Engagement with Human Rights by Administrative Decision-Makers: A Transformative Opportunity to Build a More Grassroots Human Rights Culture

Dan Moore

TRENDS IN PUBLIC LAW jurisprudence increasingly require administrative decision-makers to engage with complex human rights concepts in exercising their discretion. This includes not only the *Charter* but also international human rights sources. The engagement with human rights that is expected of administrative decision-makers is demanding: it is broad in terms of the concepts and sources that could be implicated, flexible in how the concepts could affect the decision, and rigorous in the required analysis. It will likely prove challenging for decision-makers, the people who are subject to their decisions, and the legal community in general.

But there would be real benefits to meeting the challenge head-on. It will be argued that if this vision is realized, administrative proceedings will become an increasingly important venue for the contestation and interpretation of human rights. This amounts to a vision of a more grassroots and decentralized human rights culture in Canada, in which a wider range of individuals would have the opportunity to participate in structured, yet accessible, conversations about rights. Of course, realizing this vision in practice will be challenging. But if more voices are allowed to take part in debate about rights issues, democratic shortcomings in our rights culture could be rectified, and Canada's human rights jurisprudence could benefit from unexpected innovations.

LES TENDANCES DE LA jurisprudence en matière de droit public exigent de plus en plus des décideurs administratifs qu'ils tiennent compte, en exerçant leur pouvoir discrétionnaire, des concepts complexes en droits de la personne. Cela implique de puiser non seulement dans la *Charte*, mais également dans les sources des droits de la personne à l'échelle internationale. Cet engagement envers les droits de la personne auquel on s'attend de la part des décideurs administratifs est exigeant : il est vaste en termes de concepts et de sources susceptibles d'être en jeu encore que flexible dans la manière dont ces concepts pourraient influencer la décision, tout en imposant de la rigueur dans le processus d'analyse requis. Il y a fort à parier que cet engagement posera des difficultés pour les décideurs et les personnes qui font l'objet de leurs décisions ainsi que pour le milieu juridique en général.

Il y aurait cependant de réels avantages à relever ce défi à bras le corps. Ainsi, dans l'éventualité où cette vision se réalise un jour, les procédures administratives deviendraient un recours de plus en plus choisi pour la contestation et l'interprétation des droits de la personne. La culture des droits de la personne au Canada en serait ainsi plus accessible et décentralisée, et offrirait à un éventail élargi de justiciables la possibilité de participer à des conversations structurées, encore qu'accessibles, au

sujet de leurs droits. Certes, mettre cette vision en œuvre dans la pratique poserait quelques défis, cependant, s'il y avait davantage de voix au chapitre entourant les questions relatives aux droits, nous pourrions combler certaines lacunes de nature démocratique dans notre culture en matière de droits. À cet égard, la jurisprudence canadienne sur les droits de la personne pourrait grandement bénéficier d'innovations imprévues.

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INTRODUCTION

People have a cognitive bias to use the tools that are most visible to them, and lawyers are hardly immune to this.[1] When it comes to Canada's Constitution, the natural instinct of lawyers is to assume that litigation is how it is enforced and that the judiciary will be the Constitution's interpreter and applier. This bias is only natural: we learn about the law by studying court decisions, and the courts are, generally, the ultimate adjudicator of legal issues.

The first 35 years of the *Canadian Charter of Rights and Freedoms* (the *Charter*),[2] in my view, reflect the natural bias of the legal community towards a "judicial enforcement" model of constitutional implementation.[3]

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1 Abraham H Maslow, *The Psychology of Science: A Reconnaissance* (Chicago: Henry Regnery Company, 1966) (as Maslow observed, "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail" at 15–16).

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 See Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTLJ 624 (there "has been a tendency to view the judiciary as being the primary institution responsible for 'constitutional implementation'—that is, for securing and advancing the constitutional rights and values" at 625 [footnotes omitted]).

The *Charter* has played a role in tremendous changes to Canadian society, in areas as varied as criminal procedure and the civil rights of minority groups. But these changes have mainly been realized via judicial interpretation and application, and the remedial powers given to the judiciary to enforce *Charter* rights. While it is also true that the *Charter* has impacted government policy-making, even these impacts tend to have a clear link to the prospect that *Charter* rights will be "judicially enforced."

And yet, in recent years, the courts themselves seem to be pointing us in a new direction. Trends in public law jurisprudence — especially at the Supreme Court of Canada — suggest that in the future, administrative decision-makers will be increasingly required to engage with complex human rights concepts in exercising their discretion. This includes not only the *Charter* but also international human rights sources. The engagement with human rights that is expected of administrative decision-makers presents a challenge: it is broad in terms of the concepts that could be implicated, flexible in how the concepts could affect the decision, and rigorous in the required analysis.

I will argue that if this vision is realized, administrative proceedings will become an increasingly important venue for the contestation and interpretation of human rights. This amounts to a vision of a more grassroots and decentralized human rights culture in Canada. Such engagement with human rights at the "administrative grassroots" would supplement — but of course not replace — the independent remedial and interpretive role of the judicial branch. In a more grassroots human rights culture, administrative procedures would provide a unique venue for human rights debate and reasoning, in which a wider range of individuals would have the opportunity to participate in structured, yet accessible, conversations about rights.

Undoubtedly, realizing this vision in practice will be highly challenging. The trends discussed in this paper appear to apply to any administrative decision-maker whose decisions, in particular matters, are subject to judicial review. Consider the broad range of contexts where the law delegates discretionary powers to administrative agencies and public officials.

On the one hand, this decision-making can often occur in a more procedurally formal context, such as when discretionary powers have been delegated to an administrative agency with a certain degree of independence from government. Examples include labour and employment tribunals, the Immigration and Refugee Board, municipal boards, securities commissions, and human rights tribunals. Although these decision-making contexts are certainly less formal than the courts from a legal

perspective, many of the decision-makers have some level of legal training, as well as access to organizational resources to support them when novel legal issues arise.

On the other hand, administrative decision-making also occurs in a wide range of less formal situations, where a discretionary decision-making power is exercised by a Minister or lower level officials in a government department or agency. Examples include decisions by officers of the Canada Border Services Agency on whether to defer the enforcement of a removal order;[4] decisions about driver's licenses for motor vehicles; and decisions about the issuance, refusal, and revocation of passports. Administrative officials working in contexts such as these often do not have formal legal training and are expected to quickly make and document their decisions.

This paper arises from a conference in which participants were asked to speak about emerging issues in constitutional rights that could define the next 15 years of the *Charter*.[5] In my view, this particular emerging issue is both a tremendous challenge and a transformative opportunity for Canadian society. It is a challenge because meaningful and procedurally fair engagement with human rights will be difficult for the wide range of administrative decision-makers and the people who are subject to their decisions. However, it is also an opportunity to build a more accessible and innovative system of rights protection in Canada, because effectively realizing a grassroots human rights culture would open up human rights discourse and decision-making to a wider range of voices.

I. TRENDS IN PUBLIC LAW: HUMAN RIGHTS AND ADMINISTRATIVE DECISION-MAKING

This section will identify three trends in Canadian public law that increasingly require administrative decision-makers to engage substantively with human rights concepts. Each trend has the potential to make decision-making significantly more intricate and unpredictable.

