

Rights, Review and Reasonableness: The Implications of Canada's New Approach to Administrative Decision-Making and Human Rights for Australia

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Abstract

One of the difficult issues with which courts in jurisdictions with constitutional or statutory rights protection have had to grapple is the effect of human rights on the exercise of discretion by public authorities. Rights legislation tends to be reasonably clear about the proportionality test required of legislation and regulations, but far less explicit about the role of rights in administrative decision-making. The two Australian jurisdictions with bills of rights — the Australian Capital Territory and Victoria — have largely followed the orthodox Canadian approach on the issue. However, the Supreme Court of Canada has recently cast serious doubt on much of its earlier precedent. This article examines the developments in Canadian law and the implications of the new Canadian approach for Victoria and the ACT. It argues that while the new Canadian approach may offer solutions to some of the problems faced by Australian courts, particularly in the wake of the *Momcilovic* litigation, it is based on principles that have no equivalent in Australian public law.

I Introduction

One of the many challenges for courts in jurisdictions with statutory or constitutional rights protection is determining the effect of human rights on the exercise of discretion by public authorities. Courts in a number of common law jurisdictions, including Victoria and the Australian Capital Territory (ACT), have been confronted with this issue, largely due to the fact that many rights instruments are not particularly clear on how public authorities should take rights into account in their decision-making.¹ As a result, judges have been left with the difficult task

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¹ In addition to the jurisdictions discussed in this article (Canada, Victoria and the Australian Capital Territory) courts in both New Zealand and the United Kingdom have been confronted with this issue. See, eg, Philip A Joseph and Thomas Joseph, 'Human Rights in the New Zealand Courts'

of interpreting human rights documents in a way that balances important competing policy considerations. On the one hand, there is a need for sufficient judicial oversight of administrative decisions to ensure that public authorities respect human rights when exercising public power. On the other, the administrative reality of modern government requires that legislatures delegate many functions to the executive, and legislatures do so expecting executive officers to apply their expertise and specialised knowledge when exercising their discretionary functions.

The relationship between discretionary administrative decision-making and human rights is a matter that will need to be resolved by both Victorian and ACT courts in coming years. The decisions of the Victorian Court of Appeal and High Court of Australia in the *Momcilovic* litigation² highlighted that the issue remains both unresolved and subject to disagreement. Courts in both Victoria and the ACT have to date largely taken their lead on this question from Canada. The reason for this is readily apparent: crucial provisions of the human rights acts in both jurisdictions³ are modelled on the *Canadian Charter of Rights and Freedoms*⁴ ('*Charter*'). In fact, the *Canadian Charter* and the Supreme Court of Canada's judgments on this issue have been influential across the common law world.⁵

However, for the past 25 years the Canadian Supreme Court has itself struggled to find a consistent approach to reviewing administrative decisions that limit *Charter* rights and has attempted to resolve the issue by using a variety of conflicting methods. For example, in many instances where an administrative decision was argued to impinge on protected rights, the Court has ignored administrative law principles in favour of *Charter* tests, adopting a view that administrative law was incapable of the substantive, values inquiries that the *Charter* demanded. Yet, in other cases, the Court attempted to integrate the *Charter* and administrative law, or found that the *Charter* did not apply to discretionary administrative decision-making at all. The ways in which different Canadian judgments have approached the issue highlight some of the key theoretical and practical challenges for the relationship between administrative decisions and rights. Each approach has different implications, both for the principles of judicial review of administrative action, and for the relationship between the various strands of public law.

In its recent decision in *Doré v Barreau du Québec*⁶ Canada's Supreme Court articulated a new approach to the issue, overturning and reframing much of its earlier precedent. The *Doré* decision resolves some of the most difficult aspects of the relationship between the *Charter* and administrative law in Canada. It

(2011) 18 *Australian Journal of Administrative Law* 80; Tom Hickman, *Public Law after the Human Rights Act* (Hart, 2010) ch 6.

² *R v Momcilovic* (2010) 25 VR 436 (Court of Appeal of Victoria) ('*Momcilovic CA*'); *Momcilovic v The Queen* (2011) 245 CLR 1 (High Court of Australia) ('*Momcilovic HC*').

³ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁴ The *Canadian Charter of Rights and Freedoms* comprises Part I of the *Constitution Act 1982*, which is itself sch B of the *Canada Act 1982* c 11 (UK).

⁵ David Mullan, 'Proportionality, Deference, Wednesbury: Taking up Michael Taggart's Challenge' (2010) *New Zealand Law Review* 233, 238.

⁶ [2012] 1 SCR 395 ('*Doré*').

demonstrates that the principles of Canadian administrative law have now evolved to a point where they are capable of, and the most appropriate method for, considering the substantive values issues involved in *Charter* cases. Yet the decision also leaves a great many issues unresolved. For instance, it is unclear whether the reasonableness standard in Canadian administrative law will in effect become a proportionality test when *Charter* rights are involved. While this seems likely based on statements made in the *Doré* judgment, it is not clear what the new administrative law proportionality test will entail and whether it will offer a standard of rights protection equivalent to the well-developed test⁷ that applies to legislation that infringes on a *Charter* right. Nor is it clear whether a proportionality-style test will apply only to administrative decisions which directly engage a *Charter* right, or whether the mere involvement of undefined ‘*Charter* values’ will be sufficient to require more anxious scrutiny from the courts.⁸ Many of these questions will undoubtedly be answered by the Canadian Supreme Court in coming years; however the change in Canada’s approach poses some additional challenges for Victorian and ACT courts in interpreting their own human rights legislation. Although Canada’s new approach may offer solutions to some of the issues that Australian courts will need to resolve, it does so by relying on administrative law principles for which there are no direct equivalents in Australian common law.

This article examines the interaction between rights and administrative decision-making in Canada, Victoria and the ACT and asks what lessons Australia might take from the new Canadian approach. The first section analyses the problem from a Canadian perspective, outlining the competing approaches to issue and their implications for the relationship between administrative law and the *Charter*. Section two considers the extent to which *Doré* has altered the position in Canada. The final section examines Victorian and ACT approaches to the interaction between administrative decision-making and rights, arguing that differences between the Canadian and Australian human rights instruments mean that significant logical and practical difficulties have arisen as Australian courts have attempted to follow early Canadian precedent. The article then highlights some of the key lessons and challenges for the Australian jurisdictions in the wake of *Doré*. It is suggested that although the new Canadian approach may not directly translate into Australian administrative law, it does offer some guidance to Victorian and ACT courts, and highlights some of the questions with which they will need to grapple in resolving the relationship between human rights and judicial review of administrative action.

⁷ From *R v Oakes* [1986] 1 SCR 103, discussed below, text accompanying n 14–15.

⁸ Throughout the *Doré* judgment, the Supreme Court continually refers to administrative decisions that touch on ‘*Charter* values’. It is not entirely clear what the Court meant, and whether and to what extent these *Charter* values differ from the rights expressly protected by the *Charter*. Unfortunately, it is not within the scope of this article to examine this interesting and potentially important question further.

II The Supreme Court of Canada's Earlier Approaches to Human Rights in Administrative Decision-Making

Prior to the Supreme Court's decision in *Doré*, the law in Canada dealing with the interaction between administrative law and the *Charter* was 'in disarray'.⁹ Much of the confusion was attributable to the fact that the *Charter* itself is not clear on how administrative decision-makers are required to take protected rights and freedoms into account in decision-making. The *Charter* is clear that the rights it protects apply to the decisions and actions of Canadian legislatures and governments, both provincial and federal.¹⁰ Should legislation made by any Canadian Parliament, or regulations or administrative decisions made thereunder, be found to establish limits on *Charter* rights that are not justified, the courts¹¹ have the power to declare the offending provision or action null.¹² The *Charter* also acknowledges that the rights and freedoms it protects are not absolute, as the nature of a democratic, ordered society will at times necessitate the limitation of human rights. Section 1 makes it clear that any limits that legislation imposes on rights must be justifiable:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits *prescribed by law* as can be demonstrably justified in a free and democratic society.¹³

This section has given rise to the familiar two-step test developed in *R v Oakes*.¹⁴ The first step of the *Oakes* test asks whether the objective of the legislation is sufficiently important to warrant overriding the relevant right or freedom. The second step considers whether the means chosen to achieve the legislative objective are proportionate to the ends sought to be achieved by the legislation. This proportionality test involves balancing the public interests with the rights of individuals and groups.

On its face s 1, and the *Oakes* test which applies it, only appear to apply to limits on rights which are 'prescribed by law'. In respect of the *Charter*'s effect on administrative decision-making, therefore, s 1 will clearly apply to executive government when it is making subordinate legislation or instruments which can

⁹ David Mullan, 'The Canadian Charter of Rights and Freedoms: A "Direct Driver" of Judicial Review of Administrative Action in Canada?' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) 142.

¹⁰ *Canadian Charter of Rights and Freedoms*, s 32.

¹¹ Courts of competent jurisdiction under the *Charter* include provincial superior and appellate courts as well as courts created by the federal Parliament: *R v Rahey* [1987] 1 SCR 588. Where the remedy sought for an alleged *Charter* violation relates to a trial procedure, the trial court may be a court of competent jurisdiction: *R v Smith* [1989] 2 SCR 1120. A tribunal may be a 'court of competent jurisdiction' to grant *Charter* remedies if it has jurisdiction over the matter, has the power to decide questions of law and has not had its constitutional jurisdiction clearly withdrawn: *R v Conway* [2010] 1 SCR 765 ('*Conway*').

¹² Section 52 of the *Charter* provides that 'any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect', giving courts authority to declare legislation and regulations null. Section 24 gives courts the jurisdiction to remedy executive breaches of the *Charter* and provides that 'anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances'.

¹³ Emphasis added.

¹⁴ [1986] 1 SCR 103 ('*Oakes*').

clearly be said to ‘prescribe’ law. Decision-makers will also be required to interpret their empowering legislation using the *Oakes* test, or risk making a jurisdictional error. However with respect to the exercise of discretionary powers conferred by legislation, the *Charter* is ambiguous. Are administrative decision-makers only permitted to make decisions that limit rights where the empowering legislation itself expressly or impliedly limits rights? Or do decision-makers retain some discretion to determine whether limits on rights are justified under a statutory scheme? If the latter is the case, then what test applies to the exercise of discretion, which cannot itself be said to be ‘prescribing law’?¹⁵ Over the past 25 years, Supreme Court judgments have taken a range of different approaches to reviewing administrative decisions that limited *Charter* rights. There were three separate but related aspects of the relationship between administrative law and the *Charter* on which members of the court disagreed. The first was whether s 1 and the *Oakes* test applied to administrative decisions at all. The second question was, assuming that the *Oakes* test did apply to administrative decisions, the point at which it should be applied, and whether there was still room for the application of administrative law principles where a decision limited human rights. And the final question was whether, if the courts continued to analyse decisions using administrative law tools, the involvement of the *Charter* affects the standard of review.

A Does s 1 of the Charter Apply to Administrative Decisions?

In the first case concerning the application of the *Charter* to an administrative decision to reach the Supreme Court of Canada, *Slaight Communications Inc v Davidson*,¹⁶ the Court was unanimous in finding that the *Oakes* test applied to administrative decisions. The Court split on the method for applying the *Oakes* test, but agreed on the framework justifying the application of the s 1 test to administrative decisions set out by Lamer J (*‘Slaight framework’*).¹⁷ Lamer J reasoned that in conferring discretionary statutory functions on the executive, legislatures are simply delegating their powers. Legislatures may only delegate powers that they themselves have, and as the Canadian Constitution only permits legislation to limit rights where a limit is ‘reasonably and demonstrably justified’, Canadian legislatures may only confer power on the executive to limit rights where the same test was met.

Thus the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.¹⁸

¹⁵ For a fuller discussion of these questions see Robert Leckey, ‘Prescribed by Law/Une Règle de Droit’ (2007) 45 *Osgoode Hall Law Journal* 571.

¹⁶ [1989] 1 SCR 1038 (*‘Slaight’*).

