

AB v Northwest Territories: A New Low for the Doré/Loyola Framework

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I. Introduction

Since the advent of the *Canadian Charter of Rights and Freedoms*¹ in 1982, the relationship between the *Charter* and administrative law has been somewhat rocky. The unique nature of administrative decisions has been perceived by some jurists as requiring an unnecessarily nuanced approach to *Charter* issues in the administrative law context, resulting in problematic decisions untethered from jurisprudential *Charter* reasoning and the text of the *Charter* itself. The most notable of these cases are *Doré v Québec*² and *Loyola High School v Québec (Attorney General)*.³ The legacy of these decisions, sometimes referred to as the *Doré/Loyola* framework,⁴ regrettably established that on judicial review, administrative decisions need only demonstrate a proper balancing of implicated *Charter* rights or elusively-defined *Charter* values with relevant governmental objectives, and that these decisions will only be reviewed on

The article is dedicated to my late friend Dylan Augruso, with whom I shared so many wonderful debates and discussions dating all the way back to our high school law classes as we embarked on our pursuits of legal education and practice. He no doubt would have had insightful and challenging feedback on this article, which he would have delivered with his unique blend of wit and intellect which endeared him to so many.

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

2 2012 SCC 12 [*Doré*].

3 2015 SCC 12 [*Loyola*].

4 Or occasionally the *Doré/Loyola/TWU* framework.

a standard of reasonableness rather than correctness. The recent decision of the Northwest Territories Court of Appeal in *AB v Northwest Territories (Minister of Education, Culture and Employment)*⁵ (“AB”) highlights how far down a slippery slope of constitutional misinterpretation the framework has allowed the law to slide. As will be explained, AB involves a constitutional argument that is wholly unsupported by the *Charter* itself and would likely never have been advanced but for the *Doré/Loyola* framework. The Supreme Court needs to clearly shift administrative law into a new paradigm where all administrative decisions are subject to a *Charter* rights analysis consistent with the approach utilized when courts consider whether legislation is compliant with the *Charter*’s protections.

II. The *Charter* in the Administrative Law Context Pre-*Doré*

The precise nature of when, why, and how courts should scrutinize administrative decisions has been the subject of a significant body of jurisprudence. A particularly challenging issue for courts asked to review administrative decisions has been ascertaining the relationship between the *Charter* and administrative decision-makers. Administrative decision-makers are regularly asked to make decisions that involve *Charter* considerations and, provided they have the requisite jurisdiction to do so, will be obligated to provide a response to *Charter*-related problems.⁶

Issues that call upon administrative decision-makers to engage in *Charter* analysis can be grouped into two categories.⁷ First, an administrative decision-maker may be asked to scrutinize a regulation or piece of legislation that they administer for *Charter* compliance. An illustrative example of this is the case of *Saskatchewan (Human Rights Commission) v Whatcott*,⁸ which concerned an individual, Mr Whatcott, who had circulated anti-homosexual flyers that were found to violate the hate speech provisions of the *Saskatchewan Human Rights Code*. In response, Whatcott challenged the provisions as unjustified infringements of the freedoms of religion and expression as protected by sections 2(a) and 2(b) of the *Charter*, respectively. The Saskatchewan Human Rights Tribunal found that the hate speech provisions were justifiable infringements of the *Charter*, a decision which was partly overturned by the Supreme Court.⁹

It is settled law that issues in this first category will be determined with the application of a standard *Charter* rights analysis on judicial review, with reference to the test from *Oakes* to justify an infringement if one is proven by the claimant on the balance of probabilities. Further, tribunal decisions on these issues will be subject to the non-deferential correctness standard when reviewed by the courts. These important questions pertaining to fundamental constitutional protections require a correct answer, and nothing less will suffice.¹⁰

5 2021 NWTCA 8 [AB].

6 Problematically, this response will not always have to be in the form of explicit consideration in written reasons but may instead be “inferred from the record.” See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 98.

7 It is not atypical to see issues being raised from both categories in the same case, but each will receive a distinct analysis under the appropriate framework.

8 2013 SCC 11.

