

The *Charter* in Administrative Decision-Making: Defending the Duty to Take *Charter* Values (or Purposes) Into Account

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The *Charter* in Administrative Decision-Making: Defending the Duty to Take *Charter* Values (or Purposes) Into Account

Paul Daly

THIS ARTICLE DEFENDS the continued vitality of the *Doré v Barreau du Québec* framework for judicial review of administrative decisions engaging the Canadian Charter of Rights and Freedoms, in light of the Supreme Court's recent decision in *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)* and the broader "culture of justification" articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov*. It argues that, read together, these decisions provide a coherent framework for reviewing discretionary administrative action implicating *Charter* protections. The article clarifies the relationship between *Charter* rights and values, suggesting that the latter are best understood as the purposes underpinning constitutional rights and thus as legal constraints within the *Vavilov* framework. On this view, administrative decision-makers must grapple with relevant *Charter* purposes in their reasoning, while courts conduct robust reasonableness review grounded in proportionality. Situated within Canada's decentralized system of constitutional enforcement, the *Doré* framework remains a defensible feature of Canadian public law.

CET ARTICLE DÉFEND la pérennité du cadre établi dans *Doré c Barreau du Québec* pour le contrôle judiciaire des décisions administratives touchant la *Charte canadienne des droits et libertés*, en s'appuyant sur la décision récente de la Cour suprême dans *Commission scolaire francophone des Territoires du Nord-Ouest c Territoires du Nord-Ouest (Éducation, Culture et Formation)* et de «culture de la justification» développée dans *Canada (Ministre de la Citoyenneté et de l'Immigration) c Vavilov*. Il soutient que, prises ensemble, ces décisions offrent un cadre cohérent pour le contrôle des actes administratifs discrectionnaires engageant les protections de la *Charte*. L'article présente la relation entre les droits et valeurs garantis par la *Charte*, en suggérant que ces dernières doivent être comprises comme les finalités sous-jacentes aux droits constitutionnels et, à ce titre, comme des contraintes juridiques dans le cadre de *Vavilov*. Selon cette approche, les décideurs administratifs doivent véritablement prendre en compte les finalités pertinentes de la *Charte* dans leur raisonnement, tandis que les tribunaux exercent un contrôle rigoureux selon la norme de la raisonnable, fondé sur la proportionnalité. Situé dans le contexte du système canadien décentralisé de mise en œuvre constitutionnelle, le cadre *Doré* demeure une composante défendable du droit public canadien.

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The *Charter* in Administrative Decision-Making: Defending the Duty to Take *Charter* Values (or Purposes) Into Account

Paul Daly*

I. INTRODUCTION

Forests have been sacrificed to print the academic literature on the framework for review of administrative action infringing *Charter*¹ rights set out by the Supreme Court of Canada in *Doré v Barreau du Québec*.² The framework has had supporters from its early days, but it has also provoked numerous critiques, some of which resonated with members of the Supreme Court itself.³ So much so that on the margins of academic conferences

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1 *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 [*Charter*].

2 2012 SCC 12 [*Doré*].

3 For supporters, see e.g. Angela Cameron & Paul Daly, “Furthering Substantive Equality through Administrative Law: *Charter* Values in Education” (2013) 63:2 SCLR 169; Lorne Sossin & Mark Friedman, “*Charter* Values and Administrative Justice” (2014) 67:2 SCLR 391. For critiques, see e.g. Paul Daly, “Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian *Charter of Rights and Freedoms*” (2014) 65:2 SCLR 247; Paul Daly, “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) [unpublished] online: <ruleoflaw.ca/articles/reflections-on-charter-values-a-call-for-judicial-humility>; Audrey Macklin, “*Charter* Right or *Charter*-Lite? Administrative Discretion and the *Charter*” (2014) 67:2 SCLR 561. Some of these critiques resonated with the court in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, especially at paras 306–309 [*Trinity Western*].

and during coffee breaks at continuing professional development seminars, *Doré*'s demise has regularly been predicted.

Reports of its demise have been greatly exaggerated. In *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*,⁴ the Supreme Court resoundingly reaffirmed and (in some respects) reasserted *Doré*.⁵ Key to this reaffirmation and reassertion was the culture of justification developed by the Supreme Court in its landmark administrative law decision, *Canada (Minister of Citizenship and Immigration) v Vavilov*.⁶

In this paper, I will describe the decision in *CSFTNO* (Part II), offer critical reflections on some aspects of the decision (Part III), and then develop a detailed defence of *CSFTNO* by explaining how the Supreme Court's reasoning is anchored in several well-established features of Canadian public law.

Three preliminary points will usefully frame my analysis. First, the concept of responsive reasons set out in *Vavilov* was crucially important in supporting the Supreme Court's reaffirmation and reassertion of *Doré*, as *Vavilov* fills some of the gaps in *Doré* and promises robust judicial review of the reasonableness of administrative decisions that implicate the *Charter* (see Part II, Section B below). Second, there is nothing inevitable about the *Doré* framework: it is anchored in features of Canadian public law, but those features are the product of interpretive choice about the meaning of the Constitution of Canada; they are not dictated by the constitutional text (Part IV, Section A). Third, when *Doré* is read with *Vavilov*, as it was in *CSFTNO* (and subject to some critical reflections outlined in Part III about the finer points of the analysis), it offers a normatively appealing approach to judicial review of administrative decisions that implicate the *Charter* (as argued in Part IV, Section B).

4 2023 SCC 31 [*CSFTNO*].

5 *Ibid* at paras 64–65.

6 2019 SCC 65 [*Vavilov*]; Richard Stacey, "A Unified Model of Public Law: *Charter* Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338. See also Paul Daly, "Unresolved Issues after *Vavilov*" (2022) 85:1 Sask L Rev 89. Cf Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dal LJ 793.

II. REAFFIRMING *DORÉ*

A. Factual Background

The *CSFTNO* case involved the review of ministerial discretion. Section 23 of the *Charter* creates categories of “rights holders” who, because of their personal circumstances as speakers or learners of a minority language, “have the right to have their children receive primary and secondary school instruction in that language in that province”.⁷

In the Northwest Territories (as in most of Canada), French speakers are the linguistic minority.⁸ Years of Supreme Court jurisprudence on minority language rights have established that, under certain conditions, provinces must make education available in English (in Quebec) or French (everywhere else) to cater for their minority-language community.⁹

This case involved several exercises of ministerial discretion to deny entry into French-language schools. The Minister had adopted a policy that expanded the section 23 categories and made a wider group of children eligible to attend school in French.¹⁰ The children were either French-language speakers, otherwise embedded in the French-language community in the Northwest Territories, or would contribute to the vitality of the community by attending school in French. In each case, the Commission (the provincial Francophone school board) recommended that they be permitted to attend a French-language school. However, the children did not fall within the scope of the policy.¹¹ On that basis, the Minister refused to permit them to attend a French-language school.