¹⁷ Lamer J’s framework was based on arguments made in a textbook by Canadian constitutional scholar, Peter Hogg, *Constitutional Law of Canada* (Carswell, 2nd ed, 1985) 671, cited in *Slaight* [1989] 1 SCR 1038, 1078–9 (Lamer J).

¹⁸ *Ibid.*

In other words, if a legislature expressly or implicitly grants a decision-maker power to infringe on a *Charter* right, then the legislation itself will be subjected to s 1 analysis. If a legislature grants a broad discretion that does not expressly or implicitly confer the power to limit a *Charter* right, then it is the decision, rather than the empowering legislation, which will be subject to the s 1 analysis.¹⁹

This aspect of Lamer J's judgment was accepted by the Court in *Slaight*, and continued to be generally accepted until the decision in *Doré*.²⁰ However in the 2006 case of *Multani v Commission scolaire Marguerite-Bourgeoys*,²¹ the minority judgment of Deschamps and Abella JJ questioned the *Slaight* framework. The majority of the Court applied the *Oakes* test and found that the decision of a school board to prevent a male Sikh student from carrying a kirpan (a small, wooden ceremonial dagger worn by baptised Sikhs) to school impinged on his freedom of religion. Deschamps and Abella JJ agreed that the decision was unlawful, but found that it was neither necessary nor appropriate to resort to an *Oakes* analysis when considering challenges to administrative decisions.²² Instead they found the decision unlawful on administrative law grounds. The minority judges' reasoning was based on both the words of s 1, and on the practical implications of applying the *Oakes* test to administrative decisions.

With respect to the former, Deschamps and Abella JJ pointed to the fact that the French version of s 1 uses the phrase '*règle de droit*' in place of the English phrase 'prescribed by law'. They noted that on its face the French phrase 'naturally refers to a law of general application'²³ and not to administrative decisions. They also rejected the *Slaight* framework,²⁴ stating that while administrative decision-makers must take *Charter* values into account 'it does not follow that their decisions must be subject to the justification process under s 1'.²⁵ Their reasoning on this point was essentially pragmatic. Deschamps and Abella JJ said that applying the *Oakes* test to administrative decisions had been problematic as the test had been developed to test legislation and 'is not easily applied to administrative tribunals'.²⁶ Of particular difficulty was the requirement that administrative decision-makers justify why the objectives of their decisions warrant limiting rights, where administrative decision-makers are not 'parties with an interest in a

¹⁹ *Slaight* [1989] 1 SCR 1038, 1079–80 (Lamer J).

²⁰ Evan Fox-Decent, 'The Charter and Administrative Law: Cross-Fertilization in Public Law', in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery, 2008) 184.

²¹ [2006] 1 SCR 256 ('*Multani*').

²² *Ibid* 299 [85], 309 [109].

²³ *Ibid* 310–11 [113].

²⁴ *Ibid* 299 [85], 309 [109].

²⁵ *Ibid* 308 [107].

²⁶ *Ibid* 310–11 [121]. Various aspects of administrative law in both Canada and Australia are premised on this idea that the same accountability mechanisms will not be appropriate for both administrative and legislative acts. For instance, Australia's federal *Administrative Decisions (Judicial Review) Act 1977* (Cth) applies only to decisions 'of an administrative character' as opposed to a legislative character. Canadian law also distinguishes between administrative and legislative acts, for instance in the application of the rules of procedural fairness: see *Attorney General of Canada v Inuit Tapirisat of Canada* [1980] 2 SCR 735. For a critique of that decision and some of its underlying principles see Geneviève Cartier, 'Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?' (2003) 53 *University of Toronto Law Journal* 217.

dispute’ and should not be required to defend their decisions as if they were.²⁷ In addition, they found that requiring decision-makers to apply the *Oakes* test:

makes the decision-making process formalistic and distracts the reviewing court from the objective of the analysis, which relates instead to the substance of the decision and consists of determining whether it is correct or reasonable.²⁸

Thus, the minority judgment concluded that administrative decisions:

should be reviewed in accordance with the principles of administrative law, which will both allow claimants and administrative bodies to know in advance which rules govern disputes and help prevent any blurring of roles.²⁹

B *If the Oakes Test Applies to Administrative Decisions, at What Stage Should It Be Applied?*

With the exception of Deschamps and Abella JJ, the *Slaight* framework justifying the application of the *Oakes* test to administrative decisions was generally accepted until *Doré*. The main issue of contention was the methodology for applying the *Oakes* test. The leading approach, which Evan Fox-Decent has labelled the ‘orthodox approach’,³⁰ was first articulated in Dickson CJ’s majority judgment in *Slaight*. Dickson CJ found that whenever an administrative decision raises *Charter* issues, the appropriate standard of review will always be the *Oakes* test. Administrative law principles and standards of review will only apply to aspects of the decision ‘untouched by the *Charter*’.³¹ Thus, as soon as an administrative decision is found to raise *Charter* issues, administrative law will have no further role to play in determining whether the decision was lawful. Dickson CJ reasoned that the *Charter*’s ‘reasonable and demonstrably justified’ standard is ‘more onerous’ than the administrative law standard of ‘patent unreasonableness’³²

²⁷ [2006] 1 SCR 256, 311–12 [123].

²⁸ Ibid 313–14 [120] (references omitted).

²⁹ Ibid 315 [125].

³⁰ Fox-Decent, above n 20, 182.

³¹ *Slaight* [1989] 1 SCR 1038, 1049 (Dickson CJ for Wilson, LaForest and L’Heureux-Dubé JJ).

³² At the time that *Slaight* was decided, ‘patent unreasonableness’ was one of two ‘standards of review’ that courts could apply when reviewing an administrative decision-maker’s interpretation of law. The other standard was ‘correctness’. Thus patent unreasonableness is not the same as the *Wednesbury* unreasonableness ground of review, which is one of the common law grounds on which an administrative decision-maker’s exercise of discretionary power may be challenged. The distinction is explained in: Geneviève Cartier, ‘The Baker Effect: A New Interface between the Canadian Charter of Rights and Freedoms and Administrative Law — The Case of Discretion’, in David Dyzenhaus, *The Unity of Public Law* (Hart, 2004) 63–4. Patent unreasonableness is no longer a distinct standard of review in Canadian law, following the decision in *Dunsmuir v New Brunswick* [2008] 1 SCR 190 (*Dunsmuir*). Nor does the standard now apply only to decision-makers’ interpretations of law: *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (*Baker*). The changes to the standard of review analysis are discussed at various points throughout this article, as appropriate. See in particular nn 47–51 and accompanying text below. For a general overview of this important concept in Canadian administrative law see: Audrey Macklin, ‘Standard of Review: Back to the Future?’ in Colleen Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery, 2nd ed, 2012) 279.

(which he saw as the appropriate deferential standard of review for non-*Charter* issues in this matter), and that:

patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis [as the *Charter* standard].³³

Other judgments applying the orthodox approach made similar statements about the *Charter* requiring a ‘more onerous’ level of review than administrative law was capable of providing.³⁴ In the most recent case applying the orthodox approach, *Multani*, the majority of the Court expressed the view that applying the administrative law standard of review to decisions which limit charter rights ‘could well reduce the fundamental rights and freedoms guaranteed by the *Charter* to mere administrative law principles’.³⁵

Geneviève Cartier has argued that the Supreme Court’s reasoning in these cases reflects a hierarchical view of the relationship between the *Charter* and judicial review under which the *Charter* is used to analyse any substantive issues raising fundamental values, while the role of administrative law is:

reduced to one of formal determination of jurisdiction on the basis of statutory interpretation, and does not have the ability to deal with issues of fundamental values.³⁶

Cartier has expressed concern that this hierarchical view of public law’s remedies will result in administrative law becoming ‘formalised’ and ‘impoverished’.³⁷ Some other commentators and judges have expressed similar concerns about the impact of an orthodox approach on judicial review of administrative action, arguing that reliance on *Charter* remedies at the expense of administrative law remedies ‘would be a recipe for freezing and sterilizing the natural and necessary evolution of the common law and of the civil law in this country’.³⁸

Lamer J’s judgment in *Slaight* agreed with the majority on the outcome but provided an alternative approach which alleviated some of these concerns. Lamer J first considered the legality of the impugned order using an administrative law analysis. He concluded that some aspects of the decision were unlawful under administrative law principles, but that other aspects were not unreasonable.³⁹ With

³³ Ibid.

³⁴ *Ross v New Brunswick School District No 15* [1996] 1 SCR 825, 850–1 [32].

³⁵ *Multani* [2006] 1 SCR 256, 270–1 [16] (Charron J for McLachlin CJ and Bastarache, Binnie and Fish JJ).

³⁶ Cartier, above n 32, 68.

³⁷ Ibid 68–9.

³⁸ *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, 407–7 [189] (LeBel J). See also similar concerns expressed earlier by J M Evans, ‘The Principles of Fundamental Justice: The Constitution and the Common Law’ (1991) 29 *Osgoode Hall Law Journal* 51, 73.

³⁹ Note that Lamer J thought that the ‘*Wednesbury* unreasonableness’ standard was the appropriate administrative law standard to apply, rather than the patent unreasonableness standard. Cartier argues that the different administrative law standards chosen by Dickson CJ and Lamer J reflect the former distinction in Canadian law between aspects of a decision which involved the interpretation of law, and aspects which were purely discretionary. The former attracted the ‘pragmatic and functional’ analysis derived from *Canadian Union of Public Employees, Local 963 v New*

respect to those aspects of the decision that he found lawful from an administrative law perspective, Lamer J then went on to apply the *Oakes* test. In other words, Lamer J differed from Dickson CJ in his methodology; instead of dismissing administrative law principles as soon as an administrative decision raised *Charter* issues as Dickson CJ advocated, Lamer J would only apply the Charter test after administrative law tests had been applied and the decision had been found to be lawful thereunder. Fox-Decent labels this approach a ‘mixed approach’.⁴⁰ The leading example of the mixed approach is the majority decision in *Baker*.⁴¹ The case involved a decision to deport a Jamaican woman with Canadian-born dependent children. Ms Baker argued that the decision infringed her rights under ss 7 and 15 of the *Charter*, to life, liberty and security of the person and to equality respectively,⁴² however L’Heureux-Dubé J, for the majority, found:

Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position.⁴³

While the mixed approach may have been effective in alleviating some of the concerns that the *Charter* would result in the marginalisation and ‘sterilisation’ of administrative law, it still views administrative law and the *Charter* as operating in a hierarchy.⁴⁴ Both approaches see administrative law as incapable of finally determining *Charter* matters. For the orthodox approach, this is because administrative law is not sufficiently concerned with ‘values’.⁴⁵ For those adopting the mixed approach, it is because s 1 requires courts to analyse the substance, or ‘appropriateness’ of administrative decisions which administrative law is incapable

Brunswick Liquor Corporation [1979] 2 SCR 227, while the latter attracted the *Wednesbury* unreasonableness standard. Cartier points out that the distinction is no longer relevant post the decision in *Baker* [1999] 2 SCR 817. See Cartier, above n 32.

⁴⁰ Fox-Decent, above n 20, 182.

⁴¹ [1999] 2 SCR 817. I am referring to *Baker* as an example of the mixed approach despite the fact that the court actually only applied administrative law principles. This is because the court clearly left open the possibility of applying the *Charter* standards had the administrative law analysis found the decision lawful under administrative law principles — evident from the excerpt of L’Heureux-Dubé’s judgment in the text below. The statement clearly contemplates the *Charter* standard being applied as a fallback, just as Lamer J did in *Slaight*. My characterisation of *Baker* is consistent with Fox-Decent’s original analysis of the decision, in which the orthodox/mixed framework was developed, though differs from his more recent method of categorising the case: Fox-Decent, above n 20, 186; Evan Fox-Decent and Alexander Pless, ‘The Charter and Administrative Law: Cross Fertilization or Inconsistency?’ in Flood and Sossin, above n 32, 446.

⁴² See *Baker v Canada (Minister of Citizenship and Immigration)* (1996) 142 DLR (4th) 554.