9 See *ibid* at paras 8-10, 99.

10 See *Vavilov*, *supra* note 6 at paras 55-57.

By contrast, issues falling into the second category of *Charter*-related administrative decisions have generated significantly more confusion. These issues do not involve an argument that a law or regulation violates a *Charter* right, but rather that the administrative decision *itself* is at odds with the *Charter*. Prior to *Doré*, case law addressing this second category of constitutional issues was analytically divided. Administrative decision-makers were exercising authority explicitly granted to them via statute or regulation, but the scrutiny of administrative decisions for some judges was different enough in comparison to the review of legislation for constitutional compliance so as to require a different analytical approach. This resulted in decisions being considered and determined using different legal analyses, which can be organized into two separate methodological groups.

In the first methodological group, administrative decisions were not deemed to be so unique as to require a different analytical framework and were therefore approached in the same manner as a typical *Charter* challenge of government legislation. This approach is perhaps best exemplified in the majority reasons of the Supreme Court in its 2006 decision in *Multani v Commission scolaire Marguerite-Bourgeoys*.¹¹ *Multani* dealt with the religious accommodation of a student and his belief that, as an orthodox Sikh, he should have an item of religious significance called a kirpan on his person at all times, including when attending school. A kirpan would, in everyday parlance, be described as a dagger and must be made of metal. After an incident where the student dropped their kirpan in the schoolyard, the school board decided that kirpans could not be brought to school without exception, citing the school's code of conduct which prohibited students from bringing weapons or dangerous objects of any kind to school.¹² The *Multani* family challenged this decision as an unjustifiable infringement of their son's freedom of religion, which is guaranteed by section 2(a) of the *Charter*.¹³ A majority of the Supreme Court found that the school board's refusal to accept the compromise proposed by the school and the *Multani* family was an unjustifiable infringement of freedom of religion.

In the course of coming to this conclusion, the majority judgment, authored by Justice Charron, addressed the issue of the appropriate analytical framework to be utilized to assess the *Charter* complaint. The majority ultimately determined that in circumstances where the constitutionality of an administrative decision is challenged, a traditional *Charter* analysis and section 1 justification test is appropriate.¹⁴ While acknowledging that there will be instances in which an administrative decision is challenged on multiple grounds, some of which will raise issues that distinctly fall within the purview of administrative law only, the majority concludes that those issues that are constitutional in nature should be determined via a constitutional law framework.¹⁵

The second methodological perspective, on the other hand, approaches constitutional challenges to administrative decisions by assuming that they require an analysis specific to the administrative law context, rather than a traditional *Charter* analysis. This approach is best exemplified, at least prior to *Doré*, by the dissent in *Multani*, co-authored by Justice Deschamps and Justice Abella. Although ultimately reaching the same conclusion as the

11 2006 SCC 6 [*Multani*].

12 See *ibid* at para 4.

13 See *ibid* at para 6.

14 See *ibid* at para 16.

15 See *ibid* at para 17.

majority — namely that the student should be permitted to wear the kirpan at school provided it was sewn into their clothing and therefore rendered generally inaccessible — the dissent suggested that this conclusion should be reached via an analytical methodology specific to administrative law.¹⁶ In Deschamps and Abella JJ's view:

the administrative law approach must be retained for reviewing *decisions* and *orders* made by administrative bodies. A constitutional justification analysis must, on the other hand, be carried out when reviewing the validity or enforceability of a *norm* such as a law, regulation, or other similar rule of general application.¹⁷

While acknowledging that tribunals must act in compliance with constitutional “values,” the dissent argues that this can be assessed with reference to administrative law principles rather than the typical inquiry involved in a constitutional challenge of a statute or regulation.¹⁸

The minority reasoning in *Multani* cites previous Supreme Court precedents, which, although involving constitutional issues, were nevertheless decided within an administrative law framework. This includes the Supreme Court's decision in *Trinity Western University v British Columbia College of Teachers*,¹⁹ which involved a challenge to the administrative decision of the British Columbia College of Teachers (“BCCT”) denying accreditation for Trinity Western University's (“TWU”) proposed teacher education program. Aside from the dissenting opinion of Justice L'Heureux-Dubé, the Court did not engage in a traditional *Charter* analysis, but instead determined that the BCCT acted improperly in denying accreditation to TWU's program with reference to the administrative law standard of review, albeit with reference to the *Charter*'s protections of religious freedom and equality, which animated the issues before the court.²⁰

The state of the law prior to *Doré* was, therefore, unclear for judges tasked with considering an argument that an administrative decision violated the *Charter*. Should an administrative law framework be employed? Or was a traditional *Charter* review utilizing an *Oakes* justification test the appropriate approach?