This case was, therefore, a pure case of *Charter* values. No *Charter* rights were at stake. Instead, the children (and, in the Supreme Court, the Commission) invoked the *Charter* values underpinning section 23: “Section 23 has a remedial purpose related to promoting the development of official language minority communities and changing the status quo”.¹² The provision is “preventive, remedial and unifying in nature”, as it is “intended not only to prevent the erosion of official language communities, but

⁷ *Charter*, *supra* note 1, s 23.

⁸ Statistics Canada, “Key facts on the French language in the Northwest Territories in 2021” (29 August 2023), online: <www150.statcan.gc.ca/n1/pub/89-657-x/89-657-x2023009-eng.htm>.

⁹ See e.g. *Mahe v Alberta*, 1990 CanLII 133 (SCC); *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 [*Conseil scolaire francophone*]; *Lavoie et al v Nova Scotia (AG)*, 1989 CanLII 5221 (NSCA).

¹⁰ *CSFTNO*, *supra* note 4 at para 17.

¹¹ *Ibid* at paras 23–24, 30–31, 35, 38, 42–43.

¹² *Conseil scolaire francophone*, *supra* note 9 at para 3.

also to redress past injustices and promote the development of those communities”.¹³

B. The Unanimous Decision in *CSFTNO*

1. *Reaffirming Doré*

Unanimously, the Court found that the *Charter* values underpinning section 23 were engaged and that the Minister had failed to grapple meaningfully with them in her decision.¹⁴ Notably, the Court’s reasons were written by Justice Côté, who has previously expressed scepticism about *Doré*.¹⁵ Here, however, the Court reaffirmed *Doré* in no uncertain terms:

Indeed, it has consistently been held that the *Doré* framework applies not only where an administrative decision *directly* infringes *Charter* rights but also in cases where it simply engages a value underlying one or more *Charter* rights, without limiting these rights.... This is the case because administrative decision makers have an obligation to consider the values relevant to the exercise of their discretion, in addition to respecting *Charter* rights. There can be no doubt about this, because “[t]he Constitution — both written and unwritten — dictates the limits of all state action”.... As L’Heureux-Dubé J. clearly stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, a discretionary decision, to be reasonable, must be made in accordance with the “fundamental values of Canadian society” as reflected in the *Charter*.... Relying on this statement, Abella J. held in *Doré* that discretionary decisions must “always” take *Charter* values into consideration....¹⁶

The methodology of the *Doré* framework was summarized in the following terms:

[A] reviewing court must first determine whether the discretionary decision limits *Charter* protections. If this is the case, the reviewing court must then examine the decision maker’s reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of *Charter* rights or the values underlying them. If not, the decision is unreasonable.¹⁷

¹³ *Ibid* at para 15.

¹⁴ *CSFTNO*, *supra* note 4 at paras 92–94.

¹⁵ *Trinity Western*, *supra* note 3 at paras 306–309.

¹⁶ *CSFTNO*, *supra* note 4 at paras 64–65 [emphasis in original] [citations omitted].

¹⁷ *Ibid* at para 73.

To begin with, if a *Charter* right or value is engaged, “the court must, under the approach laid down in *Doré*, determine whether the decision is reasonable through an analysis of its proportionality”.¹⁸ This is underscored by the emphasis in *Vavilov* on responsive reasons, that is, reasons that are responsive to the relevant legal constraints (such as statutory text, purpose, and context), the arguments of the parties, the factual matrix and the stakes for those impacted by the decision.¹⁹

First, a reasonable decision “must reflect the fact that the decision maker considered the *Charter* values that were relevant to the exercise of its discretion”.²⁰ Second, indeed, the reasons must “show that the decision maker “meaningfully” addressed the *Charter* protections to “reflect” the impact that its decision may have on the concerned group or individual”.²¹ Third, the reviewing court’s role, accordingly, must be robust: it “must take into account the role of the courts as guardians of the Constitution and must reflect the particular importance of justification in decisions that engage *Charter* protections”.²² Fourth, unlike in ordinary judicial review cases, where it is forbidden to reweigh the factors considered by the decision-maker, “the *Doré* approach requires reviewing courts to inquire into the weight accorded by the decision maker to the relevant considerations in order to assess whether a proportionate balancing was conducted by the decision maker”.²³

This is a striking commitment to robust judicial review of infringements of both *Charter* rights and *Charter* values. The only limitation (apart from the *Charter* being engaged) is that the *Charter* value must be relevant: “it will often be evident that a value must be considered, whether because of the nature of the governing statutory scheme, because the parties raised the value before the administrative decision maker, or because of the link between the value and the matter under consideration”.²⁴ This, incidentally, answers the objection that the *Doré* framework is less rights-protective because the onus does not shift to the state to justify an infringement of the *Charter*: in fact, once the relevance of the *Charter* has been established,

¹⁸ *Ibid* at para 67.

¹⁹ See generally Janina Boughey, “The Culture of Justification in Administrative Law: Rationales and Justifications” (2021) 54:2 UBC L Rev 403; Paul Daly, “*Vavilov* and the Culture of Justification in Contemporary Administrative Law” (2021) 100:1 SCLR 279.

²⁰ CSFTNO, *supra* note 4 at para 68.

²¹ *Ibid*, citing *Vavilov*, *supra* note 6 at paras 128, 133.

²² CSFTNO, *supra* note 4 at para 70, citing *Vavilov*, *supra* note 6 at para 133.

²³ CSFTNO, *supra* note 4 at para 72.

