politique ou d'une interprétation de la loi. Pour s'acquitter de l'obligation Doré, le décideur doit démontrer qu'il tient compte des valeurs de la Charte applicables, ce qui se vérifie par l'application du cadre Vavilov de révision judiciaire, l'analyse du caractère raisonnable étant habituellement la norme choisie, faute de quoi la décision peut être invalidée. Au bout du compte, l'obligation Doré ne doit pas être comprise comme une restriction imposée aux décideurs administratifs, son intention étant plutôt d'accroître leur autonomie en les amenant à tenir compte des valeurs de la Charte dans un exercice informel de bonne foi. Le but n'est pas de détacher la Charte de ses assises textuelles, mais bien d'enrichir notre compréhension collective des valeurs fondamentales du droit public canadien.

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Introduction

In this paper, I consider an important and heretofore understudied aspect of the Supreme Court of Canada's 2012 decision in *Doré v Barreau du Québec*: the imposition of a procedural duty on administrative decision-makers to consider "*Charter* values" before rendering decisions.

In Part I, I explain that the *Doré* decision had two aspects: a judicial review aspect, which has attracted a great deal of commentary (much of it critical) and an administrative justice aspect, which has generated less interest. The administrative justice aspect involves, I explain, a procedural duty to consider *Charter* values.

In Part II, I discuss the concept of *Charter* values. These are best understood, I suggest, as general principles which are manifested in specific provisions of the *Charter*. In this, they are no different from the general principle of good faith in Canadian contract law, the juridical structure of administrative law, or the Honour of the Crown—from each of these general principles are derived textual provisions and judicially created doctrines, as with *Charter* values and provisions.

In Part III, I outline procedural duties as an administrative law concept. Such duties can be grounded in statute, the common law or the Constitution. The United Kingdom's public sector equality duty is a statutory example, the English *"Tameside"* duty, a common law instance and Canada's duty to consult a constitutional version of the same concept. In each case, the duty is to take certain matters into account before rendering a decision, failing which the underlying decision is invalidated. Given recent developments in Canadian administrative law, there is no hard-and-fast line between procedure and substance, such that respect for a procedural duty will often be assessed by applying the reasonableness standard, which will involve a robust but respectful analysis of the justification the decision-maker offered for its compliance with the procedural duty.

In Part IV, I pull these strands together and describe the scope of the *Doré* duty. I explain the range of decisions it is applicable to and the demands it places on administrative decision-makers. In principle, the duty applies to all administrative decisions, be they exercises of discretion, individualized assessments, policy-making or statutory interpretation exercises. In order to discharge the *Doré* duty, a decision-maker must demonstrate, typically through their reasons (or sometimes by reference to the record of decision), that they were alive to the relevant *Charter* values. Failure to do so can result in the decision being invalidated. I also

explain how *Charter* values play a different role to *Charter* rights as far as judicial review of administrative action is concerned.

The *Doré* duty should not be understood as a limit on administrative decision-makers. Rather, its animating purpose is to empower decision-makers by prompting them to take account of *Charter* values in an informal, good faith way. The goal is not to unmoor the *Charter* from its textual roots but rather to enrich our collective understanding of foundational values in Canadian public law.

I. The Two Aspects of the *Doré* Decision: Judicial Review and Administrative Justice

There are two aspects to the decision of the Supreme Court of Canada in *Doré v Barreau du Québec*:[1] the decision imposes a framework for judicial review of administrative action infringing *Charter* rights (the judicial review aspect) and a separate framework for consideration of the *Charter* by administrative decision-makers (the administrative justice aspect).[2]

As far as judicial review is concerned, the Supreme Court held in *Doré* that when an administrative decision is challenged for breaching a *Charter* right, the question for the reviewing court is "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."[3] This aspect of *Doré* has been subject to considerable critical commentary.[4] In subsequent decisions, the Supreme Court has qualified the deferential

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1 2012 SCC 12 [*Doré*].

2 Paul Daly, "The Autonomy of Administration" UTLJ [forthcoming in 2023].

3 *Supra* note 1 at para 57.

4 See e.g. Paul Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms" (2014) 65 SCLR (2d) 247 and "The Court and Administrative Law: Models of Rights Protection" in Matthew Harrington, ed, *The Court and the Constitution: A 150-Year Retrospective* (Toronto: LexisNexis, 2017) 57; The Honourable Peter D Lauwers, "Reflections on Charter Values: A Call for Judicial Humility" (Speech delivered at the Runnymede Society, Toronto, 12 January 2018); Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561. *Cf* Lorne Sossin & Mark Friedman, "*Charter* Values and Administrative Justice" (2014) 67 SCLR (2d) 391; Richard Stacey, "A Unified Model of Public Law: *Charter* Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338. See generally Yan Campagnolo, "L'interaction du droit constitutionnel et du droit administratif" dans Stéphane Beaulac et Jean-François Gaudreault-DesBiens, dirs, *JurisClasseur Québec, Collection droit public, Droit administratif* (Montréal: LexisNexis, 2021).

language of *Doré*[5] and made clear that the "burden of justification" on a decision-maker who infringes *Charter* rights will be "a heavy one"[6] but there is still debate about whether these qualifications go far enough.[7]

There was a separate administrative justice aspect to *Doré*, which imposed a procedural duty on administrative decision-makers to take *Charter* values into account. As a general proposition, the Court stated, "administrative decisions are *always* required to consider fundamental values" because the Supreme Court's jurisprudence confirms that "administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise."[8] The Court went on to set out a specific methodology:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives … Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives …[9]

This is best understood as grounded in administrative justice, which relates to "those qualities of a decision-making process that provide arguments for the acceptability of its decisions."[10] The explicit requirement to consider *Charter* values is distinct from the standard of review to be applied to decisions that allegedly infringe the *Charter*. It is a standalone procedural duty. Note that "values" and "rights" play different roles that track the administrative justice/judicial review distinction: "values" must be taken account of by the decision-maker during the decision-making process,

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5 *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 38 [*Loyola*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 57–58 [*Trinity Western*].