III. *Doré* and *Loyola*

The Supreme Court's decision in *Doré* responded to the divergent approaches in previous jurisprudence and clarified that a *Charter* challenge to an administrative decision itself would not attract a typical *Charter* analysis on judicial review. The case dealt with a finding of professional misconduct against Mr Doré, a lawyer practicing in Québec, by the Barreau du Québec's Disciplinary Council. Mr Doré penned a scathing letter to a judge who had recently disparaged him in the courtroom, the contents of which were deemed to violate the acceptable standards of conduct expected of all members of the Québec bar.²¹ Before the Supreme Court, Mr Doré did not challenge the constitutionality of the professionalism provision he had been found to have violated, but rather attacked the finding of professional misconduct itself as

¹⁶ See *ibid* at para 85.

¹⁷ *Ibid* at para 103 [emphasis in original].

¹⁸ See *ibid* at paras 109-111.

¹⁹ 2001 SCC 31.

²⁰ See *ibid* at paras 28, 38.

²¹ See *Doré*, *supra* note 2 at paras 10, 16, 17.

constituting a violation of the guarantee of freedom of expression provided in section 2(b) of the *Charter*.²² At its simplest, the argument was that a decision of an entity exercising authority delegated to it by the government could not unjustifiably infringe a right protected by the *Charter*, as this would be tantamount to permitting the government to dishonor its obligation to act in accordance with constitutionally-protected human rights. This again raised the question of the appropriate legal framework that should be used to scrutinize a decision that was administrative in nature but also clearly raised constitutional issues.

The reasons in *Doré* were authored by Justice Abella and built upon her concurring reasoning in *Multani* six years prior. Justice Abella noted the inconsistencies in approaches in previous case law and identified two options before the Supreme Court for resolving this methodological conundrum: it could either endorse the applicability of a traditional *Charter* rights analysis, or embrace a more nuanced approach to reflect the unique context of administrative law.²³ In selecting the latter option, Justice Abella clarified that while administrative decision-makers must always act in consideration of *Charter* values, a degree of deference should be afforded to decision-makers who give these values proper consideration, specifically through the application of a reasonableness standard of review rather than a more exacting requirement of correctness.²⁴ Justice Abella then applied this framework to the Disciplinary Council's decision and found that it was reasonable and hence legal, reflecting an adequate consideration of the *Charter* values related to freedom of expression and the objectives of the professionalism standards established for lawyers practicing in Québec.²⁵

Three years later, the Supreme Court maintained this framework in its decision in *Loyola*. This case dealt with the application of a new religion and ethics curriculum in Québec to private educational institutions operated from a particular religious perspective. The curriculum required Québec teachers to teach students about a variety of religious perspectives from an entirely objective position.²⁶ Private educational institutions could make a request to the Minister of Education to substitute their own alternative program, provided the Minister was satisfied that the new curriculum was truly "equivalent" to the curriculum developed by the province.²⁷ Loyola High School, a private Catholic institution, had their proposed alternative curriculum rejected twice by the Minister, who deemed their curriculum to not be sufficiently neutral and, therefore, not a true equivalent of the provincial program.²⁸ Writing for the majority once again, Justice Abella confirmed that the framework from *Doré* was applicable and that administrative decision-makers must merely balance implicated *Charter* rights and values with relevant governmental objectives when making their decisions.²⁹ At the same time, though, despite having expressed concerns with the formulaic application of the *Oakes* test to administrative decisions in *Doré*,³⁰ Justice Abella acknowledged that there are specific elements of the *Oakes* formula that have some real utility in the *Doré* framework, particularly

22 See *ibid* at para 2.

23 See *ibid* at paras 34-35.

24 See *ibid* at paras 35-37, 45.

25 See *ibid* at paras 69-71.

26 See *Loyola*, *supra* note 3 at para 19.

27 *Ibid* at para 19.