⁴³ *Baker* [1999] 2 SCR 817, 832 [11] (L’Heureux-Dubé J for Gonthier, McLachlin, Bastarache and Binnie JJ).

⁴⁴ Cartier, above n 32, 68.

⁴⁵ *Slaight* [1989] 1 SCR 1038, 1049 (Dickson CJ for Wilson, LaForest and L’Heureux-Dubé JJ). Australia’s High Court has more recently made similar statements about Australian administrative law not being interested in ‘minimum standards’ or ‘values’, in contrast to developments in the UK. However Justice Gageler (in his former capacity as Solicitor-General) has expressed doubts as to whether this is actually the case, suggesting that it is difficult to rationalise certain Australian decisions without reference to values: see Stephen Gageler, ‘Impact of Migration law of the Development of Australian Administrative Law’ (2010) 17 *Australian Journal of Administrative Law* 92, 104–5.

of doing.⁴⁶ The end result of both approaches is identical — that is, decisions which fail to satisfy the *Oakes* test will be unlawful regardless of whether they are found to be unlawful for that reason or because they are also unreasonable under administrative law. Thus, the only reason for applying administrative law principles before a s 1 analysis seems to be to prevent the stagnation of the common law of administrative law. An obvious question arises as to whether protecting the common law from languishing is an appropriate justification for courts preferring one interpretation of a constitutional document over another interpretation.

C *The Charter as a Factor in the Standard of Review Analysis?*

The third aspect of the interaction between the *Charter* and administrative law on which there was confusing and conflicting authority prior to the decision in *Doré* was whether the *Charter* has an impact on administrative law's standard of review. The 'standard of review analysis'⁴⁷ is Canada's version of the doctrine of deference. It developed as a means of interpreting and giving effect to privative clauses which de-emphasised the difficult distinction between jurisdictional and non-jurisdictional errors without resorting to the circular logic underpinning the approach taken by the English House of Lords.⁴⁸ The analysis has undergone a number of transformations since it was first introduced in 1979.⁴⁹ In essence, the analysis in its current form looks at a number of factors to determine the degree to which the legislature intended courts to scrutinise a particular administrative decision. Those factors include: the presence of a privative clause and any other provisions signaling that Parliament wished courts to defer to the authority's findings; the expertise and specialised knowledge of the decision-maker; the purposes of the Act as a whole and the provision in particular; and the 'nature of the problem' and whether it is more a question of law or fact.⁵⁰ Where these factors indicate that Parliament intended the decision-maker to have significant latitude in making a decision, the court will apply a 'reasonableness' standard of review. In

⁴⁶ *Slaight* [1989] 1 SCR 1038, 1074 (Lamer J); *Cartier*, above n 32, 67.

⁴⁷ The modern term 'standard of review analysis' is used throughout this section for the sake of simplicity, even when referring to decisions made prior to *Dunsmuir* [2008] 1 SCR 190, which refer to the 'pragmatic and functional test'. For more detailed discussions of the standard of review analysis see David Mullan, 'Dunsmuir v New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!' (2008) 21 *Canadian Journal of Administrative Law and Practice* 117; Hudson Janisch, 'Something Old, Something New' (2010) 23 *Canadian Journal of Administrative Law and Practice* 219.

⁴⁸ In *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and *Pearlman v Governors of Harrow School* [1979] QB 56. For a more detailed discussion of the origins of the standard of review see Mark D Walters, 'Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law' in Christopher Forsyth et al (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 302.

⁴⁹ In *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation* [1979] 2 SCR 227.

⁵⁰ *Pushpanathan v Canada (Minister for Citizenship and Immigration)* [1998] 1 SCR 982, 1006–11 [30]–[37].

the rare instances in which the factors point to the decision-maker having less scope to err, a court will apply a 'correctness' standard.⁵¹

A number of Canadian decisions have treated the *Charter* as one element of the standard of review analysis indicative of a less deferential or correctness standard of review. There were two separate but related justifications for this approach. The first was the principle that courts are the ultimate arbiters of constitutionality,⁵² which the Supreme Court had found permitted tribunals to make decisions about the constitutional validity of legislation, but required that those aspects of tribunals' decisions be reviewed by the courts on a non-deferential, correctness standard.⁵³ The second was a line of decisions in which the Court had considered the appropriate level of deference to give to decisions by provincial and federal human rights tribunals applying anti-discrimination legislation. The decisions found that because the expertise of the tribunals was in fact-finding, those aspects of their decisions would attract a high level of deference, while the tribunals' interpretation of anti-discrimination legislation would not attract deference.⁵⁴ In later judgments, this precedent was expanded into a more general principle that where any tribunal makes a decision that limits *Charter* rights, the involvement of a

⁵¹ The number of standards of review has changed over time. Prior to the decision in *Dunsmuir* [2008] 1 SCR 190, there were two reasonableness standards of review — the less deferential reasonableness *simpliciter* and the more deferential patent unreasonableness — making a total of three standards of review. However in *Dunsmuir*, the Supreme Court combined these two reasonableness standards. For a discussion see Mullan, above n 47; Matthew Groves, 'The Differing and Disappearing Standards of Judicial Review in Canada' (2009) 16 *Australian Journal of Administrative Law* 211.

⁵² There is no specific or strict separation of powers doctrine under the Canadian Constitution as there is in Australia and the United States. So for instance, Canadian legislatures may, and frequently do, confer non-judicial functions on courts and the Supreme Court of Canada may render advisory opinions: see Peter Hogg, *Constitutional Law of Canada*, vol 1 (Thomson/Carswell, 5th ed, 2010) 7-13-7-38. Nevertheless, the constitutional basis of the supremacy of Canadian courts over constitutional matters rests on similar principles as in Australian and the US, which is inherently linked to the separation of powers doctrine see: Jean Leclair, 'Judicial Review in Canadian Constitutional Law: A Brief Overview' (2004) 36 *George Washington International Law Review* 543; Luc B Tremblay, '*Marbury v Madison* and Canadian Constitutionalism: Rhetoric and Practice' (2004) 36 *George Washington International Law Review* 515; Peter Hogg, 'Is Judicial Review of Administrative Action Guaranteed by the British North America Act?' (1976) *LIV Canadian Bar Review* 716, 720; Neil Finkelstein, *Laskin's Canadian Constitutional Law* (Carswell, 5th ed, 1986) 68-9; Barry L Strayer, *The Canadian Constitution and The Courts: The Function and Scope of Judicial Review* (Butterworths, 2nd ed, 1983) 81-6.

⁵³ *Nova Scotia (Worker's Compensation Board) v Martin* [2003] 2 SCR 504. This line of reasoning was approved in obiter by the majority of the Court in *Multani*. While the majority adopted the orthodox approach, applying the *Oakes* test to the school board's decision to prohibit a boy from carrying a dagger at school, they later stated that even if the decision 'had instead concerned the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, it would, according to the case law of this Court, have been necessary to apply the correctness standard' relying on *Martin* as authority: *Multani* [2006] 1 SCR 256, 273 [20] (Charron J for McLachlin CJ and Bastarache, Binnie and Fish JJ).

⁵⁴ See *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 ('*Mossop*'), 585 (LaForest J for Iacobucci J); *Zurich Insurance Co v Ontario (Human Rights Commission)* [1992] 2 SCR 321, 337-8 (Sopinka J for Lamer CJ and La Forest, Gonthier and Iacobucci JJ); *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557 ('*Pezim*'), 590-1 (although the statement was obiter in that case); *University of British Columbia v Berg* [1993] 2 SCR 353, 368-70 (Lamer CJ for La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ); *Ross v New Brunswick School District No 15* [1996, 1 SCR 825, 845-8.

‘human rights dimension’ was a factor pointing towards a less deferential standard of review.⁵⁵

While seeing the *Charter* as a factor in the standard of review analysis was relatively unproblematic when the court was applying administrative law tests or a mixed approach, the issue became very confused when the Supreme Court attempted to apply both this line of reasoning and its orthodox approach. The difficulty was highlighted in two cases involving decisions to deport Convention Refugees on national security grounds.⁵⁶ The appellants submitted that the decisions were unlawful both on administrative law grounds and under the *Charter*. Applying Dickson CJ’s orthodox approach in *Slaight*, the Court separated the issues involving interpretation of the *Charter* from those aspects of the decision on which the *Charter* had no bearing.⁵⁷ The Court found that the Minister’s decision on whether there was a substantial risk that the applicants would be tortured on deportation engaged the right to fundamental justice under s 7 of the *Charter*, while the decision that the applicants posed a danger to Canada’s national security did not engage the *Charter*.⁵⁸ Accordingly the latter, applying the standard of review factors, attracted a high degree of deference.⁵⁹ Confusingly, however, the Court went on to state that the fact that they were applying a deferential standard of review ‘will not prevent human rights issues from being fully addressed’, despite the fact that they had previously found that the national security decision did not touch on the *Charter*.⁶⁰ Even more confusingly, in deciding which standard of review should apply to the aspect of the Minister’s decision that did engage the *Charter* — the question of whether the applicants would be tortured if returned to Sri Lanka — the Court also found that deference applied.⁶¹ The Court’s analysis of the interaction between the *Charter* and administrative law in these cases demonstrates how difficult it was to apply all of the various lines of precedent to administrative decisions engaging *Charter* rights.

III Doré v Barreau du Québec

In March 2012, the Supreme Court of Canada considered and appears to have dispensed with virtually all of the conflicting and confusing authority attempting to

⁵⁵ See, eg. *Chamberlain v Surrey School District No 36* [2002] 4 SCR 710, 725–6 [11] (McLachlin CJ for L’Heureux-Dubé, Iacobucci, Major, Binnie and Arbour JJ) (*‘Chamberlain’*); *Trinity Western University v British Columbia College of Teachers* [2001] 1 SCR 772 (*‘TWU’*). The decision in *TWU* is a less clear statement of this principle as the Court considered whether the decision conflicted both with the *Charter* and with anti-discrimination legislation. In their discussion of the standard of review it was unclear whether the ‘human rights standards’ — which pointed towards a lower level of deference — were the *Charter* or legislative standard (at 802–4 [17] (Iacobucci and Bastarache JJ for McLachlin CJ and Gonthier, Major, Binnie, Arbour and LeBel JJ)). *Chamberlain* on the other hand, only involved the *Charter*.

⁵⁶ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 (*‘Suresh’*); *Ahani v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 72 (*‘Ahani’*).

⁵⁷ *Suresh* [2002] 1 SCR 3, 22–3 [26]–[27] (on which the decision in *Ahani* [2002] 1 SCR 72 was based).

⁵⁸ *Ibid* 22 [27].

⁵⁹ *Ibid* 24–5 [30]–[31].

⁶⁰ *Ibid* 25 [32].

⁶¹ *Ibid* 28 [39].

apply the *Oakes* test to administrative decisions. The new approach, adopted unanimously by the Court, rejects some of the fundamental assumptions that underpin both the mixed and orthodox approaches. In particular, the Court held that it is neither necessary nor appropriate to apply the *Oakes* test to administrative decisions that limit *Charter* rights. The *Doré* approach also discards the notion that the involvement of a *Charter* right is a factor pointing to or requiring the court to apply a correctness standard of review. Instead, it holds that administrative law's reasonableness standard is now sufficiently adapted to accommodate the *Charter*'s requirements of administrative decisions.

The impugned decision in *Doré* was that of the Disciplinary Council of the Barreau du Québec to reprimand a lawyer for writing a letter castigating a judge for his behaviour during a proceeding. The lawyer, Mr Doré, challenged the constitutionality of the Disciplinary Council's decision to reprimand him on the basis that it violated his freedom of expression, guaranteed under s 2(b) of the Canadian *Charter*. On appeal, the Tribunal des professions had followed the minority judgment of Deschamps and Abella JJ in *Multani*, finding that the *Oakes* test did not apply to administrative decisions.⁶² The Tribunal applied a correctness standard of review to the Barreau du Québec's decision, applying administrative law principles, and held that although the Disciplinary Council's decision 'seems harsh ... it was not unreasonable, given the gravity of Mr Doré's conduct and his lack of remorse'.⁶³ Mr Doré sought judicial review of the Tribunal's decision, arguing that it had erred in failing to apply a full *Oakes* analysis. The Superior Court of Quebec and Court of Appeal both applied the *Oakes* test, and upheld the Tribunal's decision. So the Supreme Court of Canada was again confronted with the question of whether and how s 1 of the *Charter* applies to administrative decision-makers, and to judicial review of their decisions.