²⁴ *Ibid* at para 66, citing *Vavilov*, *supra* note 6 at paras 108, 127–28.

the requirement of responsive justification kicks in and necessitates a demonstration of proportionality by the decision-maker.²⁵

2. *Striking Down the Decision in the Instant Case*

On the facts, the underlying values of section 23 were engaged, as there was a “clear link” between section 23 and the exercises of discretion “because the decisions were likely to have an impact on a minority language educational environment”.²⁶ Preserving and developing the minority-language community (which admission of the children would have contributed to) are section 23 values:²⁷

Thus, the decisions rendered by provincial and territorial governments regarding the admission of children of non-rights holder parents to minority language schools, even when they do not directly infringe the right guaranteed by s. 23, can nevertheless have a significant impact on the preservation and development of minority language communities. It follows that these values are always relevant when the government exercises such a discretion and that they must therefore be taken into account. For the purposes of this appeal, this means that the Minister was required to consider the values of preservation and development of minority language communities in exercising her discretion to decide whether to admit children of non-rights holder parents to the schools of the Francophone minority in the Northwest Territories.²⁸

Here, the evidence demonstrated that “there was a link between the admission of children of non-rights holder parents to French-language schools in the Northwest Territories and the preservation and development of the Francophone community there”.²⁹ Indeed, the evidence showed here that “the admission of the children of the appellant parents would have had considerable benefits for the preservation and development of the language and culture of the minority language community”.³⁰

The Minister failed to justify her decisions given the evidence of this link: she failed to consider the Commission’s support for the applications; she did not consider the “individual characteristics of the various

²⁵ *Trinity Western*, *supra* note 3 at para 312.

²⁶ *CSFTNO*, *supra* note 4 at para 78.

²⁷ *Ibid* at paras 80–82.

²⁸ *Ibid* at para 83.

²⁹ *Ibid* at para 86.

³⁰ *Ibid* at para 101.

applications in relation to the benefits that could result from a decision to grant them”; she attached “too much importance to her duty to make consistent decisions”; and “gave disproportionate weight to the cost of the contemplated services in the exercise of her discretion”.³¹ This meant that her reasons did not demonstrate that she “meaningfully addressed the values of preservation and development of the Francophone community of the Northwest Territories so as to reflect the significant impact that the decisions might have on it”.³²

III. CRITICAL REFLECTIONS ON *CSFTNO*

I have two sets of critical reflections on the *CSFTNO* decision. The first concerns the relationship between *Charter* rights and *Charter* values. I will suggest that the decision in *CSFTNO* adequately distinguishes between these two concepts, though I suggest that *Charter* values could be recast as *Charter* purposes, which would fit just as well into the *Vavilov* framework. The second relates to the proposition that when *Charter* values are in play, reviewing courts can reweigh the factors considered by an administrative decision-maker.

A. *Charter* Rights and *Charter* Values

The analysis in *CSFTNO* largely tracks the argument I set out in a recent academic paper.³³ The argument set out there is that in *Doré*, the Supreme Court required administrative decision-makers to consider *Charter* values as part of their decision-making process.

Charter values and *Charter* rights have different functions, with values operating essentially as relevant considerations to be grappled with by an administrative decision-maker and rights imposing harder legal constraints on decision-makers. Hence the contrasting outcomes in two recent appellate decisions. In *Webber Academy Foundation v Alberta (Human Rights Commission)*,³⁴ the Foundation invoked the values underpinning freedom of conscience and freedom of association in circumstances where the *Charter* rights in question were difficult to establish, and the Commission’s analy-

³¹ *Ibid* at paras 98–99, 102.

³² *Ibid* at para 102.

³³ Paul Daly, “The *Doré* Duty: Fundamental Rights in Public Administration” (2023) 101:2 *Can Bar Rev* 297.

³⁴ 2023 ABCA 194.

sis of the *Charter* values at play in the particular context of a secular school was held to be reasonable.³⁵ By contrast, in *Lauzon v Ontario (Justices of the Peace Review Council)*,³⁶ a disciplinary decision interfered with a justice of the peace's *Charter* right to freedom of expression and failed a "robust analysis of the impact" of its decision on her *Charter* 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. It is not the reviewing court's function to fill a "fundamental gap" in a tribunal's reasoning by mining the record.³⁷

This distinction helps to explain the relevance of *Charter* values in cases where *Charter* rights are engaged.³⁸ *Charter* rights impose additional justificatory burdens on decision-makers. Where a *Charter* right is engaged, as in *Lauzon*, there is no need for a decision-maker to reason in terms of *Charter* values. This is because writing reasons that satisfy the exigencies of *Charter* rights will also by definition discharge the administrative decision-maker's procedural duty to take *Charter* values into account.

35 *Ibid* at paras 57–58, 83.

36 2023 ONCA 425 [*Lauzon*].

37 *Ibid* at para 151. See also Paul Daly, "Charter Values, Charter Rights and Adjudicative Tribunals" (2024) 37 Can J Admin L & Prac 73.

38 For an explanation of how that decision supports the rights/values distinction, see Paul Daly, "Constraints, Correctness and the Charter: York Region District School Board v. Elementary Teachers' Federation of Ontario, 2024 SCC 22" (10 July 2024), online (blog): <administrativelawmatters.com/blog/2024/07/10/constraints-correctness-and-the-charter-york-region-district-school-board-v-elementary-teachers-federation-of-ontario-2024-scc-22> explaining how that decision supports the rights/values distinction. For the contrary view, see Léonid Sirota, "Marxist Administrative Law" (21 June 2024), online (blog): <doubleaspect.blog/2024/06/21/marxist-administrative-law>.

Compliance with *Charter* values is an inherent part of compliance with *Charter* rights. Decision-makers can, of course, reason in terms of values rather than in terms of rights and, as long as their decision is consistent with the infringed *Charter* right, there will be no reason for judicial intervention. This may play out slightly differently in cases where the decision-maker does not give reasons (as with a municipal by-law): in such instances, the decision must comply with a *Charter* right and the record must reflect consideration of *Charter* values.³⁹ But where reasons are given and a *Charter* right is engaged, the decision-maker's focus must be on demonstrating through its reasons the compliance of the decision with the *Charter*.

The decision in *CSFTNO* could have been clearer on the different roles played by *Charter* rights and *Charter* values. On several occasions in the analysis it seems that there is no obvious difference between *Charter* rights and *Charter* values in the Supreme Court's framework.⁴⁰ The proposition from an earlier case that the "protections" of the *Charter* include both rights and values is repeated, for example.⁴¹ And when Justice Côté came to explain the relevance of the engagement of the *Charter* for the purposes of judicial review, it seems at first glance that she equates rights and values: "Once the reviewing court has determined that the impugned administrative decision infringes *Charter* rights or limits the values underlying them, the court must, under the approach laid down in *Doré*, determine whether the decision is reasonable through an analysis of its proportionality."⁴²

However, a close reading of this passage—and the entirety of the decision—reveals that the Supreme Court did indeed distinguish the role of *Charter* values from the role of *Charter* rights. Notice, to begin with, that Justice Côté used different verbs for *Charter* rights and *Charter* values.