The trends are based on three major public law decisions of the Supreme Court, which I will introduce here and discuss in more detail

4 See e.g. *Canada* (*Public Safety and Emergency Preparedness*) *v Shpati*, 2011 FCA 286, [2012] 2 FCR 133.

5 "The *Charter* and Emerging Issues in Constitutional Rights and Freedoms: From 1982 to 2032" (Conference delivered at the University of Ottawa Faculty of Law and Shaw Centre, 8–10 March 2017).

below. The first is *Baker v Canada (Minister of Citizenship and Immigration)*.[6] This 1999 decision was a judicial review in a context where a statutory provision afforded relatively open-ended discretion to the Ministerial delegate, who was an immigration officer. For this paper, the core holding was that the exercise of discretion by administrative decision-makers should be informed by "fundamental Canadian values, including those in the *Charter*,"[7] and "the values reflected in international human rights law."[8]

The second major decision is *Doré v Barreau du Québec*, a 2012 judicial review of a professional disciplinary decision. *Doré* outlined how administrative decision-makers should consider "*Charter* values" when exercising their discretion in particular matters, and established that courts should take a deferential approach when reviewing the decision-maker's consideration of *Charter* issues (*i.e.* the standard of review is reasonableness).[9]

The final decision is *Canada (Attorney General) v Bedford*,[10] which was issued in 2013. *Bedford* was a *Charter* challenge to criminal offences, so it did not directly concern administrative decision-making. I will focus on how *Bedford* clarified certain principles of fundamental justice under section 7 of the *Charter*—most importantly, the principle against overbreadth—and argue that the Court's approach could have major implications for the future role of administrative decision-makers.

A. First Trend: Requirement for Administrative Decision-Making to Reasonably Engage with *Charter* Rights and Values

The relationship between administrative decision-making and the *Charter* has been a difficult issue for many years,[11] but some basic principles have long been established. For example, because administrative decision-makers are government actors exercising powers pursuant to legislation, it is clear that they are subject to the *Charter* and must act consistently with

6 [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*].

7 *Doré v Barreau du Québec*, 2012 SCC 12 at para 28, [2012] 1 SCR 395 [*Doré*] citing *Baker*, *supra* note 6.

8 *Baker*, *supra* note 6 at para 70.

9 *Doré*, *supra* note 7 at paras 55–58.

10 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

11 See e.g. Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67:1 SCLR (2d) 391 at 396–403; Christopher D Bredt & Ewa Krajewska, "*Doré*: All That Glitters is Not Gold" (2014) 67:1 SCLR (2d) 339; Evan Fox Decent, "The Charter and Administrative Law: Cross-Fertilization in Public Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 169 at 181–89; *Doré, supra* note 7 at paras 26–27, 29, 33 (for articles cited therein).

it.[12] In exercising their discretion, decision-makers are required to decide "in accordance with the boundaries imposed by the statute, the principles of the rule of law and of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."[13]

What this means in practice has been a more difficult problem. How should decision-makers perform a substantive consideration of any relevant *Charter* issues? On judicial review, how should a court review the decision-maker's treatment of the *Charter* issues?

On the latter question, two approaches have co-existed in the Supreme Court's case law. One approach was for the Court to treat the matter as a *Charter* challenge to the action of the administrative decision-maker. This often led to a non-deferential assessment of whether the rights-infringing action was justifiable under section 1 of the *Charter* through the traditional *Oakes* analysis.[14] The potential remedies resulting from such an approach to judicial review included orders, under subsection 24(1) of the *Charter*, directing the government to nullify and/or rectify the decision(s) at issue.[15] However, in other cases, the Court would take an administrative law approach, and deferentially review the substantive reasonableness of the decision—a review which might include scrutiny of the way in which the *Charter* issues were taken into account.[16]

Recent decisions of the Supreme Court have sought to bring more clarity to these issues, although questions remain and the Court has not reached a clear consensus. The first relevant decision is *Doré*, in which the Court unanimously held that courts should follow the more flexible administrative law approach when performing judicial review of administrative decisions that implicate *Charter* issues.[17]

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12 See *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1077–78, 59 DLR (4th) 416 [*Slaight*]; *R v Conway*, 2010 SCC 22, [2010] SCR 765 [*Conway*] (cases cited therein at para 5; "*Slaight* established that any exercise of statutory discretion must comply with the *Charter* and its values" at para 41); *Doré*, *supra* note 7 at para 25.

13 *Conway*, *supra* note 12 at para 46 citing *Baker*, *supra* note 6. See also *Doré*, *supra* note 7 at para 24.

14 *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*]. For examples of such an approach to judicial review, see e.g. *Slaight*, *supra* note 12; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at paras 15–23, [2006] SCR 256 [*Multani*]; *United States v Burns*, 2001 SCC 7 at paras 37–38, [2001] 1 SCR 283.

15 See e.g. *Multani*, *supra* note 14 at paras 81–82; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 95–96, 151 DLR (4th) 577.

16 See e.g. *Lake v Canada (Minister of Justice)*, 2008 SCC 23, [2008] SCR 761 [*Lake*]; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772.

17 *Doré*, *supra* note 7 at paras 23–37.

The Court affirmed that the standard of review of correctness continues to apply if a "tribunal is determining the constitutionality of a law."[18] But where a court is reviewing a particular exercise of discretion by an administrative decision-maker and the decision had potential *Charter* implications that needed to be considered on a fact-specific basis, then the fact-specific nature of the inquiry and the expertise of the decision-maker in their particular area calls for deferential review on a reasonableness basis.[19] As the Court summarized: "[o]n judicial review, the question becomes 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."[20]

Effectively, the Court's decision confirms the general principle that "reasonable" decision-making by an administrative actor requires engagement with *Charter* values because such values are among those that underlie the law granting discretion to that state actor.[21] *Doré* seeks to build on this principle, by setting out a framework for how such engagement could work in practice. What is described is not a simple exercise. There are three main steps: the decision-maker must first "consider the statutory objectives" giving rise to the discretionary power; then assess how the decision may interfere with or otherwise implicate *Charter* values; and finally, "balance the severity of the interference of the *Charter* protection with the statutory objectives," with a view to deciding "how the *Charter* value at issue will best be protected in view of the statutory objectives."[22]

The next year, in *Divito v Canada* (*Public Safety and Emergency Preparedness*),[23] the Court generally affirmed the need for administrative decision-makers to consider *Charter* issues but did not need to apply the detailed framework for judicial review that was described in *Doré*. This case was a *Charter* challenge to the breadth of the Minister's discretion in the context of international offender transfer — specifically, in cases where a Canadian citizen is seeking transfer from penal custody in a foreign country to Canada, to serve the remainder of his or her sentence in the Canadian system. The appeal concerned the validity of the legislative scheme and was not a judicial review of the Minister's specific decision with respect to Mr.

18 *Ibid* at para 43.
19 *Ibid* at paras 43, 47, 52–58.
20 *Ibid* at para 57.
21 *Ibid* at para 24.
22 *Ibid* at paras 55–56.
23 2013 SCC 47, [2013] 3 SCR 157 [*Divito*].

Divito. Nevertheless, both the majority and concurring reasons indicated that in the context of a particular offender transfer decision, the Minister should take into account any impacts on a Canadian citizen's interests under section 6 of the *Charter*.[24] Importantly, all Justices appeared to agree that judicial review of the Minister's decision would be done on a reasonableness standard, including where the decision required *Charter* considerations.[25]

More recently, a narrow majority of four Justices applied the *Doré* framework in *Loyola High School v Quebec* (*Attorney General*), affirming that the *Doré* approach applies to judicial review of "discretionary administrative decisions that engage the *Charter*."[26] A partially concurring minority of three Justices agreed that administrative decision-makers must consider and balance *Charter* impacts but did not specifically apply the approach to judicial review that had been set out in *Doré*. Instead, the minority performed a proportionality analysis under section 1 that overlapped significantly with *Doré* but did not mention either that case or *Oakes*.[27]

The majority in *Loyola* attempted to clarify several specific issues with respect to *Doré*. First, the latter decision mainly referred to "*Charter* values," but at other times suggested that decision-makers should balance the impact on "*Charter* protections" or "*Charter* rights."[28] The apparent inconsistency has been the subject of some criticism, as has the uncertain nature of the term "*Charter* values."[29]

In *Loyola*, the majority indicated that the broadest-possible approach should be taken: "*Doré* requires administrative decision-makers to proportionately balance the *Charter protections—values and rights*—at stake

24 *Ibid* at paras 49, 86 citing *Doré*, *supra* note 7 (the majority reasons of six Justices specifically quoted the approach to judicial review set out in *Doré*, while the concurring reasons of three Justices cited *Doré* only for the more general point that "the Minister's discretion must be exercised with due regard for the s. 6(1) *Charter* rights at stake" at para 86).