6 Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85 Sask L Rev 89 at 110.

7 See e.g. *ET v Hamilton-Wentworth District School Board*, 2017 ONCA 893 at para 11, Lauwers & Miller JJA, concurring [*ET*]; *Trinity Western University*, *supra* note 5 at paras 175, Rowe J, 302–314 Côté and Brown JJ, dissenting; Mark Mancini, "The Conceptual Gap between *Doré* and *Vavilov*" (2021) 43:2 Dal LJ 793.

8 *Doré*, *supra* note 1 at para 35 [emphasis in original], citing 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, Oregon: Hart, 2004) 61 at 86.

9 *Doré*, *supra* note 1 at paras 55–56.

10 Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (New Haven: Yale University Press, 1983).

but "rights" act as constraints on the lawfulness of the final decision.[11] Whereas a decision-maker need only be "alive" to *Charter* values,[12] if an administrative decision infringes a *Charter* right, the decision-maker must demonstrate that "[he or she] has furthered his or her statutory mandate in a manner that is proportionate to the resulting limitation on the *Charter* right."[13] *Charter* "values" do not constrain administrative decision-makers as much as *Charter* rights.

Two questions immediately arise: what is a *Charter* value and what is a procedural duty? I will address these questions in turn before setting out the *Doré* duty in more detail. In setting out the *Doré* duty in more detail, I will discuss the Supreme Court of Canada's reformulation of administrative law in *Canada (Minister of Citizenship) v Vavilov* and explain how reasonableness review of decision-makers' attempts to discharge procedural duties now functions. In short, whilst *Doré* is best understood as imposing a procedural duty, compliance with that procedural duty is to be assessed by reference to the *Vavilov* framework.

II. *Charter* Values

A persistent concern about *Charter* values is that they are amorphous and ill-defined.[14] This concern has sometimes animated arguments that *Doré* leads to under-powered judicial review of *Charter*-infringing state action. This may or may not be so. My concern in this Part is with a different argument, namely that *Charter* values, because they are amorphous and ill-defined, should play no role, or a very limited role, in Canadian public law.

However, properly understood, *Charter* values are an unobjectionable feature of the legal landscape of Canada. They are simply "those values that underpin each [*Charter*] right and give it meaning."[15] In this respect, *Charter* values are no different from the unwritten constitutional principles which "form part of the context and backdrop to the Constitution's written terms."[16] Unwritten principles inform the "interpretation" of

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[11] See especially *Trinity Western*, *supra* note 5 at para 56: "As the Benchers were alive to the issues, *we must then* assess the reasonableness of their decision" [emphasis added].

[12] *Ibid* at para 55.

[13] *Ibid* at para 82.

[14] See generally Matthew Horner, "*Charter* Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67 SCLR (2d) 361. See also *Ontario Nurses' Association v Participating Nursing Homes*, 2021 ONCA 148 at paras 152–156, Huscroft JA, dissenting.

[15] *Loyola*, *supra* note 5 at para 36.

[16] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 50 [*Toronto v Ontario*].

specific provisions of the Constitution's text and the "structural doctrines" necessary for the "coherence" of the constitutional architecture.[17] For example, the unwritten principle of the protection of minorities finds expression in "a number of specific constitutional provisions protecting minority language, religion and education rights."[18] Put another way, *Charter* values are general principles which find their expression in specific textual provisions.

The juridical structure of *Charter* values is, therefore, a familiar one. There are many examples in Canadian law of general principles being manifested in specific ways. This occurs even in private law, where a variety of specific duties on contracting parties are derived from the general principle of good faith.[19] The specific rules and doctrines of administrative law can, similarly, be understood as manifestations of overarching values.[20]

Perhaps the best example in Canadian public law is the Honour of the Crown, which functions as a general principle in respect of Crown-Indigenous relations. The principle is "enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights":[21] section 35 is a specific manifestation of the Honour of the Crown as, indeed, is the non-derogation clause in section 25. So too is the duty to consult "grounded" in the Honour of the Crown.[22] Recent jurisprudence suggesting that reconciliation is an interpretive principle when discerning the meaning of statutory provisions is a further instance of the Honour of the Crown being given specific application.[23]

Another example is the flourishing of linguistic minority communities—"promoting the development of official language minority communities"[24]—a principle which finds expression in various provisions of the Canadian Constitution: section 133 of the *Constitution Act, 1867*,

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17 *Ibid* at paras 55–56.

18 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 79–80, 161 DLR (4th) 385.

19 *Bhasin v Hrynew*, 2014 SCC 71. See e.g. C*M Callow Inc v Zollinger*, 2020 SCC 45.

20 *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 18; *Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 138; *Plaintiff M1-2021 v Minister for Home Affairs*, [2022] HCA 17 at para 73. See generally Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford: Oxford University Press, 2021).

21 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 19.

22 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 32.

23 *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342, Feehan JA, concurring [*AltaLink*].

24 *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 3. See also *Conseil scolaire francophone de la Colombie-Britannique v*

recognizing the official status of French and English; section 23 of the *Charter*, setting out the rights of minority language speakers; and sections 16 to 20 of the *Charter*, providing specific guarantees for French-language speakers in the province of New Brunswick. These provisions treat minority language speakers as a group worthy of concern and respect,[25] specific manifestations of a general commitment to the flourishing of linguistic minority communities.