28 See *ibid* at paras 26-28.

29 See *ibid* at para 35.

30 See *Doré*, *supra* note 2 at para 5.

the question of minimal impairment.³¹ In the end, the Court ultimately ruled that although it is reasonable to expect a teacher in a private religious institution to teach about other religions or ethical beliefs from a neutral perspective, the Minister's requirement that institutions also teach about their *own* religious beliefs from a neutral perspective was unreasonable in light of the *Charter's* protection of freedom of religion. The Court accordingly remitted the matter back to the Minister of Education for reconsideration.³²

IV. The *Doré/Loyola* Framework through the Lens of *AB*

In the years since it was established, the *Doré/Loyola* framework has been critiqued in numerous academic publications.³³ In particular, three hallmarks of this framework — namely its reference to *Charter* values, its insistence on a distinct type of *Charter* analysis that differs from a traditional *Charter* rights approach, and its deference to administrative decisions on *Charter* issues by subjecting them to a standard of reasonableness rather than correctness — have been flagged as problematic. Some of this criticism has actually emerged from within the Supreme Court itself, most notably in the dissenting reasons of Justice Côté and Justice Brown in *Trinity Western University v Law Society of Upper Canada*³⁴ and *Law Society of British Columbia v Trinity Western University*,³⁵ which concluded that the use of the *Doré/Loyola* framework in place of the *Oakes* test does not adequately protect *Charter* rights and that the framework ultimately favors statutory objectives over infringed rights. However, despite these concerns and criticisms, the Supreme Court declined the invitation to interfere with the framework in *Canada (Minister of Citizenship and Immigration) v Vavilov* (2019), as the issue was not engaged by the circumstances of that case.³⁶ This means that, for now, the *Doré/Loyola* framework remains binding law.

Looking ahead, though, the circumstances surrounding the Northwest Territories Court of Appeal's recent judgment in *AB* ground a related but somewhat novel critique of the *Doré/Loyola* framework.³⁷ The major issue with the framework exemplified by *AB* is that it invites *Charter*-related arguments where a traditional *Charter* rights analysis would not be available. In this regard, the decision in *AB* demonstrates how the framework and its reliance on *Charter* values, as opposed to *Charter* rights, may promote confusion for administrative decision-makers and judges alike and invite unnecessary judicial review applications.

AB dealt with the denial of a request by non-French-speaking parents and a number of other families in similar circumstances to have their children enrolled in a French-speaking

31 See *Loyola*, *supra* note 3 at paras 40-41.

32 See *ibid* at paras 78-81.

33 In addition to other works specifically cited in this article, see for instance: Léonid Sirota, "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2 J Commonwealth L 1; Janet Epp Buckingham, "Down a Long and Dimly-Lit Path: Are We There Yet with Standards of Review and Religious Freedom?" (2020) 2 J Commonwealth L 151; Paul Daly, "Unresolved Issues After *Vavilov*" (paper delivered at the Hugh Ketcheson QC Memorial Lecture, 19 November 2020) [unpublished].

34 2018 SCC 33.

35 2018 SCC 32 [LSBC].

36 See *Vavilov*, *supra* note 6 at para 57.

37 See *AB*, *supra* note 5.

school.³⁸ The role of Section 23 of the *Charter* in the determination of these requests was a crucial issue in the case. Section 23 is reproduced here in its entirety, along with the headers that appear in the *Charter*'s text:

MINORITY LANGUAGE EDUCATIONAL RIGHTS

Language of instruction

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Section 23 explicitly grants rights to some Canadian parents to have their children provided with education in a minority language. In *AB*, however, the claimants had emigrated from the Netherlands, where they had not spoken French, and it was undisputed that this placed them outside the protective ambit of section 23.³⁹ This bears emphasis: *the family conceded that none of their constitutional rights had been violated.*

The Minister of Education did allow for some students who did not attract the rights protections of section 23 to be admitted to French schools pursuant to an admission process set out in a ministerial directive, and the Minister also retained a residual discretion to admit non-section 23 students on a case-by-case basis.⁴⁰ However, the family's application to be permitted to enroll their child in a section 23 school pursuant to the New Immigrant stream in the directive, and a subsequent request that the Minister exercise their residual discretion to permit the enrolment, were denied. The Minister again declined to exercise their discretion