39 *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para 60; *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 at paras 36–42; *Guelph and Area Right to Life v City of Guelph*, 2022 ONSC 43 at paras 77–85.

40 David Jacobs, "Valuing Rights or Writing Values: Case Comment on *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*", 2023 SCC 31" (30 January 2024), online (blog): <oba.org/valuing-rights-or-writing-values>.

41 *CSFTNO*, *supra* note 4 at para 61, citing *Loyola High School v Quebec (AG)*, 2015 SCC 12 at para 39.

42 *CSFTNO*, *supra* note 4 at para 67. Note also the use of "infringes" for *Charter* rights but "simply engages" for *Charter* values: "Indeed, it has consistently been held that the *Doré* framework applies not only where an administrative decision *directly* infringes *Charter* rights but also in cases where it simply engages a value underlying one or more *Charter* rights, without limiting these rights" (*ibid* at para 64).

Charter rights might be “infringed” but *Charter* values might be “limited”.⁴³ This suggests that the two concepts play different roles and that the determination of the reasonableness and proportionality of a decision will differ depending on whether rights or values are in play.

The strength of this suggestion is underscored by other features of the Supreme Court’s decision. Most importantly, Justice Côté distinguishes between “consider[ing]...values” and “respecting *Charter* rights”.⁴⁴ This language maps onto the rights-values distinction I introduced above in my discussion of *Webber Academy* and *Lauzon*: values are to be considered—they are factors to be taken into account by the decision-maker—but rights must be respected. They are hard constraints on the decision-maker’s freedom of action. Indeed, Justice Côté was careful to observe that she was *not* elevating the values underpinning section 23 to the right itself, as she made clear that there was no “obligation on decision makers in [the Minister’s] position to admit all children of non-rights holder parents”.⁴⁵ This observation would make no sense if Justice Côté had obliterated the distinction between *Charter* rights and *Charter* values.⁴⁶

Furthermore, Justice Côté confirms that “context constrains” the decision-maker.⁴⁷ Given the rights-values distinction made elsewhere in the reasons, a reasonable reader can infer that the context of an infringement of a *Charter* right may differ (and require more by way of justification) from the infringement of a *Charter* value. Indeed, it is notable in this case that the obligation on the Minister was to “truly take into account the constitutional values of preservation and development of official language minority communities, in other words, that she meaningfully address[es] the considerations arising therefrom”.⁴⁸ It was an obligation to take into account (and meaningfully grapple with) the relevant values rather than to comply with them, as would be the case with a *Charter* right. More generally, the legal and factual constraints may play out differently in rights and values cases, not least because the jurisprudence on the content of a *Charter* right will be one of those legal constraints and limit a decision-maker’s freedom of action more extensively than a value.⁴⁹

43 *Ibid.*

44 *Ibid* at para 65.

45 *Ibid* at para 103.

46 See also *Sullivan v Canada (AG)*, 2024 FCA 7 at para 12.

47 *CSFTNO*, *supra* note 4 at para 68.

48 *Ibid* at para 92.

49 *CSFTNO*, *supra* note 4 at para 73.

This last point prompts reflection on the nature of *Charter* values. These have been described—not without some justification—as ill-defined, aspirational commitments that are difficult to concretize and whose influence on a particular decision will be difficult to determine in advance, undermining legal certainty.⁵⁰ However, whether this critique of *Charter* values is valid or not generally speaking, it is not particularly effective in this specific instance. The values underpinning section 23 have been set out in a series of Supreme Court decisions.⁵¹ These decisions have spoken in terms of the *purposes* of section 23.⁵² One might ask, therefore, whether *CSFTNO* was really a case about *Charter* values: was it not simply about *Charter* purposes? It may be, indeed, that the debate about *Doré* has focused on the wrong target—*Charter* values—when what is really at issue is the consideration of the purposes underpinning *Charter* rights.

Under the *Vavilov* framework, relevant precedents are a constraint on an administrative decision-maker.⁵³ As the purposes of *Charter* rights have been set out in decisions of the Supreme Court, the purposes can be said to be relevant precedents that decision-makers have to take into account; a decision-maker can conceivably “explain or justify a departure” from precedent, moulding the *Charter* purposes in question to the particularities of a given regulatory regime.⁵⁴ But if the decision-maker has not been adequately responsive in its reasons to a precedent setting out the purposes of a relevant *Charter* right, then its decision may well be unreasonable.

To put it bluntly, there is a ready response to critiques of the vagueness of *Charter* values: rather, what the Supreme Court had in mind in *CSFTNO* was a precedential articulation of the purposes of a *Charter* right, which functions under *Vavilov* as a constraint on what an administrative decision-maker can reasonably decide. *Charter* purposes would play the same role as *Charter* values—functioning as factors to be taken into account and grappled with by administrative decision-makers—but would be much easier to define.

50 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 152–56, Huscroft JA, dissenting.

51 *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at paras 3, 15.

52 *CSFTNO*, *supra* note 4 at paras 75, 78.

53 *Vavilov*, *supra* note 6 at para 112.

54 *Ibid* at paras 112–113.

This analysis also explains why there is no inconsistency between *Doré* and *CSFTNO* and *Toronto (City) v Ontario (AG)*,⁵⁵ where a majority of the Supreme Court insisted that the constitutional text has precedence over unwritten constitutional norms.⁵⁶ Constitutional text (rights) binds by imposing hard constraints on decision-makers. Constitutional purposes (values) simply require certain matters to be taken into account by administrative decision-makers (and it is open in principle to the administrative decision-makers to formulate their own views on these matters).⁵⁷

In any event, it is not clear to what extent objections founded on *City of Toronto* carry any weight in the administrative law context. First, the concern in *City of Toronto* was with the use of unwritten principles to invalidate legislation.⁵⁸ But, imposing requirements of responsive justification on administrative decision-makers does not involve the invalidation of legislation. Indeed, in most cases, the outcome of a successful application for judicial review of an administrative decision will be that the file is returned for a new decision and it is entirely possible that the decision-maker will confirm its original decision albeit on different grounds. This is far removed from the judicial death warrant contemplated by the majority in *City of Toronto*.⁵⁹ Second, most of the law of judicial review of administrative action is unwritten.⁶⁰ There is no legislative warrant for the Supreme Court's decision in *Vavilov*, nor, famously, has there been any legislative warrant for the development—over hundreds of years—of common law controls on public administration.⁶¹ “Unwrittenness” is a feature, not a bug in this area. Indeed, there is venerable pre-*Charter* Supreme Court authority using unwritten individual rights as constraints on

55 2021 SCC 34 [*City of Toronto*].