In each of these instances, there is a general principle—such as good faith, or the Honour of the Crown or the flourishing of linguistic minority communities—which finds specific manifestations in textual provisions or judicially developed doctrines.

Charter values share the same juridical structure as these phenomena. For instance, Professor Hogg has conducted an exhaustive analysis in respect of equality as a *Charter* value, demonstrating how it finds specific manifestation throughout the textual provisions of the document.[26] Similarly, the *Charter* values the Supreme Court has recognized, "such as liberty, human dignity, equality, autonomy, and the enhancement of democracy,"[27] manifest themselves in various specific provisions. Liberty is a *Charter* value with specific manifestations in sections 2 (fundamental freedoms), 7 (protection of liberty), 8 (freedom from unreasonable searches and seizures), 9 (protection from arbitrary detention), 10 and 11 (rights in relation to arrests and criminal charges). Democracy finds expression in the fundamental freedoms, e.g., section 3's guarantee of the right to vote and (perhaps) the mobility rights in section 6 that allow an unhappy citizen to "exit" a province or the federation. Human dignity is protected by the variety of provisions in section 11 giving rights to criminal accused and, most notably, by the protection against cruel and unusual punishment or treatment (section 12).

III. Procedural Duties in Administrative Law

The *Doré* duty is a procedural duty. A procedural duty imposes obligations on administrative decision-makers to do certain things prior to making a decision. The source for a procedural duty can be statute, the common law or the Constitution and the obligations imposed are obligations to

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British Columbia, 2013 SCC 42 at para 56; *Reference re Secession of Quebec*, *supra* note 18 at paras 79–80.

[25] See also Paul Daly, "Why Write Statutes Which Some People Cannot Read?" (2020) 99 SCLR (2d) 409.

[26] Peter W Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113.

[27] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 88.

do certain things during the decision-making process. The *Doré* duty is constitutional in origin and obliges administrative decision-makers to take account of *Charter* values before making a final decision.

The purpose of this Part is, first, to demonstrate that there is nothing unusual about procedural duties being imposed on decision-makers as a matter of administrative law and, second, to describe the obligations arising from procedural duties. I describe this type of duty as "procedural" because it does not impose substantive limits on the ultimate decision, which remains that of the administrative decision-maker, but rather relates to how the decision-maker's decision-making process should unfold. It would be fanciful to suggest that a procedural duty has no impact on the final decision, as the purpose of imposing procedural duties is to influence how administrative decision-makers go about their business by requiring them to take certain matters seriously. Nonetheless, it is a duty to do certain things rather than a duty to reach a particular result, and, for that reason, can safely be described as "procedural". Furthermore, compliance with a procedural duty is assessed independently of the lawfulness of the final decision: in other words, a decision-maker may satisfy its procedural duties but, ultimately, fail to make a lawful decision; conversely, even if a decision is lawful in the sense that it is substantively reasonable, the decision may be invalidated if the decision-maker failed to comply with its procedural duties.

A good example of a statutory procedural duty is the public sector equality duty imposed on decision-makers in the United Kingdom. Section 1 of the Equality Act 2010 provides that public authorities must "when making decisions of a strategic nature about how to exercise … functions," pay "due regard" to the "desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage."[28] This had precursors in legislation relating to racial and disability discrimination.[29] Where the duty is engaged, the court must ensure that the decision-maker had "a proper and conscientious focus on the statutory criteria."[30] The ultimate weight to be given to the criteria is a matter for the decision-maker[31] (as long as the decision is substantively reasonable and otherwise lawful) but compliance

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28 *Equality Act 2010* (UK), s 1.

29 *Race Relations Act 1976* (UK), s 71; *Disability Discrimination Act 1995* (UK), s 49.

30 *R (Hurley) v Secretary of State for Business, Innovation and Skills*, [2012] EWHC 201 (Admin) at para 78, Elias LJ.

31 *Ibid*.

with the duty is an "essential preliminary" to a lawful decision: failure to comply with a procedural duty renders a decision unlawful.[32]

A similar duty grounded in the common law is the so-called "*Tameside*" duty in English administrative law.[33] The eponymous case involved a statutory provision requiring the Secretary of State for Education to act reasonably: accordingly, Lord Diplock held, in the passage treated as the *locus classicus* of the *Tameside* duty, the Minister was obliged to "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly."[34] Where the duty applies, a decision-maker must conduct "a sufficient inquiry prior to making its decision."[35] The duty applies even to decision-makers exercising wide discretionary powers: indeed, "[t]he wider the discretion conferred … the more important it must be that [the decision-maker] has all relevant material to enable him properly to exercise it."[36] Again, the ultimate weight to be given to a particular consideration is a matter for the decision-maker (subject to making a substantively reasonable and otherwise lawful decision) but a failure to comply with the duty is unlawful.[37]

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[32] *R (BAPIO) v Secretary of State for the Home Department*, [2007] EWCA Civ 1139 at para 3, Sedley LJ. It is notable that in Australia, several states have created a statutory human rights duty which has a procedural component. As John Dixon J explained in *Certain Children v Minister for Families and Children & ORS (No 2)*, [2017] VSC 251 at para 177:

> The substantive obligation requires public authorities in acting, failing to act, or proposing to act, not to limit human rights unless that limitation is a reasonable limit that is demonstrably justified in a free and democratic society based on human dignity, equality and freedom. The procedural obligation is a duty on public authorities as decision makers to give proper consideration to relevant human rights. The procedural and substantive limbs … are cumulative. That is, in making a decision, a public authority must both give proper consideration to engaged human rights and reach an outcome that is, in substance, compatible with those rights.