25 *Divito*, *supra* note 23 at paras 49, 85–86.

26 2015 SCC 12 at para 35, [2015] 1 SCR 613 [*Loyola*].

27 See *ibid* ("[h]owever one describes the precise analytical approach taken, the essential question is this: did the Minister's decision limit Loyola's right to freedom of religion proportionately—that is, no more than was reasonably necessary?" at para 114).

28 *Doré*, *supra* note 7 ("*Charter* values" are mentioned at paras 23–24, 26, 29, 32, 34–37, 39–40, 42–43, 47, 51–55, 57; "*Charter* protections" are mentioned at paras 42, 45, 57; and "*Charter* rights" are referred to paras 6, 57).

29 See commentary on the nature of *Charter* values in Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561 at 561–63, 567–69; Sossin & Friedman, *supra* note 11 at 403–23; Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) 67 SCLR (2d) 361; Bredt & Krajewska, *supra* note 11.

in their decisions with the relevant statutory mandate."[30] *Charter* values are "those values that underpin each right and give it meaning."[31] Therefore, the majority suggests that consideration of *Charter* values is supposed to aid the decision-maker in performing a rigorous proportionality analysis because it allows the decision-maker to purposively assess the degree to which *Charter* protections would be infringed by a specific decision or action.[32]

The second area of attempted clarification was with respect to the proportionality analysis itself. Much commentary reacting to *Doré* questioned whether the deferential administrative law approach can bring the same rigour to *Charter* issues as the *Oakes* proportionality test.[33] The majority's reasons in *Loyola* emphasize that the proportionality analysis by the decision-maker should be "robust":[34] "the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue."[35] Despite the requirement for a careful proportionality analysis, the approach to judicial review is still one of deference to the decision-maker's expertise. As such, "under *Doré* there may be more than one proportionate outcome"; the standard of review is reasonableness and not correctness.[36]

Shortly before this article was finalized, the Supreme Court released its decision in *Ktunaxa Nation v British Columbia* (*Forests, Lands and Natural Resource Operations*).[37] This decision is a judicial review of a provincial Minister's decision to approve a development project. The Ktunaxa Nation had raised a number of concerns with the project, including its impact on their religious beliefs and practices. Puzzlingly, the majority decision does not reference *Doré*, or otherwise indicate that it is taking an administrative approach to reviewing the *Charter* aspects of the Minister's decision. Instead, the majority concludes that the Ktunaxa's claims did not fall

30 *Loyola*, *supra* note 26 at para 35, citing *Doré*, *supra* note 7 [emphasis added].

31 *Loyola*, *supra* note 26 at para 36.

32 *Ibid*.

33 See e.g. Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016) 66:1 UTLJ 121 at 165–68; Macklin, *supra* note 29 at 571–73, 576 ("the Court in *Doré* equips administrative decision-makers with a Charter-lite methodology that is approximate, vague and incomplete, starting with its problematic invocation of Charter 'values,' and ending with its account of proportionality" at 580–81).

34 *Loyola*, *supra* note 26 at paras 3, 40.

35 *Ibid* at para 4; see also *ibid* at para 39.

36 *Ibid* at para 41.

37 2017 SCC 54, [2017] SCJ No 54 [*Ktunaxa Nation*].

within the protected scope of the *Charter* right to freedom of religion.[38] The majority does not discuss the issue of standard of review in the course of their *Charter* analysis, which arguably amounts to a *de novo* consideration of the *Charter* issues.[39] In contrast, the partial concurrence from Justices Moldaver and Côté expressly follows *Doré* and *Loyola* in reviewing the Minister's decision on a reasonableness basis.[40]

Given the majority's omission of any reference to the framework set out in *Doré* and *Loyola*, it cannot be assumed that the majority meant to overrule those decisions, and they should be reconciled if possible. One potential way to distinguish *Doré* and *Loyola* from the majority's decision in *Ktunaxa Nation*, is that in the former two cases, the impact on the *Charter*-protected fundamental freedom was apparently uncontested. The reasonableness standard in *Doré* and *Loyola* was thus applied to the decision-maker's proportional balancing between the *Charter* protections and the statutory objectives. As the Court explained in *Doré*, the judiciary owes deference to this balancing not because administrative decision-makers have comparative expertise in the law itself, but because they have a "distinct advantage…in applying the *Charter* to a specific set of facts and in the context of their enabling legislation."[41] In contrast, a key issue in *Ktunaxa Nation* could be characterized as a substantive question of law: what is the scope of the *Charter* right to freedom of religion, and do the Ktunaxa's claims fall within it? This led the majority to perform a novel legal analysis of the scope of the *Charter* right and ultimately conclude that the Minister's approval of the project did not infringe the Ktunaxa's *Charter*-protected interests.

One way to understand the majority reasons in *Ktunaxa Nation*, therefore, is that on the threshold legal question of whether an administrative decision implicates a *Charter* protection, courts owe little to no deference to the conclusions of the decision-maker. However, if a *Charter* protection is indeed implicated, then the *Doré* framework applies and requires a deferential review of the decision-maker's proportional balancing. Not only

38 *Ibid* at paras 8, 60–75.

39 The Minister did not explicitly address the freedom of religion claim by the Ktunaxa in his written reasons. However, the partially concurring Justices locate, in the Minister's reasons, an implicit consideration of the *Charter* claims, which they use as the basis for their deferential review of the Minister's decision on the *Charter* issues. See *ibid* ("the Minister addressed the "substance" of the Ktunaxa's s. 2(*a*) right, and…it is implicit from the Minister's reasons that he proportionately balanced the *Charter* protections at stake for the Ktunaxa with the relevant statutory objectives" at para 139).

40 *Ibid* at paras 120, 136.

41 *Doré, supra* note 7 at para 48.

would this reconcile the majority's approach with the reasons in *Doré* and *Loyola*, but it would also suggest common ground between the majority in *Ktunaxa Nation* and the partially concurring Justices. In their reasons, Moldaver and Côté indicate that they are applying the *Doré* framework *only after* they depart from the majority on the threshold legal issue, and conclude that the Minister's decision infringed freedom of religion.[42] However, with only limited time available to consider *Ktunaxa Nation* and given the lack of explanation in the majority's reasons, this analysis is tentative.[43]

To summarize, recent Supreme Court decisions have built on *Baker*, confirming that administrative decision-makers are expected to engage substantively with *Charter* issues. Where appropriate, they should perform a meaningful proportionality analysis that balances the statutory objectives with the potential impact on the *Charter*. On judicial review, courts are to take a deferential approach and apply a reasonableness standard to the decision-maker's *Charter* considerations, at least in relation to the decision-maker's balancing analysis. A majority of the Court has so far supported the analytical framework that was first set out in *Doré*—but even the Justices in the minority in *Loyola* seemed to agree that judicial review of such decisions that engage the *Charter* should scrutinize the reasonableness of the decision-maker's proportionality analysis. The recent decision in *Ktunaxa Nation* illustrates that many essential questions still remain, especially on the issue of how courts should approach the threshold legal issue of whether a particular decision impacts *Charter* protections.

For administrative decision-makers, a complex analytical framework is emerging from these decisions, especially as described by the majority in *Loyola*. This analysis begins by identifying the *Charter* issues at stake and assessing the degree of impact on *Charter* protections in light of the values that "underpin" the relevant rights. Once these initial questions are dealt with, the decision-maker must then balance the identified impacts on *Charter* protections against the statutory objectives underlying the grant of discretion, and seek to minimize the impact on *Charter* protections while also fulfilling the broader objectives. Presumably, this substantive

42 *Ktunaxa Nation*, *supra* note 37 at paras 121–34 (first, the concurring Justices analyze the scope of the *Charter* protection), 135–55 ("[h]aving resolved the preliminary issue that the Minister's decision to approve the development infringes the Ktunaxa's s. 2(*a*) right, I turn now to the question of whether the Minister's decision was reasonable" at para 135).