56 *Ibid* at paras 48, 50, 54–56.

57 *Vavilov*, *supra* note 6 at para 113; Joanne Murray, “Administrative and Citizen Interpretations of Unwritten Constitutional Principles” (21 May 2024), online (blog): <ukconstitutionallaw.org/2024/05/21/joanne-murray-administrative-and-citizen-interpretations-of-unwritten-constitutional-principles>.

58 *City of Toronto*, *supra* note 55 at para 13.

59 Alyn James, “‘Quite Apart from *Charter* Considerations’: Constitutional Text and Unwritten Principles in *City of Toronto*”, *Paul Daly Administrative Law Matters* (24 October 2021), online (blog): <administrativelawmatters.com/blog/2021/10/24/quite-apart-from-charter-considerations-constitutional-text-and-unwritten-principles-in-city-of-toronto-aly-james-johnson>.

60 See generally Christopher Forsyth, ed, *Judicial Review and the Constitution* (Oxford: Bloomsbury Publishing, 2000).

61 Paul Craig, “*Ultra Vires* and the Foundations of Judicial Review” (1998) 57:1 Cambridge LJ 63 at 67; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001) at 37.

administrative decision-makers: *Doré* and *CSFTNO* are not as novel as they are sometimes made out to be.⁶²

B. Reweighing Considerations

As is well known, reviewing courts are not to reweigh factors taken into account by an administrative decision-maker.⁶³

However, in *CSFTNO*, this rule was qualified. Where *Charter* values are engaged, reweighing becomes appropriate.⁶⁴ Now, one can query whether this proposition was necessary in *CSFTNO* itself: the problems the Supreme Court identified with the Minister's decision related to shortcomings of responsive justification and failures to grapple adequately with relevant material.⁶⁵ As such, the Supreme Court did not actually need to reweigh the factors before the Minister.

Nonetheless, Justice Côté was clear in her exposition of the *Doré* duty that reweighing becomes possible as soon as *Charter* values enter the picture.⁶⁶ Given the abstract nature of *Charter* values—"liberty, human dignity, equality, autonomy, and the enhancement of democracy"—this could lead to invitations to reweigh considerations in a wide variety of cases.⁶⁷

This is a legitimate concern but should not be blown out of proportion. For one thing, as explained in the previous sub-section, *Charter* values can be recast as *Charter* purposes which, as they are based in prior judicial decisions, are not abstract at all. For another thing, it is difficult to see what the invocation of a *Charter* value will add in the context of most administrative schemes. Justice Stratas pointed this out very effectively in *Sullivan v Canada (AG)*.⁶⁸ This case involved a claim for employment insurance benefits by an applicant who was fired for failing to comply with his employer's COVID-19 vaccination policy.⁶⁹ When invited to do so, the applicant raised arguments relating to equality and liberty.⁷⁰ But as Justice

62 *Smith & Rhuland Ltd v Nova Scotia*, 1953 CanLII 234 (SCC) at 98 (Rand J), 103 (Kellock J) [*Smith & Rhuland*].

63 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 64.

64 *CSFTNO*, *supra* note 4 at paras 68–70.

65 *Ibid* at paras 70, 93–94.

66 *Ibid* at paras 65–70.

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

68 2024 FCA 7.

69 *Ibid* at para 2.

70 *Ibid* at para 10.

Stratas explained, in the specific context of a dispute about employment insurance benefits, recourse to abstract notions was unhelpful:

The applicant submits that Charter values of “freedom” and “equality”, as broad and unqualified as they are, should have been considered. He submits that the Appeal Division should have used “freedom” and “equality” to whittle down or eradicate the vaccination requirements that were enforced against him. We reject this submission.

The text of the Charter and case law under it heavily qualifies “freedom” and “equality”. And everything in the Charter is subject to reasonable limits prescribed by law under section 1. As well, it must also be remembered that section 1 of the Charter, in binding words that cannot be ignored, says that the Charter protects the “rights and freedoms set out in it”, not other things such as “values”. Thus, the “values” that administrative decision-makers are to take into account cannot be broader than, undercut or do an end run around the established scope of the “rights and freedoms set out” in the Charter determined in accordance with the seminal, binding Supreme Court authority of *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426. Undercutting the applicant’s submission is the fact that there are no Charter cases recognizing a general, unqualified entitlement to “freedom” or “equality”.⁷¹

Beyond the point that such general, unqualified entitlements are unknown to Canadian law, there is the reality that most regulatory regimes are, already, carefully calibrated to balance *Charter* values with statutory objectives. In the area of immigration and refugee law, for example, there is a detailed statutory and regulatory scheme designed to ensure that the values of the *Charter*—and Canada’s international and moral commitments—are respected.⁷² *Charter* values may play a role occasionally on the margins of the scheme, but they are not the daily fare of the thousands of decision-makers tasked with implementation of immigration and refugee law, even though matters of life and death are literally at stake in many cases.⁷³ *Charter* values are more likely to be relevant where, as in *CSFTNO*, a decision-maker (typically a minister) exercises a discretionary

⁷¹ *Ibid* at paras 10–11.

⁷² *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 104–17 [*Mason*].

⁷³ See e.g. *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at paras 128–29; see also *Singh Brar v Canada (Public Safety and Emergency Preparedness)*, 2024 FCA 114 at paras 65–66.

or policy-making power in a way that is difficult to reconcile with case law describing the purposes of a *Charter* right, an unwritten constitutional principle, or a common law right.⁷⁴

As such, even though I do not think it was necessary for the Supreme Court to invite reweighing in cases where *Charter* values are engaged, I think the practical significance of this invitation is likely to be modest.