The procedural obligation in the state of Victoria is to show that the decision-maker "seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified": *Castles v Secretary to the Department of Justice*, [2010] VSC 310 at para 186 [*Castles*].

[33] *Secretary of State for Education and Science v Tameside MBC*, [1977] AC 1014 [*Tameside*]; *Balajigari v Secretary of State for the Home Department*, [2019] EWCA Civ 673.

[34] *Tameside*, *supra* note 33 at 1065.

[35] *R (Plantagenet Alliance Ltd) v Secretary of State for Justice*, [2014] EWHC 1662 (Admin) at para 99, Haddon-Cave LJ.

[36] *R (Venables) v Secretary of State for the Home Department*, [1998] AC 407 at 466G.

[37] *R (Khatun) v Newham LBC*, [2005] QB 37 at para 35, Laws LJ.

An example of a constitutionally based procedural duty is the duty to consult in Canadian public law. Where a decision-maker proposes to make a decision with the potential to affect Indigenous rights, a requirement of consultation is imposed. The extent of the duty varies according to the context but requires a decision-maker subject to the duty to act "with good faith to provide meaningful consultation appropriate to the circumstances."[38] The ultimate decision after consultation is for the decision-maker, albeit a duty of accommodation may be "appropriate" in some instances.[39] A breach of the duty to consult renders the resultant decision unlawful, even if it was otherwise legally unproblematic.[40]

The *Doré* duty to take account of *Charter* values fits neatly into this set of procedural duties.

Before moving on to consider the *Doré* duty in detail, it is necessary to introduce one last nuance on the "procedural" nature of the duty. In Canadian administrative law, procedural duties of this nature are most naturally addressed under the framework for judicial review set out in *Vavilov*.[41] The *Vavilov* framework applies to judicial review of the merits of administrative decisions rather than to process.[42] At first glance, one might think that a procedural duty goes to process, not to merits. However, in *Vavilov*, process was treated as co-extensive with "procedural fairness", to be determined by reference to the factors set out in previous jurisprudence;[43] but these factors would not assist a court in determining whether a procedural duty (such as the *Doré* duty) has been discharged, as they are designed solely to calibrate the level of procedural fairness required in any particular instance. It is difficult to see, therefore, how the *Doré* duty could plausibly be said to fall on the "process" side of the merits/process divide set out in *Vavilov*.[44]

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38 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 41.

39 *Ibid* at para 37.

40 See e.g. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40.

41 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

42 *Ibid* at para 23.

43 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; 174 DLR (4th) 193 [*Baker* cited to SCR].

44 In addition, it is arguable that the merits/process divide has been abolished by more recent Supreme Court of Canada decisions such that the *Vavilov* framework now applies to all administrative decisions. See further Paul Daly, "Future Directions in Standard of Review in Canadian Administrative Law: Substantive Review and Procedural Fairness" (2023) 36 Can J Admin L & Prac 69. The analysis in Paul Daly, "The Duty to Consult and the Standard of Review: A Suggestion", (26 August 2021), online (blog): *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2021/08/26/the-duty-to-consult-and-the-standard-of-review-a-suggestion/> [perma.cc/ZY3N-MVES] has been overtaken by these developments.

Moreover, on reasonableness review as elaborated in *Vavilov,* a court must look both to the decision-making process and the final decision: for example, failing to consider certain aspects of a legislative scheme when interpreting a statutory provision, failing to grapple with key arguments and evidence, and failing to pay adequate attention to important interests are all things apt to lead a decision-maker to act unreasonably. Just like the *Doré* duty, these are things to be done during the decision-making process. As such, the *Doré* duty fits neatly into the *Vavilov* framework, under the reasonableness rubric. Indeed, subsequent to *Vavilov*, when Canadian courts have considered one of the analogues to the *Doré* duty—the procedural duty to consult Indigenous peoples—they have applied reasonableness review.[45]

Where there is a statutory right of appeal, the correctness standard applies to extricable questions of law. Compliance with the *Charter* will typically—though not necessarily[46]—constitute an extricable question of law, and thus, the question for the court will be whether the reasons and record reveal compliance with the *Doré* duty.

As a result, notwithstanding its "procedural" nature, compliance with the *Doré* duty is best assessed using the *Vavilov* framework.

IV. The Scope of the *Doré* Duty

In this Part, I set out, first, the types of decisions to which the *Doré* duty applies: exercises of discretion, statutory interpretation and policy-making. I then describe, second, how a decision-maker can discharge the *Doré* duty.

A) Triggering the *Doré* Duty

The *Doré* duty is about *Charter* values, not *Charter* rights. The Supreme Court stated in *Loyola High School v Quebec (Attorney General)* that the trigger for the duty is an administrative decision that "engages the protections enumerated in the *Charter.*"[47] Engagement here is to be understood broadly, covering "*both* the *Charter*'s guarantees and the foundational values they reflect."[48] In other words, it is not necessary for the decision-maker to determine whether a decision will infringe a *Charter*

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45 See e.g. *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34. This point is, admittedly, the subject of some debate. See Robert Hamilton & Howard Kislowicz, "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of Vavilov?" (2021) 59 Alta L Rev 41.

46 *Toussaint v Canada (Attorney General)*, 2011 FCA 213 at paras 51–55.

47 *Loyola*, *supra* note 5 at para 4.