In upholding the Tribunal's decision, the Supreme Court adopted reasoning that was similar, though not identical, to the approach of Deschamps and Abella JJ in *Multani*. The unanimous judgment delivered by Abella J began by acknowledging that the *Oakes* test had been an 'awkward fit' with administrative decisions.⁶⁴ The Court went on to discuss the practical difficulties that had arisen in applying the *Oakes* test to administrative decisions.⁶⁵ Chief among those difficulties is the fact that the test requires courts to balance the overriding purpose of the law, or decision, against the limits it places on fundamental rights, and attempting to determine the 'purposes' of an administrative decision is frequently a challenging and artificial process. While a statute empowering an administrative decision will have been enacted to achieve specific policy objectives, decisions made under legislation are usually not designed to meet their own particular purposes. The court also referred to the previous arguments made by Deschamps

⁶² There was a statutory right to appeal decisions of the Disciplinary Council to the Tribunal des professions — a judicial tribunal. This is not exactly the same as a *de novo* review, or merits review, as the appellate body is still required to apply the standard of review analysis, and give appropriate deference to the original decision-maker's findings of fact and interpretations of law: see *Pezim v British Columbia (Superintendent of Brokers)* (1994) 2 SCR 557 [66]–[67].

⁶³ *Doré* [2012] 1 SCR 395, 411 [19].

⁶⁴ *Ibid* 403 [4].

⁶⁵ *Ibid* 403–4 [4], 418 [38].

and Abella JJ regarding applying the *Oakes* test's onus of proof issues to administrative decisions.⁶⁶ Further, the Court noted that in other circumstances not involving legislation it had concluded that the *Oakes* test was an unsuitable method for resolving *Charter* matters. Specifically, the Court has held that the *Oakes* test is not suitable for determining the constitutionality of common law rules, whose objectives are also difficult, if not impossible, to identify.⁶⁷

Unlike the minority judgment in *Multani*, however, the Court did not completely reject the *Slaight* framework for rationalising the application of s 1 to administrative decisions. While the Court held that the *Oakes* test does not apply to administrative decisions, Abella J did not reiterate the argument that she and Deschamps J made in *Multani* regarding the wording of the French version of s 1 of the *Charter*. Rather, the judgment seems to assume that the s 1 requirement that limits on rights be 'demonstrably justified' does apply to administrative decisions even though the *Oakes* test is not the best formula for giving effect to the requirement. For instance, the Court commented that:

while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality.⁶⁸

Thus, it seems that the Court was of the view that administrative decisions may limit *Charter* rights provided that such limits are 'demonstrably justified', and that the question of whether a limit is so justified will be determined via a test which integrates notions of both reasonableness and proportionality. Given that the Court offered no other explanation as to why s 1 applies to administrative decisions, it seems reasonable to assume that Lamer J's *Slaight* framework — based on the premise that legislatures cannot confer powers on the executive that they themselves do not possess — still stands.

The Court did overturn many other aspects of the *Slaight* judgments. The most important was the application of the *Oakes* test, and the underlying reasons for its application in both the orthodox and mixed approaches. As discussed above, both the majority and Lamer J in *Slaight* had applied the *Oakes* test because of a 'perceived inability of administrative law to deal with *Charter* infringements in the exercise of discretion'.⁶⁹ In *Doré* the Supreme Court rejected this view, stating that the relationship between the *Charter* and administrative law has evolved since *Slaight* and it is now possible to adopt a 'richer conception of administrative law'⁷⁰ capable of dealing with *Charter* issues without resort to the *Oakes* analysis.

The Court referred in particular to its decisions in *Baker*,⁷¹ *Dunsmuir*⁷² and *Conway*⁷³ as having altered the way administrative law deals with *Charter* issues over the last 15 years. There are three important and interrelated points made in

⁶⁶ Ibid 403–4 [4].

⁶⁷ Ibid 419–20 [39]–[42].

⁶⁸ Ibid 404 [5]. Similar statements are made in [6] and [7].

⁶⁹ Ibid 413 [26].

⁷⁰ Ibid 417 [35].

⁷¹ [1999] 2 SCR 817.

⁷² [2008] 1 SCR 190.

⁷³ [2010] 1 SCR 765.

those decisions about the relationship between the two areas of law. The first is that administrative decision-makers must exercise all of their powers 'in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*'.⁷⁴ This means that the traditional dichotomy between administrative decisions involving the interpretation of legal rules and 'purely discretionary' decisions is inaccurate.⁷⁵ All aspects of decision-making involve both discretion and law.⁷⁶ The second point that flows from this is that the rationale for the courts' policy of deference to administrative decision-makers, embodied in the standard of review analysis, applies to all aspects of administrative decision-making.⁷⁷ Where an administrative decision involves the application of law, including *Charter* values, to a particular set of facts, the standard of review analysis indicates that courts should give some deference to the decision-maker's findings.⁷⁸ The Court commented that:

When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts ... When a particular 'law' is being assessed for Charter compliance, on the other hand, we are dealing with principles of general application.⁷⁹

The third point is that 'we do not have one *Charter* for the courts and another for administrative tribunals'.⁸⁰ In *Conway*, the Supreme Court held that administrative tribunals that decide questions of law also have the authority to apply and interpret the *Charter* and grant *Charter* remedies in respect of matters before them, provided that the tribunal otherwise has the power to grant the particular remedy sought.

Taken together, the Court saw these decisions as supporting its new approach to administrative decisions touching on *Charter* rights. The new approach begins by recognising that 'administrative bodies are empowered, and indeed required, to consider *Charter* values within the scope of their expertise'.⁸¹ In doing this, s 1 of the *Charter* requires decision-makers to balance fundamental rights and values with the objectives of the statute.⁸²

This is at the core of the proportionality exercise and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives.⁸³

When asked to review an administrative decision that limits a *Charter* right, courts will apply the ordinary principles of judicial review, including the standard of review analysis. Here the Court also overturned its previous decisions holding that wherever a *Charter* question is involved in a matter, the appropriate standard of review will be correctness. While correctness will be the applicable standard

⁷⁴ *Baker* [1999] 2 SCR 817, 855 [56].

⁷⁵ *Ibid* 854 [54].

⁷⁶ *Baker* [1999] 2 SCR 817, 853–5 [53]–[56]; *Dunsmuir* [2008] 1 SCR 190, 222 [51].

⁷⁷ *Baker* [1999] 2 SCR 817, 854–5 [55]; *Dunsmuir* [2008] 1 SCR 190, 221 [49].

⁷⁸ *Dunsmuir* [2008] 1 SCR 190, 223 [53].

⁷⁹ *Doré* [2012] 1 SCR 395, 418 [36].

⁸⁰ *Conway* [2010] 1 SCR 765, 779 [20].

⁸¹ *Doré* [2012] 1 SCR 395, 417 [35].

⁸² *Ibid* 426 [55]–[56].

⁸³ *Ibid* 426 [56].

wherever a tribunal makes a determination on the constitutionality of a law,⁸⁴ where the decision-maker is simply being asked to apply law and policy to individual facts, the Court reflected that the:

reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension.⁸⁵

Therefore the Supreme Court concluded that courts should ordinarily review administrative decisions that limit a *Charter* right using the deferential administrative law standard of reasonableness. In applying this standard, courts must ask whether, in balancing the statutory objectives with the proposed limit on rights, the administrative decision 'falls within the range of possible, acceptable outcomes'⁸⁶ or 'reflects a proportionate balancing of the *Charter* protections at play'.⁸⁷ The court noted that this approach 'opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship"'.⁸⁸

Applying the new test to the impugned decision, the Court first examined the objectives of the Disciplinary Board's empowering legislation. The Disciplinary Board was given broad discretion to determine whether the conduct of lawyers bore 'the stamp of objectivity, moderation and dignity'.⁸⁹ The purpose of the power, said the Court, was to 'prevent incivility in the legal profession'.⁹⁰ The *Charter* requires the Board to determine the 'appropriate boundaries of civility' in light of the right to freedom of expression under the *Charter*, and balance the severity of offending conduct accordingly.⁹¹ The Court held that in this case, the Disciplinary Board had done so. The Board had expressly considered Mr Doré's right to freedom of expression in its decision, and recognised that any disciplinary decision should not restrict a lawyer's capacity to defend his or her clients.⁹² The Board had made its decision to reprimand Mr Doré based on what it saw as the 'excessive' language he had used in his letter, which they concluded 'overstepped' the 'generally accepted norms of moderation and dignity'.⁹³ The Supreme Court concluded that:

In light of the excessive degree of vituperation in the letter's context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr Doré's expressive rights with the statutory objectives.⁹⁴

⁸⁴ Ibid 420–1 [43].

⁸⁵ Ibid 422 [46] quoting J M Evans, above n 38, 81.

⁸⁶ Ibid 426 [56] quoting *Dunsmuir* [2008] 1 SCR 190, 220 [47].

⁸⁷ Ibid 427 [57].

⁸⁸ Ibid 417 [35] quoting Mary Liston, 'Governments in Miniature: the Rule of Law and the Administrative State' in Flood and Sossin, above n 32, 100.

⁸⁹ Ibid 427 [60].

⁹⁰ Ibid 428 [61].

⁹¹ Ibid 428 [63].

⁹² Ibid 430–1 [70].

⁹³ Ibid.

⁹⁴ Ibid 431 [71].

IV The Implications of *Doré* for Australia

The Canadian Supreme Court's decision in *Doré* raises some immediate questions for the two Australian jurisdictions that have adopted statutory bills of rights: the ACT⁹⁵ and Victoria.⁹⁶ In the fairly limited number of cases that have arisen, courts and tribunals in both jurisdictions appear to have followed Dickson CJ's orthodox approach from *Slaight* in determining whether administrative decisions place unlawful limits on human rights. That is, once the Australian courts determine that an administrative decision limits a protected right, administrative law principles have no role to play in determining the legality of the decision. This approach has been taken despite the fact that both of the Australian acts contain separate provisions that set out the role of human rights in administrative decision-making. This section outlines the key provisions of the Victorian and ACT human rights legislation and discusses the way courts have dealt with administrative decisions that limit human rights.⁹⁷ It then considers some possible lessons for the Australian jurisdictions from *Doré*, as well as potential challenges in the new Canadian approach.

A *The Victorian Charter of Rights and Responsibilities*

The reason Victorian and ACT courts have followed the orthodox Canadian approach in reviewing administrative decisions impugned on human rights grounds is fairly obvious. Like the Canadian *Charter*, each of the Australian Acts expressly applies to government decision-makers⁹⁸ and each contains a 'reasonable limits' clause based on s 1 of the Canadian *Charter*. Section 7(2) of the *Victorian Act* provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom...

The subsection then sets out five factors which should be taken into account in determining whether a limit is reasonable, being:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and

⁹⁵ *Human Rights Act 2004* (ACT) ('ACT Act').

⁹⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Act').

⁹⁷ Although the ACT's legislation was adopted before Victoria's, the *Victorian Act* is considered first for two reasons. The first is that its procedural provisions, contained in the *Victorian Act* s 38, were a part of the original Act, which entered into full force on 1 January 2008. The equivalent provisions of the *ACT Act*, in s 40B, were inserted by the *Human Rights Amendment Act 2008* (ACT) and entered into force on 1 January 2009. Therefore, the relevant Victorian provisions have been in force for one year longer than the ACT provisions. Second, there are more cases on the issue in Victoria, probably because of the relative size of its population.

⁹⁸ *Victorian Act* s 38(1); *ACT Act* s 40B.