43 See e.g. Leonid Sirota, "Doré's Demise? What do the Supreme Court's Latest Decisions Mean for Judicial Review of Administrative Decisions that Implicate the Charter?" (12 November 2017), *Double Aspect* (blog), online: <doubleaspect.blog/2017/11/12/dores-demise> (for a brief analysis on the standard of review of the Minister's decision).

and "robust" proportionality balancing should be reflected in any reasons provided. This raises a number of substantive and practical challenges that are further discussed in Part II(A), below.

B. Second Trend: Role of International Human Rights Sources in Administrative Decision-Making

The balancing of *Charter* protections is not the only human rights–related consideration that can inform administrative decision-making and increase its complexity. International human rights sources can also play a role in defining the values that underlie a grant of discretion, and therefore, in defining the substantive content of that discretion. Just as the *Charter* jurisprudence directs decision-makers to consider "values" and "protections," courts have been similarly omnivorous with respect to international human rights. Their decisions can refer to a wide variety of international sources, not all of which are meant to be binding as a matter of international law.

To provide some background on the relationship between international law and domestic Canadian law, the presumption of conformity is a well-established principle of statutory interpretation: courts will interpret legislation as though the legislature intended it to comply with Canada's binding international obligations, absent a clear intention to the contrary.[44] Canada is a State Party to a number of international human rights instruments that can be a source for interpreting domestic Canadian law. These include the two international covenants, five of the other core UN human rights treaties, and five optional protocols to those treaties.[45] They also include certain binding human rights obligations arising from the inter-American human rights system, as well as International Labour Organization conventions that Canada has ratified.[46]

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44 See e.g. *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 137, 166 DLR (4th) 193; *Daniels v White and the Queen*, [1968] SCR 517 at 541, 2 DLR (3d) 1; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 48, [2015] 3 SCR 704; *R v Hape*, 2007 SCC 26 at paras 53–54, [2007] 2 SCR 292.

45 See e.g. Government of Canada, "Human Rights Treaties" (14 November 2017), online: <www.canada.ca>.

46 For a recent example of these sources being relied on by a Canadian court (albeit in the interpretation of the *Charter* rather than a statute), see *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 65, 70 (the two international covenants), 66 (inter-American obligations), 67 (International Labour Organization Convention No 87), [2015] 1 SCR 246 [*Saskatchewan Federation*]. See also *Divito*, *supra* note 23 at paras 24–27; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 136–50, [2014] 3 SCR 176 [*Kazemi*].

However, the field of international human rights law extends well beyond the text of binding instruments. The international community continually produces a vast amount of documents that are not formally binding on Canada in and of themselves, including expert commentary; non-binding guidelines; resolutions, statements, or declarations of international bodies or conferences; decisions of international judicial bodies that are not binding on Canada; and treaties that Canada has not ratified. Compared to the presumption of conformity with Canada's binding obligations, the role of non-binding sources *vis-à-vis* domestic Canadian law is less clear, but it seems that these sources can sometimes be considered as one contextual element in interpreting legislative provisions.[47]

In *Baker*, the potential role of international human rights sources in interpreting and applying domestic Canadian law was extended to the interpretation of the substantive content of discretionary administrative powers. *Baker* was a judicial review of a humanitarian and compassionate (H&C) decision in the immigration context. As part of its interpretation of the factors that should guide the exercise of this discretion, the majority indicated that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[48]

In identifying the relevant international norms, the majority referred to the "values and principles" of the *Convention on the Rights of the Child*[49] (a treaty binding on Canada) as well as the principles articulated in the preamble to the 1959 *Declaration of the Rights of the Child*[50] (a non-binding declaration proclaimed by a resolution of the UN General Assembly). The majority summarized the implications of these sources as follows: "[t]he principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show

47 Jutta Brunnée & Stephen J Toope, "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart, 2004) 357 at 383–84. For possible examples of the contextual use of non-binding international sources in the interpretation of legislation, see *114957 Canada Ltée (Spraytech, Société d'Arrosage) v Hudson (Town)*, 2001 SCC 40 at paras 30–32, [2001] 2 SCR 241; *Kazemi, supra* note 46 at para 86.

48 *Baker*, *supra* note 7 at para 70.

49 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, ratified by Canada 13 December 1991) [*CRC*].

50 *Declaration of the Rights of the Child*, GA Res 1386(XIV), UNGAOR, 14th Sess, Supp No 16, UN Doc A/4354 (1959) 19 [*Declaration*].

the values that are central in determining whether this decision was a reasonable exercise of the H & C power."[51]

Since then, international human rights sources have been used on several occasions—although not often—to interpret the substantive content of discretionary administrative powers. In a 2015 decision on the content of the H & C decision, the Supreme Court once again referred to the *Convention on the Rights of the Child*, but this time also cited non-binding guidelines from the UN High Commissioner on Refugees.[52]

Such sources have also been referred to in the extradition context, in at least three ways. First, the Minister of Justice's discretion to surrender an individual to the requesting state has been interpreted in light of "Canada's *non-refoulement* obligations" in international refugee law.[53] Second, the Supreme Court has also applied the children's rights principles identified in *Baker* to the judicial review of extradition decisions, concluding that because "international instruments touching on the rights of children inform the role the best interests of the child should play in the Minister's surrender decision," the Minister should be "attentive to children's interests and rights" and "give careful consideration to the best interests of a child who may or will be impacted by an individual's extradition."[54] Third, in a recent extradition decision, the Court relied extensively on a decision of the European Court of Human Rights—which is not directly binding on Canada as matter of international law—to develop factors to be considered by the Minister in assessing the reliability of diplomatic assurances.[55]

A final example is a 2016 *habeas corpus* decision from the Alberta Court of Queen's Bench.[56] The applicants challenged decisions made by correctional officials to place them in administrative segregation. The applicants referred to the UN's *Standard Minimum Rules on the Treatment of Prisoners* (the *Nelson Mandela Rules*) as part of their submissions to the Court. Although the *Nelson Mandela Rules* are non-binding as a matter of

51 *Baker*, *supra* note 6 at para 71 citing *CRC*, *supra* note 49 and *Declaration*, *supra* note 50.

52 *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 37–41, [2015] 3 SCR 909 citing *CRC*, *supra* note 49, art 3(1) and UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009.

53 *Németh v Canada (Justice)*, 2010 SCC 56 at para 58, [2010] 3 SCR 281.

54 *MM v United States of America*, 2015 SCC 62 at para 148, [2015] 3 SCR 973.

55 *India v Badesha*, 2017 SCC 44 at paras 46–52, [2017] SCJ No 44 citing *Othman (Abu Qatada) v The United Kingdom*, Application No 8139/09, [2012] I ECHR 159, (2012) 55 EHRR 1.

56 *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440, 41 Alta LR (6th) 29 [*Hamm*].

international law and have not been formally incorporated into any Canadian laws, the most recent version of the *Nelson Mandela Rules* was adopted through a resolution of the UN General Assembly in December 2015.[57] The Court recognized the non-binding nature of the *Nelson Mandela Rules*, but considered the general principles reflected therein relevant to its substantive review of the reasonableness of the officials' decisions in relation to the applicant's segregation.[58]

Although international human rights sources have not been frequently relied on in the elaboration of discretionary powers, the clear principle that the sources *can* play a role is a second trend increasing the potential for administrative decision-making to require substantive engagement with human rights concepts. The approach suggested by *Baker* is open-ended and flexible in several ways: in terms of the sources that can be referred to (binding or non-binding); the norms that can be drawn from these sources ("values" and "principles"); and the role that the international norms can play in the interpretation of the discretion (international sources "help show the values that are central").

The flexibility of this approach, combined with the wide variety of international sources available on almost any given issue, gives the affected person a broad selection of norms and commentary to rely on as potentially relevant to the exercise of discretion in a particular matter. This has the potential to place significant burdens on administrative decision-makers and accordingly raise the complexity of their decision-making processes.