48 *Ibid* [emphasis added].

right in order to consider *Charter* values: "In the administrative context, this Court has recognized that 'any exercise of statutory discretion must comply with the *Charter* and its values.'"[49] Indeed, it would have been strange for the Supreme Court to use the language of *Charter* "values" in *Doré* had it meant to refer to *Charter* "rights". Moreover, requiring a decision-maker to engage in a legalistic exercise of *Charter* jurisprudence would be at odds with the spirit of *Doré* which, as further discussed below, is to prompt decision-makers to engage with the Constitution in an informal, good faith manner.[50]

Of course, the *Charter* value must be relevant to the decision to be taken. Much of the time, a *Charter* value will be relevant because it has been raised in the decision-making process or because the context makes it obviously relevant: for example, the values underpinning s. 23 of the *Charter* will invariably be relevant in the context of a decision touching minority language rights. In more difficult cases, the value might not have been raised before the decision-maker or might have been considered obviously irrelevant to the decision to be taken. In borderline cases where relevancy is difficult to determine and the decision-maker has not addressed the point in its reasons, it will be appropriate for a reviewing court to look to the record to make a judgement call on whether the *Charter* value ought to have been addressed by the decision-maker.[51] Of course, a reviewing court also has the discretion not to entertain an argument which was not first addressed to an administrative decision-maker.[52]

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49 *Trinity Western*, *supra* note 5 at para 41, citing *R v Conway*, 2010 SCC 22 at para 41. See also *Baker*, *supra* note 43 at para 56: "though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*"; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 49.

50 *Cf ET*, *supra* note 7 at paras 112–125.

51 *Cf* Paul Daly, "The Role of Charter Values: Taylor-Baptiste v. Ontario Public Service Employees Union, 2015 ONCA 495", (22 July 2015), online (blog): *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2015/07/22/the-role-of-charter-values-taylor-baptiste-v-ontario-public-service-employees-union-2015-onca-495/> [perma.cc/G8BR-PUWY].

52 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 (CanLII) at paras 22–29. See also Paul Daly, "Considering Charter Values: Iacovelli v College of Nurses of Ontario, 2014 ONSC 7267", (17 January 2015), online (blog): *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2015/01/17/considering-charter-values-iacovelli-v-college-of-nurses-of-ontario-2014-onsc-7267/> [perma.cc/S7PU-VCJD].

B) Types of Decision

It is clear from the decision in *Doré* itself that the *Doré* duty applies to exercises of discretion.[53] In any situation where the decision-maker must make an "individualized assessment",[54] it is necessary for the decision-maker to determine whether its ultimate disposition of the matter is consistent with *Charter* values.

However, *Doré* is not limited to exercises of discretion or other decisions requiring individualized assessments. Subsequently, the Supreme Court applied the *Doré* duty to legislative-type policy-making in the *Law Society of British Columbia v Trinity Western* case: there, the Law Society of British Columbia had, after a referendum of its members, adopted a resolution refusing to approve a new law school; the process leading to the adoption of this resolution was assessed for compliance with the *Doré* duty.[55] Several lower courts have addressed the *Doré* duty in the context of assessing administrative policies.[56]

Furthermore, recall the statement quoted above that "administrative decisions are *always* required to consider fundamental values," including *Charter* values.[57] The Court of Appeal for Ontario considered this statement in *Taylor-Baptiste v Ontario Public Service Employees Union*[58], and concluded that *Charter* values can be taken into account by administrative decision-makers when interpreting statutes. In determining whether "a person's conduct had violated the strictures of a statutory or regulatory rule," it was legitimate for the Ontario Human Rights Tribunal to take *Charter* values into account.[59]

The debate in *Taylor-Baptiste* was about whether an administrative decision-maker has to identify ambiguity in a statute before having to resort

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53 *Doré*, *supra* note 1 at para 55.

54 *Gordon v British Columbia (Superintendent of Motor Vehicles)*, 2022 BCCA 260 at para 59.

55 *Trinity Western*, *supra* note 5 at paras 55–56.

56 See e.g. *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 [*Canadian Centre for Bio-Ethical Reform 1*]; *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 [*Canadian Centre for Bio-Ethical Reform 2*]; *Guelph and Area Right to Life v City of Guelph*, 2022 ONSC 43 [*Guelph and Area Right to Life*]. See also *Commission scolaire francophone v Minister of Education*, 2020 NWTSC 28 at paras 68, 105–107, 116, rev'd in *AB v Northwest Territories (Minister of Education, Culture and Employment)*, 2021 NWTCA 8 [*AB*], leave to appeal to SCC granted, 2022 CanLII 28613 (SCC).

57 *Doré*, *supra* note 1 at para 35.

58 2015 ONCA 495.

59 *Ibid* at para 57.

to *Charter* values. The Court of Appeal rightly rejected this proposition. As the Supreme Court observed in *R v Clarke*, in the administrative context, ambiguity is "not the divining rod that attracts *Charter* values" because administrative decision-makers "must act consistently with the values underlying the grant of discretion, including *Charter* values."[60] When determining legislative intent by reference to the traditional tools of text, purpose and context,[61] *Charter* values can be a relevant contextual consideration for an administrative decision-maker,[62] just like international law[63] or (perhaps) the constitutional imperative of reconciliation.[64] What a decision-maker cannot do is apply the presumption of constitutional compliance in the absence of an ambiguity.[65] However, where *Charter* values are relevant to the interpretation of a statutory provision, the decision-maker should take them into account.

The *Doré* duty, therefore, applies to *all* types of administrative decisions: to exercises of discretion (and other decisions involving individualized assessments), policy-making and statutory interpretation.