- any less restrictive means available to achieve the purpose that the limitation seeks to achieve.⁹⁹

Section 7(2) was modelled on the reasonable limits clauses in the *Constitution of the Republic of South Africa 1996* s 36, which sets out the same five considerations, and by the *New Zealand Bill of Rights Act 1990* (NZ), both of which were in turn heavily influenced by the *Oakes* test.¹⁰⁰

However the Australian human rights statutes contain additional provisions, absent from the Canadian *Charter*, which specify the role that human rights play in administrative decision-making. While the Canadian *Charter* simply states that it applies to executive governments, the *Victorian* and *ACT Acts* specify how they apply to executive government. Specifically, s 38 of the *Victorian Act* provides that:

- (1) it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

‘Public authority’ is defined as government departments and agencies and other bodies performing ‘public functions’¹⁰¹ as well as acts of the legislature and courts that can be classified as administrative.¹⁰²

Section 38 of the *Victorian Act* plainly requires two things of decision-makers.¹⁰³ The first is the procedural requirement that they give ‘proper’ consideration to human rights when making decisions. This element has given rise to some case law in Victoria regarding what will amount to ‘proper’ consideration

⁹⁹ *Victorian Act* s 7(2).

¹⁰⁰ See discussions in *R v Hansen* [2007] 3 NZLR 1 [19] (New Zealand); *S v Zuma* (1995) 2 SA 642 [35] (South Africa); Explanatory Memorandum, Victorian Charter of Human Rights and Responsibilities Bill 2006, 9 (regarding influences of New Zealand and South African charters on s 7(2)). For a background to the development of the *Victorian Act* see George Williams, ‘The Victorian Charter of Human Rights and Responsibilities: Origins and Scope’ (2006) 30 *Melbourne University Law Review* 880;

¹⁰¹ *Victorian Act* s 4(1)(b).

¹⁰² *Ibid* s 4(2)(g) and (j). These provisions have caused some interpretative and practical difficulties, and the Victorian Parliamentary Scrutiny of Acts and Regulations Committee (‘SARC’) has recommended that the definition be replaced with a schedule of government bodies to which the *Victorian Act* applies: see SARC, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) (‘SARC Review’) 106–8 (recommendation 22).

¹⁰³ The wording of the provision suggests that these two requirements actually apply at different stages of the decision-making process. The procedural requirement expressly applies ‘in making a decision’, ie during the decision-making process, while the second requirement — that public authorities comply with human rights — applies to their ‘acts’, suggesting that it only applies to final outcomes. Yet decisions appear to have combined the requirements into a single review methodology. For a slightly more detailed discussion of this point with respect to the equivalent provisions in the *ACT Act*, see Helen Watchirs and Gabrielle McKinnon, ‘Five Years’ Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia’ (2010) 33 *University of New South Wales Law Journal* 136, 157.

of human rights,¹⁰⁴ but generally seems to be uncontroversial. The requirement that administrative decision-makers pay ‘proper, genuine and realistic’ attention to relevant considerations already forms part of administrative law’s lexicon,¹⁰⁵ so that adding human rights to the considerations public authorities must have regard to poses no real challenge for judicial review.¹⁰⁶ The second, substantive requirement, that decision-makers not act in a way that is ‘incompatible with human rights’ unless there is no other way in which they could reasonably have acted, has been slightly more troubling, and is the aspect of the case law that may be affected by the decision in *Doré*.

Since the *Victorian Act* was passed, commentators have been divided on whether the process of determining whether a public authority has acted in a way that is ‘incompatible with a human right’ requires a consideration of the reasonable limits provision. The more common view, taken in both of the leading texts on the *Victorian Act*¹⁰⁷ and by the Victorian Equal Opportunity and Human Rights Commission¹⁰⁸ (‘VEOHRC’) is that the question requires a full ‘reasonable limits’ analysis. That is, where a court is asked to determine whether a public authority has acted in a manner that is incompatible with a human right, the court will need to ask whether the legislation requires the decision-maker to act in a way which limits rights. If not, and if there were a range of reasonable options open to the public authority, then courts will need formally to examine the five factors set out in s 7(2), and assess whether the importance of the purpose of the administrative act justifies the limits the act places on rights. In its submission to the High Court in *Momcilovic HC*,¹⁰⁹ VEOHRC argued that:

S 7(2) is inextricably linked to the operation of s 38(1) of the Charter...Where a public Authority has a range of possible courses of action that are reasonably open, s 32(2) is irrelevant. In that situation,

¹⁰⁴ See, eg, *Castles v Secretary to the Department of Justice* [2010] VSC 310 [185]; *Giotopolous v Director of Housing* [2011] VSC 20 [84]–[90].

¹⁰⁵ *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292.

¹⁰⁶ Indeed the *Brennan Report* recommended that the federal *Administrative Decisions (Judicial Review) Act 1977* (Cth) be amended in precisely this way, adding failure to consider human rights to the listed grounds of review set out in that Act. The *Report* found that ‘this would be an effective way of ensuring that human rights considerations are integrated into public sector decision making, especially if the federal government decides against implementing a federal Human Rights Act’: see National Human Rights Consultation Committee, *Report* (2009) 183 (‘*Brennan Report*’). The *Brennan Report*’s comments suggest that amending the grounds of review in this way would be a more minor reform than the adoption of human rights legislation, acting perhaps as a bridge between the current Australian federal approach and the Victorian and ACT approaches. The ‘Australian Human Rights Framework’ introduced by the government in response to the *Brennan Report* does not adopt this recommendation: see Attorney-General’s Department, *Australia’s Human Rights Framework* (21 April 2010) <<http://www.ag.gov.au/humanrightsframework>>. See discussion in Edward Santow, ‘The Act that Dares Not Speak Its Name: The National Human Rights Consultation Report’s Parallel Roads to Human Rights Reform’ (2010) 33 *University of New South Wales Law Journal* 8, 17–21.

¹⁰⁷ Carolyn Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis, 2008) 126–7; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson, 2008) 243–4.

¹⁰⁸ VEOHRC, ‘Submissions on the Court’s Questions Concerning Section 38 of the Charter’, Submission in *Momcilovic HC* (2011) 245 CLR 1, M134 of 2010, 23 February 2011, 2–3.

¹⁰⁹ (2011) 245 CLR 1.

s 38(1) limits the available courses of action to those that are demonstrably justifiable having regard to the criteria in s 7(2) of the Charter.¹¹⁰

This is also the approach that has been usually been adopted by the Supreme Court of Victoria and the Victorian Civil and Administrative Tribunal ('VCAT') in reviewing administrative decisions impugned on human rights grounds.¹¹¹ However, in some situations, s 38 has been ignored, and the interpretive requirement in s 32(1) of the Act has been seen as imposing an obligation not only to interpret legislative provisions consistently with human rights, but also to interpret any powers that those provisions confer as being subject to a s 7(2) analysis.¹¹² In applying the s 7(2) test to s 38, the Supreme Court and VCAT have given varying levels of attention to why the *Victorian Act* should be construed in this way. Many judgments have simply assumed that s 7(2) applies to executive acts and decisions, perhaps relying on leading commentary.¹¹³ In a few decisions, Bell J has given more detailed consideration to the effect of the *Victorian Act* on administrative decision-making and implicitly adopted the *Slaight* framework as a justification for applying s 7(2) to administrative decisions and acts. Most recently in *Patrick's Case*¹¹⁴ Bell J considered the issue in some detail and set out the procedure that he thinks courts should apply when reviewing administrative decisions for compliance with the *Victorian Act*. The case involved a decision by VCAT to appoint State Trustees Ltd as administrators of the estate of a mentally ill man (Patrick) knowing that State Trustees would likely sell the man's home. Patrick had argued that his brother, who would not have sold the home, should have been appointed as the administrator. The Supreme Court was asked whether in exercising its discretion to appoint State Trustees, VCAT had unlawfully interfered with Patrick's right under s 13(a) of the *Victorian Act* not to have his privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The methodology for dealing with administrative decisions that limit rights in Victoria is complicated slightly by the fact that the *Victorian Act* does not provide for a distinct cause of action for breach of human rights. Section 39 of the *Victorian Act* provides that:

¹¹⁰ VEOHRC, above n 108, 2–3.

¹¹¹ See *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 422–4 [45]–[58] (Hollingworth J) ('*Sabet*'); *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [58]–[59] (Bell J) ('*Kracke*'); *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286, [323] (Bell J); *Castles v Secretary to the Department of Justice* (2010) 28 VR 141, 276 [145] (Emerton J); *PJB v Melbourne Health* [2011] VSC 327 [304]–[361] (Bell J) ('*Patrick's Case*').

¹¹² See, eg, *Kracke* (2009) 29 VAR 1, [208]–[211] (Bell J); *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286 [323] (Bell J), [75]–[91]; *RJE v Secretary to the Department of Justice* (2008) 21 VR 526, 554–6 [108]–[112] (Nettle JA). In some of these judgments, Lamer J's *Slaight* analysis has been applied to the interpretive provision set out in s 32(1), to support a view that where the *Victorian Act* applies to a public authority, statutory provisions that conferred discretionary power on that authority should be interpreted consistently with the *Victorian Act*, which involves a s 7(2) analysis. However the Supreme Court cast some doubt on this interpretation of s 32(1) in *DPP v Ali (No 2)* [2010] VSC 503 [41]–[45], as do the judgments of both the Court of Appeal and High Court of Australia in *Momcilovic CA* (2010) 25 VR 436; *Momcilovic HC* (2011) 245 CLR 1: see discussion at notes 122–36 and associated text below.

¹¹³ See, eg, *Sabet* (2008) 20 VR 414, 422–4 [45]–[58]; *Kracke* (2009) 29 VAR 1 [58]–[59] (Bell J); *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 [323] (Bell J).

¹¹⁴ [2011] VSC 327.

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

From an administrative law perspective this means that an aggrieved person must apply for relief under either the *Administrative Law Act 1978* (Vic) or the common law¹¹⁵ on an ordinary ultra vires ground, such as *Wednesbury* unreasonableness or failure to afford procedural fairness. Section 39 then operates to allow the aggrieved person to seek the same relief on the ground that the decision was unlawful under the *Victorian Act*.¹¹⁶ Thus the first ‘step’ in Bell J’s process involved ensuring that the court had jurisdiction under s 39(1) and identifying the administrative law ground on which the decision was impugned.¹¹⁷

Moving on to review the impugned decision on human rights grounds, Bell J stated that ‘an act or decision of a public authority will be unlawful under s 38(1) if it limits a human right in a manner which is not reasonable and demonstrably justified as specified in s 7(2), unless s 38(2) applies’.¹¹⁸ While Bell J did not spell out why he had concluded that s 38(1) should be read in light of s 7(2), each of the parties that made submissions in the case had argued on the basis that the s 7(2) test applied to administrative decisions.¹¹⁹ In its submission, VEOHRC expressly referred to the *Slaight* framework in arguing that the reasonable limits clause applied not only to interpreting a decision-makers’ statutory powers but also in determining the compatibility of their exercise of discretion with human rights.¹²⁰ Bell J also referred to his early decision in *Kracke* in which he had expressly accepted the *Slaight* framework of reviewing administrative decisions which limited human rights, albeit in the context of interpreting administrative powers rather than deciding whether an administrative act had breached a *Charter* right.¹²¹ Bell J then moved directly to a human rights analysis under s 7(2) in considering the human rights aspects of the claim, just as Dickson CJ did in *Slaight*, and gave no further consideration as to whether the decision was also unreasonable under administrative law principles.

However, while all of the VCAT and Supreme Court of Victoria decisions analysing the lawfulness of discretionary administrative decisions under the *Victorian Act* have taken this approach, the interaction between ss 7(2) and 38

¹¹⁵ Under *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 56.01.