IV. A DEEP DEFENCE OF *CSFTNO*

In this Part, I will offer a defence of the decision in *CSFTNO* grounded in various well-established features of Canadian public law.

A. An Institutional Analysis of *Charter* Enforcement in Canada

In one of the most interesting scholarly works of the past decade, Professor Peter Cane offered an institutional explanation for divergence between jurisdictions.⁷⁵ He identified the “similarities and differences” in the “systems of government” as an explanatory device and went on over the course of several hundred pages, to describe the similarities and differences of UK, US and Australian administrative law.⁷⁶ The import of Cane’s advice is that it is important to take a step back and appreciate *CSFTNO* in its broader institutional context. There are, in fact, deep doctrinal roots nourishing the decision.

1. *Canada’s Decentralized Approach to Enforcement of the Constitution*

In Canada, unlike other common law jurisdictions, analysis of constitutional issues is decentralized. Administrative decision-makers are entitled to consider constitutional questions, provide constitutional remedies and discharge the Crown’s duty to consult Indigenous peoples.⁷⁷ A

74 See e.g. *Forum des maires de la Péninsule acadienne Inc v Minister of Justice and Public Safety*, 2024 NBKB 58 at paras 41–43; *Lalonde v Ontario (Commission de restructuration des services de santé)*, 2001 CanLII 21164 at paras 123–24 (ONCA); 9255–2504 *Québec Inc v Canada (AG)*, 2023 FC 1719 at para 48.

75 Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge, UK: Cambridge University Press, 2016).

76 *Ibid* at 2.

77 *Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Laseur*, 2003 SCC 54 at para 48 [*Martin*]; *R v Conway*, 2010 SCC 22 at para 78 [*Conway*]; *Clyde River (Hamlet) v Petroleum GeoServices Inc*, 2017 SCC 40 at paras 21–22

decision-maker's parent statute might limit their ability to consider constitutional questions (though the test in this regard is extremely permissive) or their ability to grant remedies (and here the constraints are often more significant). In principle, however, the constitution is "not some Holy Grail which only judicial initiates of the superior court may touch".⁷⁸

This position differs from that in other jurisdictions. In Ireland, the contrasting view has been expressed most forcefully.⁷⁹ In England, too, judicial review is centralized in the court system (and the tribunal system there functions as a court substitute).⁸⁰

Defensible normative reasons have been offered for the Canadian position. Each of sections 24 (remedies), 35 (Indigenous rights) and 52 (constitutional questions) provides a textual basis for administrative decision-makers to consider the Constitution.

- Section 24 refers to a "court of competent jurisdiction", which was interpreted by a unanimous Supreme Court in *Conway* as extending in principle to administrative decision-makers (subject to limitations on their competence to grant remedies inconsistent with their parent statute).⁸¹
- Section 35 makes Indigenous rights enforceable, has been held to be a recognition of Canada's duties to Indigenous peoples and a unanimous Supreme Court in *Clyde River* and *Chippewas of the Thames* held that administrative decision-makers can wear the "Crown" for the purposes of discharging the Honour of the Crown.⁸²
- Section 52 makes the Constitution the supreme law of the land and a unanimous Supreme Court concluded in *Martin* that an administrative decision-maker could not enforce an unconstitutional law and, thus, had to be empowered to consider constitutional questions (subject to the power being withdrawn by clear statutory language or by necessary implication): "[it is] the most fundamental question of

[*Clyde River*]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 29 [*Chippewas of the Thames*].

78 *Cooper v Canada (Human Rights Commission)*, 1996 CanLII 152 at para 70 (SCC) [*Cooper*].

79 See generally Paul Daly, "The Administrative State and the Courts" in David Farrell & Niamh Howlin, eds, *Oxford Handbook of Irish Politics* (Oxford, UK: Oxford University Press, 2021) 264.

80 See generally Peter Cane, *Administrative Tribunals and Adjudication* (London, UK: Hart Publishing, 2009).

81 *Conway*, *supra* note 77 at para 22.

82 *Clyde River*, *supra* note 77 at para 29; *Chippewas of the Thames*, *supra* note 77 at para 37.

law one could conceive, as it will determine whether the enactment is in fact valid law, and thus whether it ought to be interpreted and applied as such or disregarded.”⁸³

Simply put, the Constitution binds administrative decision-makers, and they must often determine themselves what constitutional compliance entails.

I do not say that these unanimous decisions are necessarily correct. They have a textual basis. But one could legitimately interpret the provisions at issue differently. Nonetheless, the decentralization of the Canadian Constitution has occurred through a series of unanimous Supreme Court decisions over the last two decades. With all due respect to the contrary view offered by Professor Mark Mancini, *this* is the current “constitutional settlement.”⁸⁴

There are also good practical reasons for this position. Most importantly, the sweep of the administrative state is such that the bodies most likely to infringe upon or vindicate constitutional rights are administrative decision-makers.⁸⁵ This point was made pithily by Justice McLachlin in *Cooper*: “Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.”⁸⁶ This passage was quoted with approval in *Martin*, where Justice Gonthier added: “Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts.”⁸⁷ In *Conway*, where the logic of *Martin* was extended to remedies, Justice Abella commented: “If ... expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under section 52 of the *Constitution Act*, 1982, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under section 24(1) of

83 *Martin*, *supra* note 77 at para 28.

84 Mark Mancini, “The Metastasis of *Charter* Vibes...Again” (11 December 2023), online (blog): <doubleaspect.blog/2023/12/11/the-metastasis-of-charter-vibes-again/>.

85 And throughout the state, officials of various types have an important role in ensuring compliance with the precepts of the Constitution. See Vanessa MacDonnell, “The Civil Servant’s Role in the Implementation of Constitutional Rights” (2015) 13:2 NYU Intl J Cont L 383.

86 *Cooper*, *supra* note 78 at para 70.

87 *Martin*, *supra* note 77 at para 29.

the *Charter*.”⁸⁸ As Professor Angela Cameron and I wrote, a decade ago, consideration of constitutional issues by administrative decision-makers fills a significant gap:

[Judicial review] ought not, however, to be the sole focus of attention. Decisions and the decision-making processes that produce them will always be individuals' first points of contact with administrative law. Often, they will be the last. Lack of resources may preclude an individual from seeking judicial review, and judicial doctrines of justiciability may preclude judges from entertaining the merits of individual cases. Placing too much emphasis on judicial review in the education context blithely presupposes that courts can consistently conduct necessary oversight. Yet it is more likely that judicial control will be exercised in fits and starts, if at all in the case of lower-level decision-makers.⁸⁹

In addition, when infringements of the Constitution come before the courts on judicial review it is often quite useful to have the considered views of the decision-maker responsible for administering the statute in question: “the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court.”⁹⁰ This point has been made repeatedly in the jurisprudence and bolsters the proposition that constitutional issues should generally be raised before the decision-maker and not for the first time on judicial review.⁹¹

There are, in short, good principled and practical reasons for decentralized enforcement of the Constitution.