C) Discharging the *Doré* Duty

The *Doré* duty is a procedural duty. It makes *Charter* values a mandatory consideration in cases to which the duty applies. Failure to take relevant *Charter* values into account before adopting a policy, exercising a discretion, making an individualized assessment or interpreting a statutory provision justifies invalidation of the decision. Under the *Vavilov* framework, compliance with the *Doré* duty will most often be addressed by reference to the reasons provided by an administrative decision-maker.[66]

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60 2014 SCC 28 at para 16, citing *Doré*, at para 24. See further also John Mark Keyes & Carol Diamond, "Constitutional Inconsistency in Legislation—Interpretation and the Ambiguous Role of Ambiguity" (2017) 48:2 Ottawa L Rev 315 at 335–343.

61 *Vavilov*, *supra* note 41 at para 118.

62 *Duncan v Retail Wholesale Union Pension Plan*, 2017 BCSC 2375 at para 81.

63 *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 44–46 [*Entertainment Software*].

64 *AltaLink*, *supra* note 23 at para 124, Feehan JA, concurring.

65 See by analogy the discussion of the equivalent international law presumption in *Entertainment Software*, *supra* note 63 at paras 47–48.

66 As mentioned above, on a statutory appeal the situation is different. Questions relating to compliance with the *Charter* are generally to be answered on the correctness standard on statutory appeals (see e.g. *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112). But the correctness standard imposes obligations of result, not obligations of reasoning: if the decision-maker can demonstrate by reference to the record and reasons (if any) that it was "alive" to the relevant *Charter* values, this will arguably be sufficient to discharge the *Doré* duty, even if the decision-maker's reasons would not necessarily survive reasonableness review. *Cf Société-Radio Canada v Canada (Attorney General)*, 2023 FCA 131 at paras 57–61.

First, where an administrative decision-maker has failed to discharge the *Doré* duty, either because the failure is manifest in its reasons[67] or evident from the record,[68] the decision will be struck down and (subject to any exercise of remedial discretion[69]) the matter remitted to the decision-maker.

Second, compliance with the *Doré* duty is assessed independently of the reasonableness of the decision.[70] The judicial review aspect of *Doré* is distinct from its administrative justice aspect. In *Doré* itself, compliance with the duty to take *Charter* values into account was assessed independently of the reasonableness of the decision.[71] Similarly, in the *Trinity Western* case, the Supreme Court held that the Law Society had to be able to demonstrate that it was "alive to the question of the balance to be struck,"[72] *and* "then," that the balance struck was reasonable.[73] In this case, the record demonstrated that the Law Society had satisfied the *Doré* duty. The Supreme Court went on to hold that the interference with *Charter* rights was proportionate. There were two distinct steps in the analysis.

The recent decision of the New Zealand Supreme Court in *Moncrief-Spittle v Regional Facilities Auckland Limited*[74] endorsed *Doré* and illustrates this feature of the *Doré* duty very well. The incident which gave rise to the underlying litigation was the cancellation of an event featuring alt-right speakers (Canadians both, as it happens) at the Bruce Mason Centre, a 1,000-seat theatre in Auckland. Perhaps, predictably enough, when word began to circulate about the event, voices were raised in opposition to giving these speakers a platform; one local group promised

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67 See e.g. *Canada (Attorney General) v Robinson*, 2022 FCA 59 at para 28 [*Robinson*].

68 See e.g. *Canadian Centre for Bio-Ethical Reform 1, supra* note 56 at para 60; *Guelph and Area Right to Life*, *supra* note 56 at paras 77–85.

69 *Vavilov*, *supra* note 41 at paras 139–142.

70 Evan Fox-Decent & Alexander Pless, "The *Charter* and Administrative Law Part II: Substantive Review" in Colleen Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery, 2021) at 408–410.

71 *Doré*, *supra* note 1 at paras 66–67. First, the decision-maker had to "demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise" (at para 66). Second, it was necessary for a reviewing court to assess the reasonableness of the decision: "To make that assessment, we must consider whether this result reflects a proportionate application of the statutory mandate with Mr. Doré's expressive rights".

72 *Trinity Western*, *supra* note 5 at para 55.

73 *Ibid* at para 56.

74 [2022] NZSC 138.

to blockade the venue and confront the speakers. The organizers had not concealed any information about the event, but equally, they had not raised potential security issues, even though they had faced similar challenges in hosting a similar event in Australia. Ultimately, the facilities management company (RFAL) responsible for the venue decided to cancel the event. An application for judicial review was brought by two individuals, a ticket holder for the cancelled event and a local concerned citizen.

The Supreme Court held that freedom of expression was a "substantive constraint" on RFAL in two ways.[75] First, in what I have characterized as the administrative justice aspect of *Doré*, RFAL "had to turn [its] mind to and engage with the question of whether it was reasonable to limit the free speech interest in play by cancelling the event."[76] Indeed, in the decision-making process, RFAL was "required to give freedom of expression a heavy weighting."[77] Here, RFAL's decision-making was adequate: it took freedom of expression into account and balanced it with its statutory duties in respect of health and safety; and it considered options which would be minimally impairing of freedom of expression, though many of these were not actionable because of decisions made by the organizers (e.g., to publish information about the venue).[78] Second, on judicial review, the reviewing court would have to be "satisfied that the decision was a reasonable limit."[79] In the circumstances of this case, the Court held that the cancellation decision was a reasonable limit on freedom of expression.[80]

In cases where reasons are given for a decision, the two steps will merge, in the sense that both can be assessed by reference to the reasons provided.[81] Under the rubric of reasonableness review, an administrative decision-maker must demonstrate "responsive justification" to *Charter* values and "grapple" with them.[82] If the reasons demonstrate an absence of

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75 *Ibid* at para 83.