C. Third Trend: Reliance on Discretionary "Safety Valves"

A final trend is the increasingly central role of discretionary "safety valves" in ensuring that legal regimes can be applied to a wide variety of individuals while respecting their *Charter* rights. Recent case law suggests that in the future, administrative decision-makers will be increasingly expected to make decisions that have direct implications for the *Charter* rights of the person affected—especially the "right to life, liberty and security of

57 See *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UNGAOR, 70th Sess, Supp No 49, UN Doc A/70/49 (2016).

58 *Hamm*, *supra* note 56 at paras 91–95 ("[c]ourts are entitled to make limited use of international standards such as the *Mandela Rules*....I conclude that, while the *Mandela Rules* are not determinative, they encapsulate an international standard in relation to the treatment of prisoners which Canada acknowledges; those rules inform, but do not dictate, the result in a Canadian *habeas corpus* application" at paras 92, 94 [footnotes omitted]).

the person" under section 7. While the first two trends were about *how* decision-makers should take human rights into account, this trend could affect *what kinds* of human rights are at stake in administrative decisions, and how important these decisions will be for the overall integrity of legislative schemes.

Where a legislative scheme is challenged because of its potential to infringe *Charter* rights in individual cases, courts have, on numerous occasions, upheld the scheme on the basis that it includes a "safety valve," or administrative discretion to consider individual circumstances and tailor the scheme's impact accordingly. One example is the *Extradition Act*,[59] which is a *prima facie* infringement of the subsection 6(1) *Charter* right of Canadian citizens to remain in Canada because it allows for the extradition of Canadian citizens to foreign states. However, the Supreme Court held that this infringement is generally justifiable under section 1, and the Minister has discretion to refuse extradition in individual cases if the extradition of a particular citizen would not be a justifiable limit of subsection 6(1).[60]

Another example is the *Controlled Drugs and Substances Act* (*CDSA*),[61] which includes blanket criminal prohibitions on possessing certain controlled substances. The Supreme Court has recognized circumstances where a blanket application of these prohibitions, with no exceptions, would have no connection to the health and safety objectives of the *Act*, or potentially even undermine those objectives, thus infringing section 7 of the *Charter*.[62] Despite the potential for broad criminal prohibitions to result in section 7 violations in particular circumstances, such prohibitions have, nevertheless, been upheld under the *Charter* in light of the Minister of Health's discretion to allow tailored exemptions from these prohibitions where appropriate. In *PHS*, the Supreme Court recognized the important role of the Minister's discretion as a "safety valve" to prevent arbitrary or otherwise unconstitutional applications of the blanket prohibitions in individual cases:

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59 SC 1999, c 18.

60 *United States of America v Cotroni*, [1989] 1 SCR 1469, 48 CCC (3d) 193; *Lake*, *supra* note 16 at paras 28–30, 37.

61 SC 1996, c 19.

62 See e.g. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 3 SCR 134 [*PHS*] (the decision to refuse to extend an exemption for patients and staff of a particular medical facility was arbitrary because there was no connection to the legislation's health and safety objective); *R v Smith*, 2015 SCC 34, 2 SCR 602 (the lack of an exemption to allow certain individuals to possess "non-dried forms of medical marihuana" was arbitrary because there was no connection to the legislation's health and safety objectives).

> If the Act consisted solely of blanket prohibitions with no provision for exemptions for necessary medical or scientific use of drugs, the assertions that it is arbitrary, overbroad and disproportionate in its effects might gain some traction....
>
> The availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects.
>
> I conclude that while s. 4(1) of the *CDSA* engages the s. 7 *Charter* rights of the individual claimants and others like them, it does not violate s. 7. This is because the *CDSA* confers on the Minister the power to grant exemptions from s. 4(1) on the basis, *inter alia*, of health. Indeed, if one were to set out to draft a law that combats drug abuse while respecting *Charter* rights, one might well adopt just this type of scheme—a prohibition combined with the power to grant exemptions....[63]

The Court indicated that, "as with all exercises of discretion, the Minister's decisions must conform to the *Charter*," and that "where s. 7 rights are at stake, any limitations imposed by ministerial decision must be in accordance with the principles of fundamental justice."[64] Unfortunately, because the Court released *PHS* six months before *Doré*, it did not address how the *Doré* framework might apply to ministerial decisions under the CDSA where the right to life, liberty and security of the person is implicated.

Recent jurisprudential developments might make the role of discretionary "safety valves" in preventing *Charter* violations even more important. As noted above, the Supreme Court's decision in *Bedford* clarified three principles of fundamental justice: those against arbitrariness, overbreadth, and gross disproportionality.[65] The Court made clear that the section 7 principles of fundamental justice are focused on individual interests, while countervailing societal interests or benefits are to be taken into account in the section 1 analysis.[66] According to the Court, "a grossly disproportionate, overbroad, or arbitrary effect on [the section 7 rights of] one person is sufficient to establish a breach of s. 7."[67]

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63 *PHS*, *supra* note 62 at paras 109, 113–14.

64 *Ibid* at paras 117, 128 ("[i]f the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally" at para 117).

65 *Bedford*, *supra* note 10 at paras 110–21.

66 *Ibid* at paras 121–23. See also *Carter v Canada* (*Attorney General*), 2015 SCC 5, [2015] 1 SCR 331 at paras 79–82 [*Carter*].

67 *Bedford*, *supra* note 10 at para 123.

The Court's articulation of overbreadth is of particular interest. According to the Court, the principle against overbreadth is relevant where a law "is rational in some cases, but…overreaches in its effect in others."[68] A law will be unconstitutionally overbroad, and thus a violation of section 7, if its application to even one individual would result in a non-trivial infringement of the individual's right to life, liberty and security of the person in circumstances where the infringement has no connection to the objective for the law.[69] Therefore, even if a law is rational or "non-arbitrary" in nearly all of the circumstances in which it can impose limits on section 7 interests, the relatively small number of circumstances in which it *will* impose arbitrary limits are sufficient to make the law overbroad and thus contrary to section 7.[70]

This individual-focused approach has important implications for the *Charter* viability of legislation. Although the Court signalled in *Bedford* and *Carter* that it might be possible to justify section 7 infringements under section 1 because of broader societal objectives, successful justifications of this nature have, so far, been rare.[71] When governments are crafting a legislative scheme that may infringe the right to life, liberty and security of the person, an individual-focused approach to section 7 means they have two main, non-exclusive, options to avoid overbreadth:

1. Governments can try to avoid any circumstance where the provisions of the law could require arbitrary impacts on an individual's section 7 interests, by carefully delineating the group of individuals who may be impacted, and minimizing the impact on section 7 rights; *and/or*
2. Governments can include a discretionary "safety valve" to allow the application of the scheme to be tailored—*e.g.* through administratively granted exemptions—if the scheme's impact on the section 7 rights of a particular individual would be arbitrary.

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68 *Ibid* at para 113.

69 *Ibid* at para 112. See also *Carter*, *supra* note 66 at para 85.

70 See e.g. *Carter*, *supra* note 66 ("[l]ike the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population….The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled" at para 85). See also *R v Michaud*, 2015 ONCA 585 at para 72–79, 127 OR (3d) 81 [*Michaud*].

71 See *Bedford*, *supra* note 10 at para 129; *Carter*, *supra* note 66 at para 95. See *Michaud*, *supra* note 70 at paras 81–145 (a case where an infringement of section 7 was found on the basis of overbreadth, but the infringement was held to be justified under section 1).

Several cases post-*Bedford* have demonstrated how a discretionary "safety valve" can help to prevent unconstitutional overbreadth. In two decisions, the Federal Court upheld provisions in the *Immigration and Refugee Protection Act* that limit eligibility for a pre-removal risk assessment.[72] One of the main factors underlying the Federal Court's decision was the residual discretion of removal enforcement officers to defer the removal if there is new evidence to suggest a section 7 *Charter* violation if the individual is removed from Canada.[73] In *Atawnah*, the Federal Court of Appeal explicitly indicated that its decision to uphold the impugned provisions under section 7 of the *Charter* was based on the "safety valves" in place near the end of the removal process.[74]

To conclude, the "saving" role of administrative "safety valves" is the final trend giving administrative decision-makers a more prominent role in the interpretation and application of human rights. Developments in the section 7 case law suggest that administrative discretionary procedures could become an even more important policy tool to save legislative regimes from overbreadth issues. In exercising such "safety valve" discretionary powers, a key task for decision-makers will be to consider the potential impacts of a scheme on the section 7 interests of particular individuals and tailor those impacts to avoid arbitrariness while still serving the broader statutory objectives. A major question for the Court to clarify in the coming years will be how decision-makers and courts are to apply the *Doré* and *Loyola* framework in the section 7 "safety valve" administrative context: where the relevant *Charter* protections are those under section 7, thus implicating both the right to life, liberty and security of the person, and potentially the principles of fundamental justice as well.