38 See *ibid* at para 2.

39 See *ibid* at paras 13, 41, and 56.

40 See *ibid* at paras 8-10.

when the issue was remitted back to them for reconsideration after the family successfully brought their first application for judicial review.⁴¹

It is useful at this point to place oneself in the shoes of the counsel for AB's family and consider the different advice that one might give to the family in different legal contexts. If judicial review of the Minister's exercise of discretion were subjected to a traditional *Charter* rights analysis, one would likely tell AB's family that, unfortunately, they have little legal recourse, as they are not individuals who attract the very specific protections provided in section 23.⁴² Other considerations aside, the text of this section of the Constitution is very specific and clearly not applicable to the family, who would be best advised to not engage in an expensive and time-consuming legal battle.

By contrast, the *Charter* values framework is far less clear. The AB family is clearly not a rights holder pursuant to section 23, but perhaps there is some malleability in the *values* underpinning section 23 that can support some type of argument that the Minister's non-exercise of discretion undermined these values. Indeed, counsel for the AB family and other co-applicants who had likewise been rejected from enrolment in French schools successfully made this argument *twice* on judicial review before Justice Rouleau of the Northwest Territories Supreme Court.⁴³

In its judgment, the Court of Appeal suggests that the argument being made by the applicant families is trying to stretch section 23 beyond its clear limits, noting that "having regard to fundamental societal values [when making an administrative decision] does not require the extension of constitutional rights to those who do not hold them."⁴⁴ However, the focus on *Charter* values, rather than on rights as they are explicitly protected in the *Charter*, invites attempts to stretch the *Charter* beyond its clear textual limits.

From the more amorphous perspective of a *Charter* values approach, the AB family's argument that denying their enrolment in a section 23 school was at odds with the *Charter* was not far-fetched. The Ministerial directive appeared to identify linguistic and cultural revitalization and French population growth as values underpinning the inclusion of section 23 in the *Charter*.⁴⁵ In this regard, a decision in the family's favour may seem apt: the family wished to assimilate into the francophone community in the Northwest Territories, had previously enrolled their child in a French daycare, and, despite their international origins, had raised their child with an emphasis on using French as the primary language of communication rather than Dutch or English, which the parents spoke prior to immigrating to Canada. Moreover, their application appeared to have the support of the francophone community, as both

41 See *ibid* at paras 14-16.

42 As the Court of Appeal notes at AB, *supra* note 5 at para 51, the ministerial directive was not challenged as unconstitutional. This challenge was not available as no *Charter* right was infringed given that the directive explicitly dealt with individuals and families who did not have any rights under section 23. But for the *Doré/Loyola* framework the same logic would apply to the challenge to the minister's non-exercise of their residual discretion.

43 AB, *Commission scolaire francophone c Ministre de l'Éducation*, 2019 NWTSC 25; *Commission scolaire francophone c Ministre de l'Éducation*, 2020 NWTSC 28.

44 AB, *supra* note 5 at para 57.

45 See *ibid* at para 9.

the principal of the school AB had proposed to attend and the French school board, the Commission scolaire francophone, supported the family's application.⁴⁶

The Minister's initial reasons for declining an exercise of discretion to allow the child to be enrolled in a section 23 school acknowledged the family's commitment to French and the family's "remarkable involvement in the francophone community."⁴⁷ If section 23 promotes cultural and linguistic revitalization, as the Ministerial directive suggests, it presumably favours the inclusion of families like AB's that are committed to being a part of and contributing to a community and its revitalization. Moreover, as the francophone educational community itself was desirous of the student's enrolment, one can certainly see that there is a solid argument to be made that it is unreasonable to not admit the student in light of the values that the directive associates with section 23.