76 *Ibid.*

77 *Ibid* at para 121.

78 *Ibid* at paras 125–130.

79 *Ibid* at para 84.

80 *Ibid* at paras 101–103.

81 See e.g. *Robinson*, *supra* note 67 at para 28. Again, this is subject to a caveat as far as statutory appeal appeals are concerned: on correctness review, the court must focus on whether the outcome was correct, not whether the outcome was adequately justified by the reasons provided by the decision-maker. Correctness review imposes an obligation of result, not of reasoning. As such, as long as the court is satisfied having reviewed the record and reasons (if any) that the decision-maker was appropriately alive to the relevant *Charter* values, the *Doré* duty will have been discharged, even if the record and reasons might not necessarily have been adequate if subjected to reasonableness review.

82 *Vavilov*, *supra* note 41 at paras 128, 133.

responsive justification and grappling, the decision will be unreasonable. And, as mentioned above, if a *Charter* "right" is also implicated, the administrative decision-maker must, *in addition*, reach a decision that respects the constraints of the *Charter*.[83]

In situations where reasons cannot be given for a decision, greater care must be taken.[84] Sometimes, the record "will … uncover a clear rationale"[85] which can be measured against the *Doré* duty.[86] This was what occurred in the *Trinity Western* case. However, in other cases involving the application of the *Doré* duty to legislative-type decisions, the record has demonstrated inadequate attention to *Charter* values.[87]

Third, the normative reach of the *Doré* duty is somewhat limited. It is a duty to take *Charter* values into account, not a duty to reach a particular result. Whereas a decision-maker might have to demonstrate that its final decision represents a minimal interference with a *Charter* right, achieving

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[83] *Trinity Western*, *supra* note 5 at para 82. See e.g. *Lauzon v Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425 [*Lauzon*]. Here, the Council found that a Justice of the Peace had committed misconduct by writing a strongly worded newspaper article about practices in bail court. The Council recommended that she be removed from office. The Court of Appeal found that the recommendation of removal was unreasonable. Justice of Appeal Lauwers explained that because the Justice of the Peace's *Charter* right to freedom of expression was engaged, the Council was obliged to engage in a "*robust* proportionality analysis" (at paras 140–148). In particular (at para 151):

> The Panel was required to undertake a robust analysis of the impact of its proposed disposition on JP Lauzon's rights. To structure this analysis, the Panel was required to undertake three inquiries: first, to assess the negative or deleterious effects that the removal recommendation would have on the exercise of right asserted by JP Lauzon (on the assumption that the recommendation would be accepted by the Attorney General and implemented by Cabinet) as well as any collateral effects, for example, creating a chilling effect on the rights of others; second, to assess the positive effects or benefits of that disposition in terms of the public good; and third, to undertake the proportionality analysis by assessing, for example, whether the disposition involves means that are always impermissible, whether the disposition is needed to achieve the good sought, or whether the deleterious effects or costs imposed by the disposition are out of proportion to the public good to be achieved. The Panel did not do that work, and it is not up to this court, in an effort to salvage the disposition, to reconstruct what the Panel's approach would have been.

[84] *Cf AB*, *supra* note 56 at paras 50–54, failing to untangle a policy from its application in individual cases and thereby wrongly concluding that there had been a merger of the two steps.

[85] *Vavilov*, *supra* note 41 at para 137.

[86] See also *Baker*, *supra* note 43 at para 44, and for a particularly broad approach, *Canadian Centre for Bio-Ethical Reform 2*, *supra* note 56 at paras 36–42.

[87] See e.g. *Canadian Centre for Bio-Ethical Reform 1*, *supra* note 56 at para 60; *Guelph and Area Right to Life*, *supra* note 56 at paras 77–85.

a proportionate balancing of the rights and interests at stake, taking account of *Charter* values, does not restrict the decision-maker's freedom of movement to the same extent. Just as the duty to consult does not give Indigenous peoples a veto on Crown conduct, the *Doré* duty does not compel an administrative decision-maker to reach a particular conclusion. Imposing the *Doré* duty does not give *Charter* values direct normative effect (just as unwritten constitutional principles are not standalone bases for invalidating statutes) but rather treats them as defeasible procedural constraints on decision-makers. They are "interpretive aids" which decision-makers must engage with but need not necessarily comply with.[88] The *Doré* duty, which is an aspect of "administrative justice," involves "administrative law balancing, not a specific invalidation of any government action."[89]

A good example is the decision of the Court of Appeal for Ontario in *Lalonde v Ontario (Commission de restructuration des services de santé)*.[90] There the Commission required the closure of a hospital which served the minority Francophone community in Ottawa. Justices of Appeal Sharpe and Weiler explained that the Commission's decision had to be struck down for its failure to engage with the unwritten constitutional principle of protection for linguistic minorities:

> The Commission offered no justification for diminishing Montfort's important linguistic, cultural, and educational role for the Franco-Ontarian minority. It said that matter was beyond its mandate. The Commission failed to pay any attention to the relevant constitutional values, nor did it make any attempt to justify departure from those values on the ground that it was necessary to do so to achieve some other important objective. While the Commission is entitled to deference, deference does not protect decisions, purportedly taken in the public interest, that impinge on fundamental Canadian constitutional values without offering any justification.[91]

Conclusions in judicial review cases are often stated in negative terms, as decisions are quashed for failure to comply with various duties. But the Court of Appeal's complaint in *Lalonde* was not that the Commission had failed to take the best possible decision in the circumstances; rather, what was lacking was meaningful engagement with a relevant constitutional principle. Just as the courts use *Charter* values to inform development of

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88 *Toronto v Ontario*, *supra* note 16 at para 84.