II. A NEW MODEL OF RIGHTS IMPLEMENTATION

The three trends outlined above, when combined, have the potential to place significant pressures on Canadian administrative decision-makers. They are now subject to an increasingly clear requirement to engage with

72 SC 2001, c 27, s 112.

73 *Peter v Canada* (*Public Safety and Emergency Preparedness*), 2014 FC 1073 at paras 86, 95–127, 84 Admin LR (5th) 1; *Atawnah v Canada* (*Public Safety and Emergency Preparedness*), 2016 FCA 144, 397 DLR (4th) 177, aff'g 2015 FC 774, 31 Imm LR (4th) 169 [*Atawnah* FCA].

74 *Atawnah* FCA, *supra* note 73 ("the supervisory role of the Federal Court, together with the ability of the Minister to exempt an applicant from the application of paragraph 112(2)(b.1) of the Act, acts as a "safety valve" such that the PRRA bar under review is not overbroad, arbitrary or grossly disproportionate" at para 23).

a wide range of human rights ideas in a manner that is flexible, substantive, and rigorous. Whether they are engaged in the kind of proportionality balancing described in *Doré* and *Loyola*, taking into account international values and principles as in *Baker*, or acting as a "safety valve" to prevent overbreadth, administrative decision-makers seem poised to play a central role in elaborating human rights and applying them to everyday situations.

As this section will explain, realizing this vision of human rights-informed administrative decision-making poses tremendous challenges for various groups, such as the officials involved in the exercise of administrative discretion, the members of the public who are subject to decisions, and the legal community in general. In trying to meet these challenges, there are real risks to the fairness, effectiveness, and coherence of each administrative regime and Canada's legal system as a whole. However, successfully navigating these challenges and risks could come with a great reward. Empowering administrative decision-makers—and, therefore, the broader public—to more regularly engage with human rights is a transformative opportunity, because it could open up the interpretation and application of human rights in Canada to a wider range of perspectives.

A. Tremendous Challenges

In several ways, the consideration of human rights concepts that has been mandated by the courts will significantly increase the complexity of administrative decision-making processes. This section will first discuss the difficulties inherent in characterizing the relevant *Charter* and international human rights concepts before turning to the challenges for administrative decision-makers in applying those concepts to the decision at hand.

Clearly, identifying and fully understanding the relevant human rights is a challenge in many cases. Decision-makers must engage in a purpose-driven analysis of *Charter* rights *and* values. For some provisions of the *Charter*, courts have stated some underlying values; presumably, administrative decision-makers are expected to have some familiarity with this jurisprudence.[75]

But beyond the judicially-established values, it is far from clear what range of *Charter* values may exist and how they may be broader than—or different from—the actual rights set out in the text of the *Charter*. Many

75 See e.g. in the context of freedom of expression, *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30, [2007] 2 SCR 610 ("the values protected by the free expression guarantee: individual self-fulfilment, truth seeking and democratic participation" at para 34).

questions are unsettled in this regard. For example, how does the analysis in relation to *Charter* values reflect or incorporate the principles of fundamental justice that the courts have recognized under section 7? Does the set of *Charter* values include concepts that are commonly referred to in rights discourse but are not explicitly referenced in the enumerated rights of the *Charter*, such as personal autonomy, human dignity, rule of law, accommodation, or the communal rights of minorities (outside of the language context)?[76]

Even where a decision-maker is simply trying to take into account a *right* rather than a value—*e.g.* where a straightforward reference to "freedom of expression" or "liberty" seems to capture the *Charter* protection implicated by the decision—this analysis will not be straightforward. The mere text of a *Charter* right is only the beginning of a meaningful *Charter* analysis. To state the obvious, the provisions of the *Charter* are drafted in a way that is intentionally open-ended and high-level, allowing them to be interpreted purposively and to remain relevant as time passes.[77] Through litigation, the legal community has elaborated on the textual *Charter* rights with purposes, principles, and multi-part tests. Even though *Doré* and *Loyola* encourage a more flexible approach to *Charter* reasoning in administrative procedures as compared to the judicial context,[78] one might reasonably expect a legally appropriate analysis of *Charter rights* to make use of some elements of the existing jurisprudence and established tests.[79] Furthermore, *Ktunaxa Nation* may suggest that courts will apply a correctness standard to the threshold legal question of whether a *Charter* right is implicated by a particular administrative decision. If that is the case, then "correct" administrative decision-making could require careful

76 See *Oakes*, *supra* note 14 (the following "values and principles essential to a free and democratic society" are articulated in the context of the section 1 analysis: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society" at para 64). See generally Sossin & Friedman, *supra* note 11 at 409–20; Horner, *supra* note 29.

77 See e.g. *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 509, 24 DLR (4th) 536; *Saskatchewan Federation*, *supra* note 46.

78 *Doré*, *supra* note 7 at para 37; *Loyola*, *supra* note 26 at para 42.

79 For example, any analysis with respect to an impact on section 8 *Charter* rights would seem legally incorrect if it did not reflect the fundamentals of the jurisprudence. The mere text of section 8 does not contain the most basic principles for this right, such as the notion that the core purpose is the prevention of unjustified intrusions by the state on individual privacy interests, and the idea that this right protects "people, not places." (See *Hunter v Southam Inc*, [1984] 2 SCR 145 at 159, 11 DLR (4th) 641; *R v Dyment*, [1988] 2 SCR 417, 55 DLR (4th) 508).

reference to *Charter* jurisprudence in certain circumstances, especially where the novel nature of a claim makes it arguable that the claim falls outside the scope of *Charter* protections.

Where a decision-maker is asked to engage with international human rights norms, the task facing him or her could be even more difficult. As described above, the international human rights community produces a vast galaxy of normative documents, with varying degrees of "bindingness" or authoritativeness. To rigorously engage with international norms and assign them the appropriate weight in the overall analysis, the decision-maker will need to determine the legal status of each document. Is it a treaty that can be binding on states? Is it a document intended to set out non-binding best practices? Or is it persuasive commentary about the obligations of states? If it is a potentially binding document, has Canada ratified or acceded to it? If it is non-binding, has Canada expressed a view about it? If it is persuasive commentary, just how persuasive or authoritative is it, and does it relate to obligations that apply to Canada?[80]

The challenges identified so far relate only to the identification and characterization of the relevant human rights concepts. Even if an administrative decision-maker has properly delineated the relevant concept(s), he or she must still relate these concepts to the decision at hand. Fully realizing the approach set out in *Doré*, *Loyola*, and *Baker* requires a robust and purposive analysis by decision-makers.[81]

This kind of analysis has proven difficult for Canadian courts, even in appellate bodies where judicial actors have the benefit of more time to deliberate, more fully developed adversarial pleadings, and often the assistance of expert witnesses or interveners.[82] In the administrative context, decision-making occurs in a less formal manner and with fewer supporting resources. Further, many administrative decision-makers are not lawyers and have little or no legal training. They often have little time

80 The majority decision in *Kazemi*, *supra* note 46 at paras 138–48, illustrates how meaningful engagement with international sources requires contextualization and prioritization. The Court was provided with a wide variety of non-binding sources on the interpretation of an international norm binding on Canada—specifically, Article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 25 June 1987, ratified by Canada 24 June 1987). The majority's interpretation of Article 14, and overall section 7 *Charter* analysis, turned on a careful assessment of how much weight to give to the various sources.