In the end, all of the parties and decision-makers in *AB* were let down by the *Doré/Loyola* framework. The *Charter* values approach supported an argument that was unsupported by the written text of the *Charter* itself, and this lack of textual anchorage ultimately led to the Court of Appeal allowing the Minister's appeals and upholding the Minister's decision not to admit the non-section 23 students.⁴⁸ By contrast, a clear focus on *Charter* rights rather than *Charter* values could have provided needed clarity and predictability for everyone involved from the outset, thereby saving a great deal of time, money, and judicial resources. This type of waste resulting from the framework's problems is not surprising, and was predicted by Christopher D Bredt and Ewa Krajewska in their analysis of *Doré* in 2014, which suggested that the framework established in *Doré* undermines the purpose of administrative tribunals to enhance access to justice by providing cheaper, more expeditious resolutions to legal disputes without resorting to the courts.⁴⁹

If left unresolved, the *Doré/Loyola* framework will continue to invite *Charter* arguments in instances where, but for the framework's reference to *Charter* values, a *Charter* rights argument is clearly unavailable. Just as *Charter* rights must be given their proper emphasis and consideration when an allegation is made that the state has engaged in some type of action that unjustifiably infringes *Charter* rights, there will also be instances where reference to the *Charter* is unnecessary and either distracts from the issues before the court or represents an attempt to disguise a non-constitutional issue as a constitutional one in an effort to bring the *Charter* into consideration.

In this respect, the key problem is that the framework does not distinguish between *Charter* rights and *Charter* values, and in fact, appears to view them as equally grounding a constitutional argument. In *Loyola*, Justice Abella explained that *Doré* "requires administrative decision-makers to proportionately balance the *Charter* protections — *values and rights* — at stake in their decisions with the relevant statutory mandate."⁵⁰ The upshot of this is that if a *Charter* value is somehow threatened by an administrative decision and this value was not given due

46 See *ibid* at paras 13 and 24.

47 *Ibid* at para 24.

48 See *ibid* at 134-135.

49 "Doré: All That Glitters is Not Gold" (2014) 67 SCLR (2d) 339 at 354.

50 *Loyola*, *supra* note 3 at para 35 [emphasis added].

consideration by the administrative decision-maker, then judicial intervention would be warranted, even if a *Charter* right is not implicated.

In *AB*, the Court of Appeal attempted to address this by ruling that the *Doré/Loyola* framework only applies if a *Charter* right is infringed, although the passage that the Court of Appeal references from *LSBC* specifically adopts Justice Abella's reference to *Charter* protections in *Loyola*, which does not restrict the framework's application to only those instances where a violation of a *Charter* right has been made out.⁵¹ While *AB* accordingly constitutes a misstatement of the current status of the law, the requirement that a violation of a *Charter* right be made out as a prerequisite to a *Charter* challenge of an administrative decision describes what the law should be and hopefully will be in the future. Just as a *Charter* value can be plucked from the ether to act as a makeweight to a *Charter* right that has actually been infringed, so too can a *Charter* value be conjured from the void to unnecessarily create a *Charter* challenge. Justice Rowe identifies this problem in his concurrence in *LSBC*, noting that by "equating 'rights and values' under the umbrella term of '*Charter* protections[']' the majority undermines the view that rights and values are distinct in scope and function."⁵²

V. A Better Way Forward

The *Doré/Loyola* framework may be fairly described as an example of judicial overthought. Justice Rowe appears to identify the framework as a well-intentioned effort that unfortunately worsened rather than improved the law in his concurring opinion in *LSBC*, noting that while "*Doré* was motivated by a desire to streamline the review of administrative decisions for compliance with the *Charter*, its stated preference for a 'robust conception of administrative law' should not have the (unquestionably unintended) effect of diluting the protection afforded to *Charter* rights."⁵³ While there are certainly instances where the law must be cognizant of the unique nature of the Canadian administrative state, this does not require a novel analytical regime for the application of the *Charter* in judicial review of administrative decisions. The *Doré/Loyola* framework has cheapened the protection of *Charter* rights against improper government action, and its emphasis on amorphous *Charter* values threatens transparency and consistency in both administrative decisions and judicial review rulings when the administrative decision is challenged as violating the *Charter*.