89 Sossin & Friedman, *supra* note 4 at 413. This point is sometimes misunderstood. See e.g. *AB*, *supra* note 56 at paras 56–57.

90 (2001), 208 DLR (4th) 577, 56 OR (3d) 505 [cited to OR].

91 *Ibid* at para 184.

92 See especially *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

the common law[92]—and use unwritten constitutional principles to put flesh on the bones of the textual structure of the Constitution—so too can administrative decision-makers infuse their decisions with *Charter* values.

Accordingly, this point can be stated in positive fashion. The goal of the *Doré* duty is to empower administrative decision-makers, not to constrain them. The goal of the *Doré* duty is not to enlarge the scope of the *Charter* or unmoor it from its textual anchors but to force administrative decision-makers—who may not be legally trained—to engage with the *Charter*. This approach recognizes that the *Charter* is not "some holy grail which only judicial initiates of the superior courts may touch" but one which belongs to the people and, as a result, "law and law-makers that touch the people must conform to it."[93] *Doré* provides for an informal approach to the application of constitutional norms, which is well suited to the characteristics of many decision-makers[94] and is in harmony with the insistence in *Vavilov* that "'Administrative justice'" will not always look like 'judicial justice.'"[95] It is in specific contexts that the implications of *Charter* values are most likely to be felt by administrative decision-

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93 *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 70, 140 DLR (4th) 193, McLachlin J dissenting. See also Thomas Poole, "The Reformation of English Administrative Law" (2009) 68:1 Cambridge LJ 142, at 153–158.

94 Paul Daly, "The Inevitability of Discretion and Judgement in Front-Line Decision-Making in the Administrative State" (2020) 2:1 J Commonwealth L 99 at 123–132.

95 *Vavilov*, *supra* note 41 at para 92. As Lord Hoffmann observed in *R (Begum) v Denbigh High School*, [2006] UKHL 15 at para 68, one cannot expect front-line decision-makers to make decisions "with textbooks on human rights law at their elbows".

96 Angela Cameron & Paul Daly, "Furthering Substantive Equality through Administrative Law: Charter Values in Education" (2013) 63 SCLR 169 at 190–196, 199–201. See also *Castles*, *supra* note 32 at para 185:

> The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

makers, especially those on the front lines of public administration,[96] who are therefore well placed to bring their expertise to bear.

Furthermore, the practical reality is that many constitutional norms are underenforced.[97] Underenforcement may occur because the courts lack the ability to consider a particular matter due to the operation of doctrines such as mootness, standing or exhaustion of remedies. Norms may also be underenforced because nobody has the resources to bring a constitutional challenge. Or the underenforcement of a norm may simply escape public knowledge because it occurs secretly, in the heart of government. The *Doré* duty is a useful corrective to underenforcement.

By requiring them to consider *Charter* values, rather than the intricacies of *Charter* doctrine, the *Doré* duty enables administrative decision-makers to engage through their reasons with the values underpinning the provisions of the *Charter*. An administrative decision-maker might well conclude that a *Charter* value has less weight in a particular context than a statutory objective. Equally, however, the process of writing reasons which engage with the *Charter* value might cause the decision-maker to reach a different decision or, at least, write a different set of reasons to justify their decision. Ultimately, the concern is to create "a bridge between fundamental and core values on the one hand, and the choices legislatures and executive government make on the other."[98]

Conclusion

To briefly recap, I argued in Part I that *Doré* has two independent aspects, one related to judicial review, the other related to administrative justice. My focus in this paper has been on the administrative justice aspect, which I have called the *Doré* duty. This is a duty to consider *Charter* values in administrative decision-making: I discussed the concept of *Charter* values in Part II. The *Doré* duty is best understood as a procedural duty: by reference to similar duties, I teased out the essential elements of this concept in Part III. In Part IV, I pulled the concepts of *Charter* values and procedural duties together to illustrate the administrative justice aspect of *Doré*: I explained the scope of the duty, in terms of the decisions to which it applies and the demands it places on administrative decision-makers.

Once the *Doré* duty is properly understood as a matter of legal doctrine, it can be properly debated. On the one hand, it is helpful to understand

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97 Lawrence Gene Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91:6 Harv L Rev 1212.

98 Sossin & Friedman, *supra* note 4 at 422. See also Cameron & Daly, *supra* note 96 at 182–186.

that proponents of the *Doré* duty are not interested in aggrandizing the *Charter*—*Doré* is not Miracle-Gro for the living tree. Nonetheless, there would be no harm in more carefully delineating *Charter* values (an exercise in which administrative decision-makers are well placed to take an active part). On the other hand, the *Doré* duty might be seen to be too lax for some settings—whereas a minister or front-line official cannot necessarily be expected to engage in a detailed *Charter* analysis in every case, it might be appropriate to impose more onerous requirements on adjudicative tribunals. Just as many have argued for the return of the proportionality test for the purposes of judicial review of alleged infringements of *Charter* rights by administrative decision-makers, so too others might urge or require competent administrative tribunals to apply the rigours of proportionality in their decision-making, certainly where *Charter* rights are engaged.[99]

These debates are for another day, however. The object of this paper has been to set out the *Doré* duty so as to better understand the administrative justice aspect of the *Doré* decision and the differing roles of *Charter* values and *Charter* rights. Even if the judicial review aspect of *Doré* is reformed, the administrative justice aspect should at least be preserved (and perhaps, for some sophisticated administrative decision-makers, made more demanding).

99 See e.g. *Lauzon*, *supra* note 83 at paras 140–148.