¹¹⁶ *Sabet* (2008) 20 VR 414, 430. For a detailed critique of the operation of s 39 see Jeremy Gans, ‘The Charter’s Irremediable Remedies Provision’ (2009) 33 *Melbourne University Law Review* 105. On the interaction between ss 38 and 39 in the context of VCAT decision-making see: *Director of Housing v Sudi* [2011] VSCA 266 (‘*Sudi*’) and discussion in Matthew Groves, ‘Tribunals, Judicial Review and the Victorian Charter’ (2012) 23 *Public Law Review* 9. Groves argues that s 39 adds ‘nothing of value’ to the *Victorian Act* and endorses the recommendation made by SARC in its recent review of the Act that s 39 be replaced with a provision stating that s 38 does not create new legal rights or liabilities: *SARC Review*, above n 102, 127 (recommendation 32).

¹¹⁷ *Patrick’s Case* [2011] VSC 327 [290]–[303].

¹¹⁸ *Ibid* [306].

¹¹⁹ *Ibid* [209] (applicant’s submissions), [220] (Attorney-General’s submissions), [230] (VEOHRC’s submissions).

¹²⁰ *Ibid* [227].

¹²¹ *Ibid* [210].

should probably still be regarded as uncertain. Neither the Court of Appeal nor the High Court of Australia have ruled on the issue directly but obiter comments made by both courts in the *Momcilovic*¹²² litigation cast some doubt on the Supreme Court's approach. The *Momcilovic* case did not involve a challenge to an administrative decision, but to a provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) that reversed the onus of proof in relation to a drug trafficking offence. Thus, neither the Victorian Court of Appeal nor the High Court of Australia was asked to rule on the interaction of ss 7(2) and 38 of the *Victorian Act*. Nevertheless both courts made various comments that may foreshadow their likely approach to the issue. Specifically, although the Court of Appeal did not discuss 38, it did hold that s 7(2) plays no role when the courts are applying s 32 the *Victorian Act* which requires legislation to be interpreted consistently with human rights where possible.¹²³ The Court of Appeal's decision was based largely on the language of the *Victorian Act*,¹²⁴ key differences between s 32 and the provision in the *Human Rights Act 1998* (UK) ('UK Act') on which the Victorian provision was modelled¹²⁵ as well as the Victorian Parliament's intention in drafting the *Victorian Act*.¹²⁶ Some similar arguments can and have been made in relation to s 38 leading the Human Rights Law Centre ('HRLC') to argue:

Just as this Court held in *Momcilovic* that s 32 of the Charter is a codification of the common law principle of legality, so too s 38 of the Charter is a codification of the common law principle most famously identified with *Entick v Carrington* that executive action that interferes with common law rights is unlawful unless expressly authorised by statute.¹²⁷

Both Jeremy Gans and the HRLC have submitted that the language of s 38 evinces an intention that administrative acts be treated differently from legislative acts and that applying s 7(2) to administrative decisions ignores the plain meaning of s 38(2).¹²⁸ Gans has argued that s 38(2) leaves no scope for decision makers to impose even proportionate limits on rights where there is a course of action that is compatible with rights reasonably open to them.¹²⁹ Similarly the HRLC submitted to the Court of Appeal in *Sudi*:¹³⁰

Parliament's enactment of s 38(2) makes plain that executive action that breaches human rights is only lawful if there was statutory authorisation

¹²² *Momcilovic CA* (2010) 25 VR 436 (Court of Appeal); *Momcilovic HC* (2011) 245 CLR 1.

¹²³ For a thorough analysis and critique of the Victorian Court of Appeal's judgment see Julie Debeljak, 'Who is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights that Parliament Intended it to Have' (2011) 22 *Public Law Review* 15.

¹²⁴ *Momcilovic CA* (2010) 25 VR 436, 444–6 [28]–[35].

¹²⁵ *Ibid* 456–8 [69]–[78].

¹²⁶ *Ibid* 458–63 [79]–[96].

¹²⁷ Human Rights Law Centre ('HRLC'), 'The Human Rights Law Resource Centre Ltd's Outline of Submissions', Submission in *Sudi* [2011] VSCA 266, S APCI 2010 0051 (6 September 2010) 4 (references omitted).

¹²⁸ Jeremy Gans, 'Can Public Authorities Limit Rights?', *Charterblog* (25 May 2008) <<http://charterblog.wordpress.com/2008/05/25/can-public-authorities-limit-rights/>>; HRLC, above n 127, 3–4.

¹²⁹ Gans, above n 128.

¹³⁰ [2011] VSCA 266.

for the action and that the public authority ‘could not reasonably have acted differently’.¹³¹

The HRLC urges that s 38 be interpreted in line with its equivalent in the *UK Act*. The Commission argued that as the *UK Act* has no general reasonable limits provision, s 7(2) was not intended to have any effect on s 38.¹³² It is outside the scope of this article to analyse the similarities and differences between the Victorian and UK positions in any detail. However it is noteworthy that while the *UK Act* does not have a general limiting clause, the scope of many of the rights set out in the *European Convention on Human Rights*¹³³ (which is annexed to the *UK Act*) is qualified by reference to legitimate and proportionate policy aims. There is some evidence in the Explanatory Memorandum to the *Victorian Act* that s 7(2) was intended to play this role.¹³⁴

The High Court overturned the Court of Appeal’s judgment in *Momcilovic HC*, but not based on its interpretation of the *Victorian Act*. It is virtually impossible to extricate any binding legal authority from the High Court’s judgment in *Momcilovic HC*, as the six separate judgments came to different views on virtually every issue before the Court. Nevertheless the fact that at least three judges, in obiter statements, agreed with the Court of Appeal’s interpretation of s 32 indicates that the role that s 7(2) plays in delimiting other provisions in the *Victorian Act* remains in doubt.¹³⁵ A few of the judges did make brief obiter comments about the interaction between s 7(2) and s 38. The Chief Justice indicated a preference for the HRLC’s interpretation of s 38 in which s 7(2) does not play a role in determining whether a public authority’s actions are compatible with human rights.¹³⁶ On the other hand, both Heydon and Bell JJ indicated that s 38 should be read in light of s 7(2) as otherwise the powers of public authorities would be far too limited by the *Victorian Act*, and it is unlikely that Parliament intended this result.¹³⁷ Accordingly, the question of whether public authorities in Victoria may exercise their discretionary powers in a way that imposes reasonable limits on human rights should probably be regarded as unresolved.

Indeed, the ambiguity of the obligations of public authorities under s 38 was considered briefly by the Victorian Parliament’s Scrutiny of Acts and Regulations

¹³¹ HRLC, above n 127, 5.

¹³² *Ibid* 4.

¹³³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

¹³⁴ Charter of Human Rights and Responsibilities Bill, As Sent Print Explanatory Memorandum, 2006, 7–8.

¹³⁵ *Momcilovic HC* (2011) 245 CLR 1. French CJ (at 44 [35]–[36] and Crennan and Kiefel JJ (at 219–20 [571]–[576]) agreed with the Court of Appeal and thought that s 7(2) only applied after s 32 had been completed, where the court was contemplating making a declaration of inconsistent interpretation under s 36. Gummow J (at 92 [168]), with whom Hayne J agreed on this point (at 123 [280]) held that the process of interpreting legislation consistently with rights under s 32 involves the application of the reasonable limits test under s 7(2). Bell J’s view on this issue is not clear (see 247–8 [677]–[678], 249–50 [682]–[685]). Heydon J thought that the s 7(2) test played a role in s 32, but saw both as legislative functions and so invalid (at 171–5 [430]–[439]).

¹³⁶ *Momcilovic HC* (2011) 245 CLR 1, 43–4 [32]–[34] (French CJ).

¹³⁷ *Ibid* 165–7 [416]–[419] (Heydon J); 249 [681] (Bell J).

Committee ('SARC') in its four-year review of the *Victorian Act*.¹³⁸ In light of the interpretative uncertainties besetting s 38, SARC recommended that the provision:

be redrafted to state the obligations of public authorities in plain language that is accessible to both lay employees of public authorities and lay users of public services without recourse to overseas precedents.¹³⁹

However, this recommendation was the preferred approach of only a minority of SARC members. The majority supported a second, alternative recommendation, which would result in more significant reforms to the provisions of the *Victorian Act* dealing with public authorities. This second reform option recommended by SARC was to completely remove public authorities from the reach of the *Victorian Act*, as well as any role for courts in interpreting, or remedying breaches of, the Act.¹⁴⁰ The Victorian government has not indicated whether it intends to follow either of these recommended approaches, though has stated that 'there is an ongoing place for courts in protecting rights in relation to the Charter'.¹⁴¹ SARC's recommendations were made only eight days after the High Court's judgment in *Momcilovic HC* was handed down, limiting SARC's ability to analyse the impact of the judgment. As a result, the Victorian government has said that it will seek further legal advice on this and related matters before making any decisions on any amendments to s 38 of the *Victorian Act*.¹⁴²

B *The ACT Human Rights Act*

In its original form, the *ACT Act*, like the Canadian *Charter*, said nothing specific about how rights applied to administrative decision-making. Following a discussion in the first review of the *ACT Act* noting that there was some doubt about the extent to which it applied to executive government,¹⁴³ a provision similar to s 38 of the *Victorian Act* was inserted in 2008.¹⁴⁴ Section 40B of the *ACT Act* now provides:

- (1) It is unlawful for a public authority —
 - (a) to act in any way that is incompatible with a human right; or
 - (b) in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and —

¹³⁸ *SARC Review*, above n 102, 108–10. The review was undertaken to meet the requirements of s 44 of the *Victorian Act*, which requires the Attorney-General to cause reviews of the Act after four and eight years.

¹³⁹ *Ibid* 110.

¹⁴⁰ *Ibid* 173.

¹⁴¹ Victorian Government, 'Response to Scrutiny of Acts and Regulations Committee Review of the Charter of Human Rights and Responsibilities Act 2006', 14 March 2012, 23.

¹⁴² *Ibid* 23–4.

¹⁴³ ACT Department of Justice and Community Safety, 'ACT Human Rights Act 2004: Twelve-Month Review — Report' June 2006, 25–33.

¹⁴⁴ *Human Rights Amendment Act 2008* (ACT). The provisions came into effect in 2009.

the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or

the law cannot be interpreted in a way that is consistent with a human right.

A notable difference between s 40B and the equivalent Victorian provision is the absence of any reference to ‘reasonableness’ in the *ACT Act*. While s 38(2) of the *Victorian Act* provides that a public authority will not have acted inconsistently with rights if there is no other reasonable way it could have acted, the *ACT Act* requires express language in the empowering legislation permitting a public authority to limit rights or the act will be invalid. Another important distinction between the *ACT* and *Victorian Acts* is that the *ACT Act* gives individuals a direct method for challenging administrative decisions that purportedly limit human rights.¹⁴⁵ Therefore, in the *ACT*, a person challenging an administrative decision on human rights grounds is not required to make an application for judicial review on ordinary administrative law grounds before being able to argue that government action is unlawful for limiting human rights.

The 2008 amendments also changed the reasonable limits provision in the *ACT Act*, making it almost identical to s 7(2) of the *Victorian Act*. Section 28 of the *ACT Act* provides that:

Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Subsection (2) then sets out the same five factors as in the *Victorian Act* that should be considered in determining whether a particular limit is reasonable.

The amendments to the *ACT Act* led to similar discussions as in Victoria about whether s 40B should be read in light of the limitations clause. In the five-year review of the *ACT Act*, the ACT Human Rights Act Research Project (‘ACTHRA Project’) described this as ‘a thorny issue’.¹⁴⁶ The ACTHRA Project explained that because s 28 only contemplates limits on rights being set by Territory¹⁴⁷ laws:

It would seem clear that s 28 cannot apply directly to conduct — or put another way, public authorities cannot rely directly on s 28 as a defence for conduct that restricts human rights ... But there may be recourse to s 28 via the obligation on public authorities to interpret and apply the law compatibly with human rights (s 30). Where a particular conduct is

¹⁴⁵ *ACT Act* s 40C.

¹⁴⁶ ACT Human Rights Research Project, Australian National University, ‘The Human Rights Act 2004 (ACT): The First Five Years of Operation’ *A Report to the ACT Department of Justice and Community Safety*, May 2009, 20 <http://acthra.anu.edu.au/acthra_res_proj.php> (‘ACTHRA Project’).