2. *The Effect of Decentralization on the Enforcement of the Constitution*

What has all this got to do with *Charter* values? In a structurally decentralized system for interpreting the Constitution, there is an inevitable tension between doctrinal rigor and non-lawyerly thinking about legal principles. There is a choice between requiring administrative decision-makers to

88 Conway, *supra* note 77 at para 80. See also *Clyde River*, *supra* note 77 at paras 29–34.

89 Cameron & Daly, *supra* note 3. See also *Clyde River*, *supra* note 77 (“judicial review is no substitute for adequate consultation...adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstrance following an adversarial process” at para 24 [emphasis in original]).

90 Martin, *supra* note 77 at para 30.

91 *Ibid* at para 34, citing *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, 1991 CanLII 57 at 13 (SCC) and Cooper, *supra* note 78 at para 46.

apply the Constitution as courts would and permitting them to take a more informal approach that permits them to bring a non-lawyerly perspective to bear on constitutional issues. There is nothing inevitable about the choice in favour of informality made in *Doré* and reaffirmed in *CSFTNO* but, again, principled and practical reasons can be provided.⁹²

In “The Inevitability of Discretion and Judgement in Front-Line Decision-making in the Administrative State”, I wrote:

It would be *unrealistic* to expect front-line officials to think like lawyers because, most of the time, they are not trained lawyers...Given the reality of how front-line officials actually exercise discretion and judgement, inculcating deep knowledge of—say—the principles of statutory and constitutional interpretation in front-line officials would be very difficult. Not only are the technicalities of legal interpretation hard to master, this knowledge (if inculcated) would have to compete in any event with the cultural norms embedded in the decision-making environment.⁹³

It would also be *inappropriate* to expect front-line officials to master the details of legal interpretation. Where a legislative choice has been made to delegate authority to bodies other than courts, it ill becomes courts to insist on the application of *judicially* crafted doctrine to circumscribe the authority of *administrative* officials. Such an approach holds non-lawyers to legal standards and forces them to adopt an interpretive mindset that is not necessarily their own. The upshot is that all front-line officials have to think like lawyers, even if the whole point of empowering them in the first place was to avoid having decisions made by people who think like lawyers.⁹⁴

If administrative decision-makers are required to reason like courts—law books at their elbows—the practical benefits of decentralization are lost and the principled reasons for it are undermined.⁹⁵ If this were the case, an administrative decision-making process would simply be the launchpad

92 See also Joanne Murray, “Administrative and Citizen Interpretations of Unwritten Constitutional Principles” (21 May 2024), online (blog): <ukconstitutionallaw.org/2024/05/21/joanne-murray-administrative-and-citizen-interpretations-of-unwritten-constitutional-principles/>.

93 Paul Daly, “The Inevitability of Discretion and Judgement in Front-Line Decision-Making in the Administrative State” (2020) 2 J Commonwealth L 99 at 120–22 [Daly, “Inevitability of Discretion”].

94 *Ibid* at 122–23; see also Matthew Lewans, “Administrative Law, Judicial Deference and the Charter” (2014) 23:2 Const Forum 19 at 20.

95 See also Richard Stacey, “Public Law’s Cerberus: A Three-Headed Approach to Charter Rights-Limiting Administrative Decisions” (2024) 37:1 Can JL & Jur 287 [Stacey, “Cerberus”].

for consideration of issues by the courts. Pervasive correctness review, as Professor David Mullan pointed out in 2006, would be problematic:

If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question.⁹⁶

In other common law jurisdictions, constitutional provisions are the preserve of the courts and so administrative tribunals may not have to deal with them at all.⁹⁷ But as soon as they are allowed to deal with constitutional provisions, the legal system has to face up to the fact that it is unrealistic and inappropriate to require non-lawyers to master the doctrinal intricacies of constitutional law. Hence the emergence of *Charter* “values” as an integral part of the framework for front-line decision-making in the administrative state. If one wants to ensure the principled and practical benefits of decentralized enforcement of the constitution, informality is the better approach:

This approach recognizes that it would be unrealistic and inappropriate to require administrative officials to have Professor Hogg’s loose-leaf *Constitutional Law of Canada* text to hand whenever they encounter a human rights issue and Ruth Sullivan’s text on the interpretation of statutes on the shelf in case a knotty interpretive problem arises in the course of their work. It *deformalizes* the process of decision-making by front-line officials. Rather than *the Charter*, they are directed towards *Charter values*; rather than *statutory text*, they are directed towards *statutory objectives*. And they are directed to *balance Charter values* against statutory objectives, having regard to “*the specific facts of the case*”...There is no free pass for front-line officials: they must make a good faith, conscientious attempt to apply the *Charter* and respect the human rights of those citizens with whom they come into contact. This does not require them to engage in a detailed

96 David Mullan, “Administrative Tribunals and Judicial Review of Charter Issues after Mullan” (2007) 21:1 NJCL 127 at 145; see also Doré, *supra* note 2 at para 33.

97 Paul Daly, “Administrative State”, *supra* note 79.

proportionality analysis (the so-called “Oakes test”) but to balance *Charter* values with their statutory objectives. They must, the Supreme Court has recently emphasized in its articulation of reasonableness review in *Vavilov v Canada (Immigration and Citizenship)*, justify their decisions in light of the applicable legal and factual constraints, be responsive to the arguments made by the individuals who appear before [them] and take particular care with decisions which have potentially harsh consequences for those concerned.⁹⁸

Again, *this* is the “constitutional settlement”, as it has developed over many years of case law. This is the doctrinal and institutional structure behind CSFTNO. It is designed to facilitate the consideration of constitutional issues by administrative decision-makers. As I argued above, CSFTNO can perhaps be sharpened by replacing the language of *Charter* values with the language of *Charter* purposes. It would be much more workable for administrative decision-makers to address *Charter* purposes than to address the detailed jurisprudence on *Charter* rights. But doing away with *Doré* entirely might not be workable without doing away with much else besides.