81 See also Macklin, *supra* note 29 at 571–73.

82 With respect to the challenges posed by international legal sources, see e.g. *Saskatchewan Federation*, *supra* note 46 at paras 64–71 (the majority cited a wide variety of international sources), 150–60 (the dissent raised serious concerns about the use of international law).

to make complex decisions and prepare written reasons, and they do so without the benefit of a wholly adversarial process where legal counsel have fully litigated the constitutional issues. Therefore, for both the decision-makers and the persons affected by their decisions, meaningful engagement with *Charter* values and the wide range of international sources can be expected to be truly challenging.

B. Real Risks

The challenges identified above flow from not only the undeniable complexity of the human rights analysis envisioned by the courts, but also the resource and time constraints on the work of administrative decision-makers. These challenges could pose real risks to the fair and effective implementation of administrative regimes. Five are discussed below.

The first risk is to procedural fairness. The range of human rights sources that decision-makers may need to engage with, and the intricate nature of the analysis they may need to perform, could, in certain cases, limit the ability of the person affected to fully comprehend the issues at stake.[83] If so, the person may not have been given a fair opportunity to participate in the process and have his or her perspective taken into account.[84] Furthermore, given resource constraints within administrative tribunals, it may be difficult to perform a meaningful human rights analysis and then adequately communicate it in the written reasons provided by some decision-makers. This difficulty could compromise the ability of the person affected to understand the decision and the ability of courts to engage in fully informed judicial review.[85]

A second, related risk is with respect to access to justice. Administrative processes are often designed to be less formal in their procedure and simpler in terms of the substance. This can allow individuals to have their case considered without the expense of retaining counsel and without the procedural complexity and delays that can arise from more formal court processes. Integrating deeper human rights analysis into decision-making

83 Sossin & Friedman, *supra* note 11 at 394.

84 See *Baker*, *supra* note 7 ("the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure…with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" at para 22).

85 See *ibid* at paras 35–44. On the importance of clear reasons, see Sossin & Friedman, *supra* note 11 at 428–29.

could make it intimidatingly difficult for people to prepare submissions for an administrative process and thereby detract from the public accessibility of the process.

Third, the analysis that may be required with respect to human rights issues (in particular the wide range of concepts and sources that could be involved), could increase the amount of time spent on certain matters and thus strain the limited resources of administrative tribunals even further.

A fourth risk is to the predictability of decision-making. Increasing complexity could lead to more variation between decision-makers in their approach to the issues, and therefore, in outcomes. Especially where international norms might be relevant, the very issues at stake in a particular decision could depend greatly on which sources the person affected chooses to provide to the decision-maker. Truly substantive engagement with the sources that happen to be brought forward in a particular matter could lead to widely varying outcomes under a particular administrative scheme, even between matters that, on their facts, would appear similar.[86]

Finally, if administrative processes become a more important forum of debate on human rights issues, there are risks for the legal coherence of rights protection in Canada. With administrative tribunals at all levels of government issuing more reasons that implicate human rights, there could be significant variations between the regimes in terms of how the rights are developed and applied.[87] Furthermore, the human rights jurisprudence arising out of administrative processes could differ from judicially developed human rights in surprising ways.[88] Especially in contrast to appellate courts, the work of many administrative decision-makers allows them to hear directly from people from all walks of life. This might lead administrative decision-makers to adopt interpretations of *Charter* rights that are less beholden

86 Bredt & Krajewska, *supra* note 11 ("given the indeterminate definition and scope of Charter values, the *Doré* framework may lead to an unwieldy and unpredictable proportionality analysis.... This would undermine one of the very purposes of the system of administrative tribunals—to resolve disputes more quickly and cheaply" at 354); Horner, *supra* note 29 at 384.

87 See also Sossin & Friedman, *supra* note 11 ("while personal autonomy may be a broadly recognized Charter value, it will necessarily mean something different in the context of a privacy commission than in the context of a parole board" at 422) cited in *Loyola*, *supra* note 26 at para 42.

88 Hickman, *supra* note 33 ("[a] further difficulty with the distinction between review of administrative decisions and review of legislation is that the application of the [*Charter*] becomes disjointed. A person's rights are not uniform but their content will depend in part on whether they are subject to interference by administrative decision or legislation" at 166); Macklin, *supra* note 29 at 580–81.

to tradition and precedent, and more reflective of modern realities and the needs of marginalized or otherwise disadvantaged groups.

Presumably, judicial review would address some inconsistencies in how rights are understood. On the threshold legal issue of whether a particular decision implicates a *Charter* protection, *Ktunaxa Nation* may suggest that courts will take a less deferential approach to judicial review, in order to enforce some consistency in how the legal system defines the outer limits of *Charter* protections. But taking *Doré* and *Loyola* seriously means that the unique insights and expertise of administrative decision-makers should be respected and recognized, even when they are interpreting and applying human rights, a task that has traditionally been the role of the judiciary.[89] *Ktunaxa Nation* does not appear to change the deference that is owed, under the *Doré* framework, to how administrative decision-makers characterize the degree of impact on *Charter* protections in a particular matter and then weigh those impacts in the proportionality balance against statutory objectives. Over time, judicial deference to how administrative decision-makers perform this "frontline" human rights analysis could have real consequences for what *Charter* protections mean when applied to everyday life.

C. Transformative Opportunity to Build a More Grassroots Human Rights Culture

The first three risks discussed above are policy problems centered around the respective capacities of administrative decision-makers and the persons affected by their decisions, which should be proactively addressed. Some suggestions for how to do so are put forward in the conclusion.

Stepping back to the latter two risks, predictability and coherence, they can be viewed as potential benefits. These particular risks, if leveraged correctly, mean that the need to integrate human rights considerations into administrative decision-making could be a transformative opportunity

89 *Doré*, *supra* note 7 at paras 29, 35, 47–48, 54 (*Dunsmuir* and *Conway* "emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens" a less-hierarchical "institutional dialogue" between courts and administrative bodies; "[reflecting] the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation" at paras 35, 48); *Loyola*, *supra* note 26 at para 42; *Conway*, *supra* note 12 at paras 79–80.

to build a human rights culture in Canada that is more accessible and innovative.

As noted at the outset, courts have, so far, been the primary vehicle for realizing *Charter* rights and otherwise engaging in real debates about human rights in Canada. Judicial enforcement of *Charter* rights has some real strengths for rights claimants, especially as compared to more political processes. Litigation can lead to powerful and constitutionally binding remedies, and it involves an impartial adjudicative process that can allow marginalized individuals and groups to have a fair consideration of their claim. The reliance on *Charter* litigation is likely also driven by perceptions that rights are "above" politics and a natural bias of the legal community towards the judicial enforcement model of human rights implementation.

But there are good reasons to believe that a heavy emphasis on the judicial enforcement model of constitutional implementation distances the average Canadian from the concepts of human rights. Many people can go all their lives without reading a court decision that raises a *Charter* issue, let alone being party to a court proceeding involving such issues. This kind of litigation is expensive and time-consuming. The body of jurisprudence that has developed can be difficult for anyone to understand, whether they have legal training or not.

There are also good reasons to be concerned about this distance. If *Charter* rights are some of the fundamental principles governing our society, in particular the relationship between individuals and the state, then an approach to *Charter* rights that respects democratic principles should seek to welcome the widest range of voices in conversations about what these rights should mean and how they should be realized in practice.

The trends identified in this paper point the way towards a new model of rights implementation in Canada, one that could supplement the necessary role of the judiciary and be more accessible. In a context where administrative processes are increasingly relied on as a "safety valve" to ensure that administrative schemes are in accordance with the *Charter*, and where they are expected to make their decisions in a way that substantively engages with human rights concepts, it can be expected that administrative decisions will become a major forum for contestation of rights issues—whether *Charter* issues or international human rights.