¹⁴⁷ At the time, s 28 provided that ‘Human rights may be subject only to such reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society’ (emphasis added). The word ‘Territory’ was removed from s 28 in 2012 by the *Human Rights Amendment Act 2012* (ACT). The Explanatory Statement to that Act stated that the purpose of the amendment was to enable ‘proportionality to be factored into public authority conduct that is referable to legal sources other than Territory laws’. In other words, reasonable limits may be imposed by laws that were not made by the ACT Parliament, but nevertheless apply in the ACT. This amendment has no effect on this aspect of ACTHRA’s argument.

referable to a Territory law, the public authority will be required to interpret and apply the law compatibly with human rights, and it is in that context that the reasonable limits provision in s 28 may be enlivened *vis-à-vis* conduct.¹⁴⁸

There are a number of difficulties with this interpretation. The first is that, as discussed above, following the *Momcilovic* decisions there remains some doubt as to whether the reasonable limits provision in the *Victorian Act* (s 7(2)) has any role to play in the interpretative function under s 32 of the *Victorian Act*, which is broadly equivalent to s 30 of the *ACT Act*. A further difficulty, touched on in Bell J and Heydon J's judgments in *Momcilovic HC*, is that the formulation gives public authorities latitude in interpreting their empowering legislation (only needing to justify that any limits imposed by the interpretation are reasonable and proportionate) but not in actually exercising the discretion granted to them by the legislature.¹⁴⁹ Where multiple courses of action are available to a decision-maker under correctly interpreted legislation, they are left with no discretion to choose the most appropriate course if there is another available that does not limit rights.

To date, these issues have not been analysed fully by ACT courts. There has been even less discussion of the interaction between the equivalent provisions in the *ACT Act* than in Victoria, and few applications for review of administrative decisions on human rights grounds.¹⁵⁰ However, based on the limited case law on the issue, it seems that the ACT is inclined to follow both Victoria and Canada in applying its limitations clause (s 28(2)) to administrative decisions which limit human rights. In the leading case on the issue, *Hakimi v Legal Aid Commission (ACT)*,¹⁵¹ Refshauge J set out a seven step methodology to determine whether a public authority has breached s 40B,¹⁵² which has been applied in subsequent decisions involving the exercise of administrative discretion.¹⁵³ Most important, for the purposes of this article, are steps three to five of Refshauge J's test, which ask:

- 3 Is the relevant act or decision apparently inconsistent with, or does it impose a limitation on, any of the rights protected under Pt 3 of the Human Rights Act?
- 4 Is the limitation reasonable, insofar as it can be demonstrably justified in a free and democratic society having regard, inter alia, to the factors set out in s 28(2) of the Human Rights Act? To put it another way, is the limitation proportionate?
- 5 Even if the limitation is proportionate, where the matter involves making a decision, did the decision-maker give proper consideration to the protected right?¹⁵⁴

¹⁴⁸ Ibid 20–1.

¹⁴⁹ See above n 137 and accompanying text.

¹⁵⁰ Watchirs and McKinnon, above n 103, 155.

¹⁵¹ (2009) 3 ACTLR 127.

¹⁵² Ibid [51]–[53].

¹⁵³ *Eastman v Chief Executive Officer of Dept of Justice and Community Safety* (2010) 172 ACTR 32, 47 [83]; *Canberra Fathers and Children Inc v Michael Watson* [2010] ACAT 74.

¹⁵⁴ *Hakimi v Legal Aid Commission (ACT)* (2009) 3 ACTLR 127 [51]–[53].

C *Lessons and Challenges from Doré*

There are a number of factors that point in favour of Victorian and ACT courts following the lead of the Canadian Supreme Court, and no longer applying the full, formal *Oakes* analysis to administrative decisions. While in many cases Australian courts have not found it necessary to actually undertake a full reasonable limits analysis,¹⁵⁵ in the few instances where such an analysis has been applied Australian courts have run into similar difficulties to those experienced by Canadian courts in identifying the purposes of the impugned administrative decision.¹⁵⁶ Comments of the Court of Appeal in *Momcilovic CA* also highlight the likelihood of similar evidentiary issues arising in Victoria if s 7(2) continues to apply to administrative decisions in full.¹⁵⁷ While it is difficult to generalise based on the limited case law that exists in Australia, it does seem that as in Canada, the *Oakes* analysis and its statutory counterparts in Australia are not well adapted to analysing administrative decisions.

Following the *Doré* approach may also reflect a more faithful reading of the text of the two Australian human rights documents. As outlined above, both the Victorian and ACT human rights acts appear to be much clearer than the Canadian *Charter* about the fact that the reasonable limits provisions apply to legislation and not to the exercise of administrative discretion by public authorities. The inclusion of specific provisions in both acts outlining the obligations of public authorities when acting in an administrative capacity suggests that both Parliaments intended rights to play a different role in administrative decision-making than in the development and interpretation of legislation. Read together with the language of the limitations clauses, which specify that rights may be limited ‘under law’, there is a strong argument that the reasonable limits provisions in both Australian Acts should only apply to primary and subordinate legislation, and not to administrative acts. More specifically, in the Victorian context it is arguable that the approach in *Doré* better reflects the reasonableness assessment required by s 38(2) than applying a full s 7(2) analysis does. This argument sits a little less comfortably in the context of the *ACT Act*, however, as s 40B contains no explicit reference to administrative discretions having to be exercised reasonably. As discussed above, a plain reading of the *ACT Act* appears to offer much less scope for public authorities to act in a manner that limits rights, no matter how reasonable or proportionate such a limitation may be.

¹⁵⁵ For instance, in *Hakimi v Legal Aid Commission (ACT)* (2009) 3 ACTLR 127, Refshauge J found that the right to a fair trial does not extend to funding a lawyer of choice, and so it was not necessary to ask whether the decision of ACT Legal Aid not to fund the applicant’s chosen lawyer was demonstrably justified. See also *R v Williams* (2007) 16 VR 168, 178–81, in which King J expressed the same view in obiter. This aspect of *Williams* was cited with approval by the Federal Court of Australia in *Australian Competition and Consumer Commission v Bon Levi (No 2)* [2008] FCA 788 [16].

¹⁵⁶ See *Patrick’s Case* [2011] VSC 327 [341]; *Canberra Fathers and Children Inc v Michael Watson* [2010] ACAT 74 [60]–[72].

¹⁵⁷ *Momcilovic CA* (2010) 25 VR 436, 475–6 [142]–[146]. See also discussion in HRLC, ‘The Human Rights Law Resource Centre Ltd’s Outline of Submissions’, Submission in *Sudi* [2011] VSCA 266, S APCI 2010 0051, 6 September 2010.

However, differences between the Australian and Canadian legal contexts make it difficult and inappropriate to adopt key aspects of *Doré* in Victoria and the ACT. The most significant of these is the fact that Australian administrative law does not contain a direct equivalent to Canada's reasonableness standard of review. As discussed above, central to the Canadian Supreme Court's reasoning in *Doré* was the fact that the relationship between administrative law and the *Charter* had changed such that administrative law was now capable of adequately protecting *Charter* rights without the need to resort to the *Oakes* analysis. When *Slaight* was decided in 1989, the deferential standard of review — then termed 'patent unreasonableness' — was a much closer fit with the 'classic model of administrative law' in which judicial review had a very limited role in overseeing the substantive, discretionary aspects of administrative decision-making.¹⁵⁸ Similar to the traditional, very strict *Wednesbury* unreasonableness review ground, courts would only intervene under the patent unreasonableness standard if a decision was 'clearly irrational' or 'evidently not in accordance with reason'¹⁵⁹ or where the result 'border[ed] on the absurd'.¹⁶⁰ The courts were clear that it was not their role to examine the relative weight that a decision-maker had given to various competing, relevant considerations.¹⁶¹ At the time, the courts also distinguished between discretionary aspects of administrative decision-making and aspects involving the interpretation of law. The former automatically attracted the patent unreasonableness standard. Thus, if Canadian courts had applied administrative law principles alone to a discretionary decision that had the effect of limiting rights in 1989, they would only have been able to interfere in a decision where a decision-maker had ignored fundamental rights or made a completely irrational decision to limit them. It is therefore not difficult to see why both the majority and Lamer J in *Slaight* concluded that administrative law lacked the ability to 'deal with *Charter* infringements in the exercise of discretion'.¹⁶² Indeed the European Court of Human Rights reached a similar conclusion about the inability of the similarly-framed *Wednesbury* unreasonableness test adequately to protect

¹⁵⁸ See Michael Taggart, 'Proportionality, Deference, *Wednesbury*' (2008) *New Zealand Law Review* 423, 427–9.

¹⁵⁹ *Canada (Attorney-General) v Public Service Alliance of Canada* [1993] 1 SCR 941, 963 (Cory J).

¹⁶⁰ *Voice Construction Ltd v Construction and General Workers' Union, Local 92* [2004] 1 SCR 609, 617 [18] (Major J). Though note that despite the highly deferential terms in which the standard was framed, patent unreasonableness was not always applied consistently in practice: see Grant Huscroft, 'Judicial Review from CUPE to CUPE: Less is Not Always More', in Grant Huscroft and Michael Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, 2006). It is also important to note that the Canadian 'patent unreasonableness' standard and the *Wednesbury* unreasonableness ground of review are not, and never have, been the same thing. They were not even originally intended to apply to the same aspects of decisions: the former was originally concerned with the review of administrative decision-makers' interpretations of law (which in Australia are reviewed on a 'correctness' basis: that is, they must be legally correct), while the *Wednesbury* unreasonableness ground applied to the exercise of discretion. (Note, however, that since *Baker*, Canadian courts no longer delineate between law and discretion, and it is unclear how the two principles now relate to each other). The Supreme Court of Canada has never acknowledged that inspiration for the patent unreasonableness standard came from the *Wednesbury* unreasonableness ground of review. Nevertheless, the similarities in the way each has been described suggest that this was the case. For a brief description see Cartier, above n 32, 63–4.

¹⁶¹ See, eg, *Douglas Aircraft Co of Canada v McConnell* [1980] 1 SCR 245, 277 (Estey J).

¹⁶² *Doré* [2012] 1 SCR 395, 413 [26].

fundamental rights, providing the impetus for the UK's adoption of proportionality as a ground of review.¹⁶³

While Canadian courts have been reluctant to follow the UK in adopting proportionality as a distinct ground of judicial review,¹⁶⁴ over time the Canadian reasonableness standard has evolved into something much closer to the more intrusive investigation of a decision-maker's reasoning process that characterises proportionality review. This is not to say that Canadian courts have necessarily become less deferential towards executive government — at least not on every occasion.¹⁶⁵ Indeed, the development of a doctrine of deference in Canadian administrative law has been critical to the evolution of the modern reasonableness standard. The importance of these twin doctrines for protecting the constitutional balance between the roles of courts and administrative decision-makers was emphasised by the Court in *Doré*.¹⁶⁶ However, judicial review in Canada has moved away from the classic 'see no evil' approach, where deference meant 'refraining from careful engagement with administrative reasons',¹⁶⁷ to a point where courts will scrutinise the justifications and balancing process that a decision-maker has undertaken, including the weight given to various considerations, but will give the decision-maker's conclusions a varying degree of latitude depending on the context.¹⁶⁸

Underlying this shift has been a redefinition and to some extent withdrawal from, though not abandonment of, two important dichotomies that underpinned the classic, Diceyan model of administrative law. The first is the rigid distinction between law and discretion. As noted above, in *Baker* the Supreme Court acknowledged the artificiality of distinguishing between aspects of decision-making involving the interpretation of law and those involving 'pure discretion', and began applying the standard of review analysis to the latter.¹⁶⁹ The importance

¹⁶³ *Smith and Grady v UK* (1999) EHRR 493. For a discussion of the decision see Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Pearson, Harlow and Taggart, above n 9, 35.

¹⁶⁴ See Mullan, above n 5, 235–6.