What the Supreme Court should have done in *Doré* and *Loyola*, and will hopefully do in the future, was utilize the time-tested tools already at their disposal, namely, the traditional *Charter* rights analysis and the justification test from *Oakes*.⁵⁴ Rather than trying to reinvent the wheel, the Court would have been better off simply relying on the existing framework that has served constitutional law so well for decades and is entirely applicable and appropriate for use in reviewing whether the substance of administrative decisions complies with the *Charter*.

51 See *AB*, *supra* note 5 at para 65.

52 *LSBC*, *supra* note 35 at para 174.

53 *Ibid* at para 206.

54 Justice Côté and Justice Brown indicated their preference for this shift in *LSBC*, *supra* note 35 at para 267.

Fortunately, the Supreme Court may, in fact, have an upcoming opportunity to retire the *Doré/Loyola* framework. On April 14, 2022, the Supreme Court granted leave to appeal in *AB*.⁵⁵ The appeal was heard by the Court on February 9, 2023 and the Court's decision has not yet been rendered. While the appellants have not directly challenged the framework in their appeal,⁵⁶ which is logical given that it provides them with part of their argumentative platform, this case nevertheless provides a proper factual and legal context for the Supreme Court to potentially signal a shift away from the *Doré/Loyola* framework, and to bring much-needed clarity to this area of the law. As reflected in the above analysis, this case is a prime example of the troublesome nature of the framework and demonstrates how an analysis based on *Charter* values may ultimately result in a decision that is unsupported by the clear text of the *Charter* itself.

Of course, a victory for the appellants that restored the analysis of Justice Rouleau regarding *Charter* values would be a positive one for the affected families and communities. However, it would also, unfortunately, stimulate further uncertainty in this area of the law and open the door to future challenges to administrative decisions that, while perhaps meriting political scrutiny, are not actually legally improper. While a judicial attraction to reaching a conclusion that is agreeable to the children, families, schools, and school boards involved is understandable, the courts must be cognizant of the dangerous attraction of judicial activism, and must avoid imposing a legal solution where what is required is a political solution that can be subjected to public and especially electoral scrutiny.

It is also important to remember that the Minister of Education had financial concerns in mind when considering the families' applications, as the cost of students in section 23 schools was higher than in other public schools, and the Minister had to consider the financial implications of any enrolment decision not just for these specific students but as a precedent for future applications as well.⁵⁷ If the Supreme Court ultimately rules that the Minister's decision to reject the families' applications was unreasonable, *Charter* values will have been used to create a potentially expansive positive right unsupported by the specific language of section 23, which could have significant resource allocation implications for current and subsequent governments in the Northwest Territories and in other provinces and territories as well. The Supreme Court has consistently guarded against this, given that spending money on one thing means not having as much money to spend on something else, and given the courts' limited competence for interfering in allocative decision-making.

To sum up, then, *AB* represents a new low-point in the application of the *Doré/Loyola* framework, which not only fails to properly protect *Charter* rights but now also works to invite arguments that the *Charter* has been violated despite no *Charter*-protected right having been infringed. If and when the Supreme Court will choose to overrule this framework is anybody's guess, although the factual circumstances in *AB*, as well as the current dynamics of the Supreme Court, may provide a platform for the Court to implement a paradigm shift. Justice Abella, who was influential in developing and implementing the *Doré/Loyola* framework, has recently retired from the Supreme Court, removing a strong advocate for

⁵⁵ See *AB*, *supra* note 5, leave to appeal to SCC granted, 39915 (14 April 2022).

⁵⁶ See *ibid* (Memorandum of Argument of the Appellants on Notice of Application for Leave to Appeal at para 3).

⁵⁷ See *ibid* at para 23.

the framework's utility from future decisions. Three of the nine members of the Supreme Court — Justice Côté, Justice Brown, and Justice Rowe — have been explicitly critical of the *Doré/Loyola* framework.⁵⁸ Time will tell whether the current composition of the Court and their collective reasoning will produce a resolution to the problems inherent in the *Doré/Loyola* framework.

58 Justice Brown and Justice Rowe did not in fact hear the appeal in *AB* as a result of events which transpired after this article had been completed. Justice Brown was granted a leave of absence following the receipt of a complaint of alleged misconduct by the Canadian Judicial Council. In light of Justice Brown's absence, the Court heard *AB* as a panel of seven, with Justice Rowe being the odd man out for this case.