This would be a more grassroots and decentralized context for the interpretation and application of human rights. Administrative processes are the way in which most people interact most regularly with public decision-making. Many of these decisions have a significant impact on

individuals' well-being, with potential links to *Charter* protections and international human rights sources. For example:

- Equality interests can be impacted by decisions about social benefits, such as decisions by the federal Social Security Tribunal on employment insurance or other matters.
- Decisions in the immigration and refugee context can impact a wide range of *Charter* interests—most obviously the right to life, liberty and security of the person—and the various international sources on *non-refoulement* and the detention of migrants can be potentially relevant to such decisions.
- Provincial landlord and tenant boards make decisions affecting the core personal interest of housing, with potential implications for equality, accommodation, autonomy, or other *Charter* protections. There is also a rich body of commentary at the international level on the right to an adequate standard of living, including housing.[90]

More substantively integrating human rights issues into these kinds of decisions is a way to involve a wider range of people in discussions about what rights should mean, how they should be applied, and how they should be balanced with other important societal objectives and values. Many people, especially those who are marginalized or otherwise disadvantaged, may be unable to regularly access and be involved in judicial processes about the *Charter*. But human rights decision-making at the "administrative grassroots" could be much more accessible and immediately relevant.[91] As noted by Justice McLachlin, as she then was, in a passage quoted in the unanimous reasons of the Court in *Conway*:

> The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and lawmakers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many

90 See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 11 (entered into force 3 January 1976, accession by Canada 19 May 1976). See discussion of this possibility in Gerald Heckman, "The Role of International Human Rights Norms in Administrative Law" in Flood & Sossin, *supra* note 11, 309 at 321–22.

91 Sossin & Friedman, *supra* note 11 ("[t]here are literally hundreds of tribunals, at the federal, provincial and municipal levels, involving thousands of full and part-time adjudicators applying a myriad of statutory schemes and regulatory regimes. If the Charter is to be Canada's 'supreme law', it must have relevance for those who are most vulnerable to the adverse effects of government action (and inaction)" at 329).

> more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[92]

Such a model has the potential to be transformative in ways beyond increased accessibility. As noted above, it poses significant risks in terms of predictability and coherence for rights protection. Another way to say this is that a system of true grassroots rights contestation will be rather messy. Decision-makers will be working in a wide variety of contexts. Differences in procedures, regimes, operational challenges, and in the professional backgrounds of decision-makers could all lead to wide variations and inconsistencies in how rights are interpreted and applied. New ideas will develop in one area, but not another, or different tribunals will take diverging approaches to the same issues.

However, the "messiness" of a grassroots model could be a benefit. Opening the elaboration and application of these values to a wider range of voices, in a wider range of decision-making contexts, has the potential to bring new and innovative perspectives to Canada's human rights jurisprudence.[93]

This could be understood as "crowdsourcing" human rights. Just as in a crowdsourcing model, some of the innovations in human rights will not necessarily be ones that should be pursued; yet, judicial review could hopefully correct this. If approached with the right attitude, administrative engagement with human rights could amount to an ongoing and decentralized process of experimentation. It could lead to new ideas with real value, especially with respect to what is required to practically fulfil certain rights or how the general public believes these rights should be balanced. As long as there is robust governance of grassroots administrative decision-making through judicial review and other mechanisms, the best new ideas for advancing rights could eventually gain traction and be incorporated into mainstream rights jurisprudence.

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92 *Cooper v Canada* (*Human Rights Commission*), [1996] 3 SCR 854 at para 70, 140 DLR (4th) 193 quoted in *Conway*, *supra* note 12 at para 77. See also *Conway*, *supra* note 12 at para 79.

93 Sossin & Friedman, *supra* note 11 ("the *Doré* framework opens up the possibility of a new and different kind of Charter dialogue, between administrative decision-makers and courts, in which expertise in policy-specific decision-making contexts may inform the development of Charter values and vice versa" at 429–30).

CONCLUSION

This paper began by identifying three trends: first, an increasing call for administrative decision-makers to rigorously engage with *Charter* protections in exercising their discretion; second, the potential role of international human rights sources in some decision-making contexts; and third, the coming into focus of administrative discretion's "safety valve" role where schemes have the potential to infringe individual rights to life, liberty and security of the person. These trends are increasing the centrality of administrative decision-making in rights protection. They are also increasing the complexity of such decisions, requiring more regular engagement with what can seem like a limitless range of human rights concepts and sources. This poses significant challenges for decision-makers, the people who are subject to their decisions, and the legal community in general.

Meeting these challenges carries significant risk—in terms of procedural fairness, access to justice, tribunal resources, predictability, and legal coherence of rights protection. A number of proactive policy measures could be taken to better prepare decision-makers and the public to deal with these risks. First, additional measures could be taken to educate the public on the *Charter* and international human rights. Such education could include substantive information about the content of these rights, as well as practical information about how to locate various sources and understand their interpretive weight. The legal community should continue its efforts to make legal resources more accessible, especially for marginalized or disadvantaged communities, and in a wide variety of languages and formats.

There may be a special need to better equip the public to leverage international human rights sources in an appropriate manner. While sources on international law have become far more accessible through online sources, the number and variety of documents now available can be overwhelming. Public education with respect to international law could be most helpful if it assists individuals in contextualizing and prioritizing the various sources: differentiating between binding and non-binding sources and understanding the potential normative weight of particular sources in a specific decision-making context. For example, the international human rights community has developed numerous binding and non-binding sources on the rights of persons deprived of their liberty. All of the primary documents are easily available online, but a self-represented prisoner

making submissions or complaints to institutional officials would benefit greatly from guides or handbooks that identify the most persuasive and useful primary sources.

Similarly, these challenges point to the importance of training public officials on the *Charter* and international human rights, especially officials who exercise discretion. Clearer guidelines may be required to aid officials in considering human rights concepts, and to provide some basic information for the public about how human rights could be relevant in a particular decision-making context.[94]

Finally, in a grassroots system of administrative engagement with human rights, judicial review will play a crucial role in setting aside unreasonable decisions and providing general guidance.[95] To be fair, just, and coherent, a legal system that allows for some "crowdsourcing" of human rights requires robust, and appropriately deferential, judicial review—to adopt and promote the welcome innovations, and quash the problematic mistakes.[96] Measures may need to be taken to ensure that judicial review is more effective and accessible, especially for individuals and groups who are self-represented.

But despite these issues, there would be real benefits to meeting the challenge head-on. This could be a transformative opportunity to bring about a more decentralized, grassroots human rights culture in Canada. If more voices are allowed to take part in debates about rights issues, democratic shortcomings in our rights culture could be rectified and Canada's human rights jurisprudence could benefit from unexpected innovations.

As Pierre Elliott Trudeau remarked at the proclamation ceremony of the patriated Constitution, on April 17, 1982, proclamation was "not so much an ending, but a fresh beginning. Let us celebrate the renewal and

94 See Sossin & Friedman, *supra* note 11 (for a discussion on how to "operationalize" human rights issues in the context of administrative decision-making: "[a]dministrative decision-makers cannot be expected to be intuitively aware of the range of Charter values; rather, tribunals should develop training and, ideally, guidelines, which highlight the Charter values most relevant to the subject matter of the tribunal" at 425–26).

95 Macklin, *supra* note 29 at 583 ("[t]o fulfil the promise of bringing the Charter to the people, it matters not only that administrative decision-makers consider the [*Charter*]; it matters *how* they consider it, and it matters even more *how carefully* a reviewing court supervises their decisions" at 583 [emphasis in original]).

96 See Sossin & Friedman, *supra* note 11 ("[t]he courts will have a role to play here as well, both to establish some key parameters and through appropriate deference, to recognize and validate the necessary space for administrative decision-makers to develop an approach to the [*Charter*] commensurate with their perspective, expertise and experience" at 428)

patriation of our Constitution; but let us put our faith, first and foremost, in the people of Canada who will breathe life into it."[97] The courts are now asking the legal community to renew its faith in the Canadian people, and to embrace the new life they could bring to the protection of human rights in our country.

97 See Pierre Elliott Trudeau, "Remarks at the Proclamation Ceremony, April 17, 1982" *Library and Archives Canada* (29 January 2002), online: <www.collectionscanada.gc.ca>.