B. A Normative Analysis of *Charter* Values

The primary concern with this constitutional settlement was always the risk of under-powered judicial review.⁹⁹ *Vavilov* has, however, taken care of that: judicial review for constitutional compliance will be appropriately robust.¹⁰⁰ CSFTNO adds that decision-makers will often have to consider *Charter* values.¹⁰¹ It is important to be clear that in many instances, the relevance of *Charter* values will arise from the evidence and submissions before the decision-maker: a decision-maker has to meaningfully grapple with the central planks of the matter as presented by the party or parties.¹⁰² If a constitutional issue is presented, it too must be properly addressed.¹⁰³ This is *Vavilov* 101.

98 Daly, “Inevitability of Discretion”, *supra* note 93 at 125. See also Stacey, “Cerberus”, *supra* note 95; Vanessa MacDonnell, “Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making” (2019) 65:2 McGill LJ 175.

99 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.

100 See especially *Lauzon*, *supra* note 36.

101 CSFTNO, *supra* note 4 at para 66.

102 *Ibid.*

103 *Vavilov*, *supra* note 6 at para 55.

CSFTNO makes clear that *Charter* values may be relevant in other circumstances but only where this is obvious from the decision-making context.¹⁰⁴ CSFTNO was one such instance and I think the Supreme Court was unarguably right (though I suppose I have to agree because they cited me for this proposition) that a Minister deciding whether to admit students to minority language school should bear the purposes of minority language education in mind.¹⁰⁵ I would note that something similar could be said of the recent decision in *Mason v Canada (Citizenship and Immigration)*: once it became clear that one of the consequences of the tribunal's interpretation of the statute would be a risk of refoulement in breach of what is generally accepted to be a norm of customary international law, then it does become unarguable that the point ought to have been considered by the tribunal.¹⁰⁶

The other instances of "obviousness" that one finds in the case law relate to policymaking. For my part, I again find it unarguable that a law society should put its mind to freedom of religion and equality when determining a Christian university's application for accreditation, that a municipality should consider freedom of speech when making decisions that impact residents' ability to express themselves, and that a school board should have careful regard to freedom of conscience when setting policies and making decisions on the wearing of religious symbols in the classroom.¹⁰⁷

In each of these instances, officials in the administrative state exercise significant authority over the citizenry. If they must conform to the constitution (not least because citizens may lack the wherewithal and resources to bring them to court) and it is unrealistic and inappropriate to expect them to conduct a full-fledged proportionality analysis, then they are properly required to consider *Charter* values (or purposes) before they implement their chosen policies.

There remains the objection that giving *Charter* values an expansive role risks upsetting the constitutional appletart by giving unwritten aspects of the Constitution primacy over its written features.¹⁰⁸ This objection has been partly addressed in Part III, Section A, where I explained that it is

¹⁰⁴ CSFTNO, *supra* note 4 at para 75.

¹⁰⁵ *Ibid* at para 66.

¹⁰⁶ *Mason*, *supra* note 72 at paras 108–11.

¹⁰⁷ *Trinity Western*, *supra* note 3; *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154; *Guelph and Area Right to Life v City of Guelph*, 2022 ONSC 43; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

¹⁰⁸ *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 65, citing *Reference re Secession of Quebec*, 1998 CanLII 793 at para 53 (SCC).

based on the mistaken premise that *Charter* values are to be equated with *Charter* rights.

But there is also an institutional response to this objection. The Constitution must be read as a coherent whole: the text of the *Charter* cannot be read in isolation from the institutional mechanisms created for its enforcement in sections 24 and 52 of the *Constitution Act, 1982*.¹⁰⁹ Once it is read as a coherent whole, rather than as a collection of discrete textual provisions, the objection dissolves: *Charter* values emerge as relevant considerations because of careful structural analysis of the institutional features of the Constitution. It is true, of course, that *Charter* values are a product of judicial creativity, but this hardly invalidates them as features of the law of judicial review of administrative action. After all, the conception of reasonableness review in *Vavilov* was woven almost entirely from whole cloth: it is entirely a common law doctrine, with little or no direct statutory or constitutional basis. Based on the institutional analysis I have offered in Part IV of this paper, *Charter* values stand on much firmer ground than the current common law of reasonableness review.¹¹⁰ And, again, if *Charter* values are recast as *Charter* purposes (as I suggested in Part III, Section A), they would stand on still firmer ground.

V. CONCLUSION

In this paper I have defended the recent decision in *CSFTNO*. In Part II, I explained the decision and how the Supreme Court took the opportunity to reaffirm and reassert its much-maligned decision in *Doré*. In Part III, I offered some critical reflections on *CSFTNO*: the rights/values distinction could have been more clearly drawn and the statement that a court may, when a value or right is engaged, reweigh relevant considerations was unnecessary to the outcome in *CSFTNO* and possibly unhelpful. Nonetheless, these critical reflections do not justify condemnation of *CSFTNO*:

109 The Honourable Justice Malcolm Rowe and Manish Oza, “Structural Analysis and the Canadian Constitution” (2023) 101:1 Can Bar Rev 205.

110 For a pre-*Charter* version of *Charter* values influencing the law of judicial review of administrative action, see *Smith & Rhuland*, *supra* note 62. Note also section 26 of the *Charter*. “[T]he guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.” (see *Charter*, *supra* note 1, s 26). That some rights and freedoms have a textual basis does not mean that courts are forbidden from interpreting the Constitution so as to develop additional constraints on government action. The duty to consult, which has no explicit textual basis in the Constitution of Canada, is an excellent example.

ready answers are available and provided in Part III, Section A (recasting *Charter* values as *Charter* purposes) and Part III, Section B (appreciating the limited scenarios in which *Charter* values/purposes will have an impact on administrative decision-making). In Part IV, I developed a deep defence of *CSFTNO*, offering an institutional reading of the decision and explaining how it is in harmony with well-established features of Canadian public law, especially Canada's decentralized approach to the enforcement of the Constitution (Part IV, Section A). In fact, the *Doré* duty has surprisingly deep doctrinal roots. I then concluded by presenting the normative case for judicial enforcement of *Charter* values/purposes which, in my view, is an attractive way of regulating the relationship between state and citizen.