¹⁶⁵ The Supreme Court has made it clear that the reasonableness standard is capable of giving effect to levels of deference and has previously made comments which suggest that reasonableness is a spectrum (see Gus Van Harten, Gerald Heckman and David Mullan, *Administrative Law: Cases Text and Materials* (Emond Montgomery, 6th ed, 2010) 847). However, in *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339, Binnie J rejected this notion and stated that reasonableness is 'a single standard that takes its colour from the context' [at 378 [59]]. Regardless of how the standard is defined, it seems that it is at least possible that the 'context' may require the court to give as much, or even more, deference to an administrative decision-maker as was required under the patent unreasonableness standard.

¹⁶⁶ *Doré* [2012] 1 SCR 395, 415 [30], 418 [36], 423–7 [50]–[58].

¹⁶⁷ Sheila Wildeman, 'Pas de Deux: Deference and Non-Deference in Action' in Flood and Sossin, above n 32, 343.

¹⁶⁸ Though note that the extent to which the Court will engage with the weight that the decision-maker has given to competing considerations remains contested, and has varied significantly: contrast the approach taken by the majority in *Baker* [1999] 2 SCR 817, 858 [65], 863 [73], 864 [75] (L'Heureux-Dubé J for Gonthier, McLachlin, Bastarache and Binnie JJ) with that in *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339, 378–81 [59]–[67] (Binnie J for McLachlin CJ, Lebel, Abella and Charron JJ). See further Wildeman, above n 167, 353–65.

¹⁶⁹ Geneviève Cartier, 'Administrative Discretion: Between Exercising Power and Conducting Dialogue' in Flood and Sossin, above n 32, 388.

of this decision for the development of reasonableness was to acknowledge that legislatures may sometimes want courts to play a greater role in scrutinising the exercise of statutory discretion by administrators than the classic model of judicial review permitted. Just as Canadian law recognised that legislatures may ask courts to defer to an expert administrator's interpretation of their empowering legislation by inserting a privative clause, it needed to recognise that legislatures may equally request that courts play varying roles in scrutinising the manner in which decision-makers exercise discretion. This change required courts to develop methodologies for applying both the non-deferential correctness standard, and a moderately-deferential 'reasonableness *simpliciter*' standard of review, that existed in Canadian law between 1997¹⁷⁰ and 2008¹⁷¹ and sat between correctness and patent unreasonableness, to review of discretionary administrative decisions.

This, at least in part, led to the alteration of the second, very much related, dichotomy between substance and process.¹⁷² Fox-Decent has explained that following *Baker*, Canadian judges now no longer see review of the substance or reasons for a decision as tantamount to merits review.¹⁷³ A good illustration is found in the Supreme Court's description of the modern reasonableness standard, which is an amalgamation of the old 'patent unreasonableness' and 'reasonableness *simpliciter*' standards, in its 2008 *Dunsmuir* decision:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.¹⁷⁴

The description clearly shows that reasonableness review is concerned now both with the effect of the decision and the decision-maker's reasons for reaching it, a far cry from the patent unreasonableness position in 1989. The way in which reasonableness intertwines issues of process and substance, with justification at its heart, gives it much in common with the concept of proportionality.¹⁷⁵ It is therefore not difficult to see why, even prior to *Doré*, a number of commentators have argued that despite the Supreme Court's protestations, proportionality either did or should form a part of Canadian administrative law.¹⁷⁶

It is obviously not yet clear what, if any, effect the *Doré* decision will have on the application of reasonableness in Canada. One possibility is that it may

¹⁷⁰ *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748.

¹⁷¹ *Dunsmuir* [2008] 1 SCR 190.

¹⁷² See David Dyzenhaus and Evan Fox-Decent, 'Rethinking the Process/Substance Distinction: *Baker v Canada*' (2001) 51 *University of Toronto Law Journal* 193; Evan Fox-Decent 'The Internal Morality of Administration: The Form and Structure of Reasonableness' in Dyzenhaus, above n 32.

¹⁷³ Fox-Decent, above n 172.

¹⁷⁴ *Dunsmuir* [2008] 1 SCR 190, 220 [47].

¹⁷⁵ Mullan, above n 5, 263–4.

¹⁷⁶ *Ibid* 242–4; Guy Regimbald 'Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review' (2005–06) 31 *Manitoba Law Journal* 239; Fox-Decent, above n 172, 143.

bifurcate the reasonableness standard, with courts applying reasonableness as a de facto proportionality analysis whenever *Charter* rights are engaged and a less-well-defined and possibly less-intrusive version of reasonableness where rights are not engaged. There is also an ongoing debate within Canada and around the common law world about the nature of proportionality review in the administrative law context, and whether it is more a test of procedure, substance or both.¹⁷⁷ Obviously much will depend on the version of the proportionality principle that Canada's courts ascribe to in future and the extent to which it is compatible with concurrent developments in the reasonableness standard of review. However it does seem from a number of statements made by the Court in *Doré* that Canada's reasonableness standard is, at least in situations involving *Charter* rights (and possibly also these undefined *Charter* 'values'), moving fairly close to proportionality review.¹⁷⁸

In contrast to the UK and Canada, Australian courts have been careful to retain the very narrow, traditional version of the *Wednesbury* unreasonableness ground of review for discretion.¹⁷⁹ Australian judges have continually emphasised that unreasonableness requires something so 'overwhelming'¹⁸⁰ or 'exceptional'¹⁸¹ as to amount to an abuse of power.¹⁸² Even in its broadest and most controversial incarnation, the test has been described in very narrow terms under Australian law:¹⁸³

[T]he test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable simply because one conclusion has been preferred to another possible conclusion.

¹⁷⁷ See Taggart, above n 158; Mullan, above n 5; Fox-Decent, above n 172; Murray Hunt, 'Against Bifurcation' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart, 2009); David Dyzenhaus, 'Proportionality and Deference in a Culture of Justification', in Grant Huscroft, Brad Miller and Gregoire Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, forthcoming 2013).

¹⁷⁸ See eg, *Doré* [2012] 1 SCR 395, 404 [5], 405 [7], 426 [56], 427 [57].

¹⁷⁹ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2008) 368.

¹⁸⁰ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 627 [44] (Gleeson and McHugh J).

¹⁸¹ *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598, 1616 [100] (Kirby J).

¹⁸² *Attorney-General v Quin* (1990) 170 CLR 1, 38 (Brennan J).

¹⁸³ *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 648 (Crennan and Bell JJ). It should be noted that this passage refers to the 'irrationality or illogicality' ground that applies to fact-finding, and not to *Wednesbury* unreasonableness, which applies to the exercise of discretion, however the two grounds are clearly linked and in many cases indistinguishable in the ways they have been described: see Aronson, Dyer and Groves, above n 179, 372–6; Robin Creyke and John McMillan, *Control of Government Action: Text Cases and Commentary* (LexisNexis, 3rd ed, 2012) 812–17.

The reason for this restraint is the constitutionally entrenched separation of powers doctrine.¹⁸⁴ Australian courts continue to interpret the separation of powers as requiring the maintenance of strict dichotomies between process and substance and between law and discretion, and have repeatedly indicated that any expansion in the unreasonableness ground risks courts intruding into the merits of decisions, which is beyond judicial power.¹⁸⁵ This traditional, rigid approach explains why proportionality, as a distinct ground of judicial review of administrative action, has not gained any traction with the Australian High Court.¹⁸⁶ Further, Australia's *Constitution* makes it difficult for a proportionality test to be incorporated into the common law of administrative law in the ACT and Victoria if it is not first accepted by the High Court. The High Court of Australia has stated that Australia has 'but one common law',¹⁸⁷ suggesting that it may not be possible for states and territories to develop additional grounds of review. Bell J discussed this issue in *Patrick's Case*, citing the High Court's recent decisions in *Kirk v Industrial Relations Commission NSW*¹⁸⁸ and *Wainohu v State of NSW*¹⁸⁹ and noting that the Supreme Court of Victoria must administer the 'unified common law of the nation' and 'cannot perform functions which are inconsistent with the institutional integrity of the court within the federal judicial framework established by the Commonwealth Constitution'.¹⁹⁰ Given the above-mentioned suggestions from Australian judges and commentators to the effect that the inclusion of a proportionality ground of review would result in courts stepping beyond their

¹⁸⁴ *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 35–6 (Brennan J). As noted above, the Canadian Constitution does not contain a strict separation of judicial power: see above n 52. Although Canadian courts have been fairly constrained in their approach to judicial review — evidenced, for example, by their reluctance to follow the UK in adopting proportionality as a distinct ground of review and by their concern with deference — there is no constitutional impediment to them reviewing administrative decisions at a more intrusive standard than they traditionally applied. Thus Canadian administrative law may be able to accommodate a more rigorous standard of review than that possible under Australian law.

¹⁸⁵ See, eg, *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 42 (Mason J); *Attorney-General v Quin* (1990) 170 CLR 1, 38 (Brennan J); *Abebe v Commonwealth* (1999) 197 CLR 510, 579–80; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160. See also *Secretary, Department of Human Services v Sanding* [2011] VSC 42 [229]–[232] in which Bell J briefly discusses the fact that while Australian courts have repeatedly rejected both an expansion in the scope of review as well as its counterpart — the deference doctrine — similar principles actually underpin the Canadian standard of review and Australia's law/merits distinction.

¹⁸⁶ See discussions in Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1, 24; Aronson, Dyer and Groves, above n 179, 380–3; Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action — the Search Continues' (2002) 30 *Federal Law Review* 217, 224; Ben Saul, 'Australian Administrative Law: the Human Rights Dimension' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 54–5. For a discussion of Australian case law on this issue in the context of the *Victorian Charter* see *Sabet* (2008) 20 VR 414, 422–4 [45]–[58]. David Dyzenhaus makes a compelling argument in a forthcoming essay that proportionality, when viewed as a test of a decision-maker's justifications and when coupled with a doctrine of deference, actually supports the separation of powers: Dyzenhaus, above n 177, 26–8. It is outside the scope of this article to consider this argument in any detail.

¹⁸⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–4.

¹⁸⁸ (2010) 239 CLR 531.

¹⁸⁹ (2011) 243 CLR 181.

¹⁹⁰ *Patrick's Case* [2011] VSC 327 [313].

constitutional power into an examination of the merits of a case, it is possible that any attempt by the Supreme Courts of Victoria or the ACT to develop a proportionality ground of review under common law would risk contravening the *Constitution*. Thus the common law in Australia has no equivalent principle through which courts can undertake the kinds of substantive and values inquiries that the Canadian Supreme Court and European Court of Human Rights have found necessary to uphold human rights.

Fortunately for Victoria and the ACT, there does not appear to be any constitutional difficulty with states and territories effectively adding a proportionality ground of review via statute. In *Momcilovic HC* only Heydon J found that the interpretative function conferred on Victorian courts by s 7(2) of the *Victorian Act* was invalid. Heydon J found that the task of determining whether the needs of a democratic society justify imposing limits on fundamental rights is a legislative function that is incompatible with the exercise of judicial power.¹⁹¹ All of the other judges upheld the constitutional validity of the relevant provisions of the *Victorian Act*. The simplest solution to the questions raised by *Doré* may therefore be for the ACT and Victorian legislatures to clarify the role that human rights are intended to play in discretionary administrative decision-making.

V Conclusions

The Supreme Court of Canada's decision in *Doré* has resolved some longstanding theoretical and practical difficulties in the relationship between the Canadian *Charter* and administrative law. Most critically, the decision recognises that Canadian administrative law is capable of protecting fundamental rights without the need to resort to the *Oakes* test, which has proven inappropriate and difficult to apply to administrative decision-making. The new Canadian approach is designed to balance the *Charter*'s demand for strong human rights protection with the legislature's intent to give administrative decision-makers discretion in interpreting and applying their empowering legislation. While the case probably raises as many questions for Canadian administrative law as it answers, it also has some potentially significant implications for the two Australian jurisdictions which have adopted statutory bills of rights. The *Doré* decision casts serious doubt on some of the fundamental justifications for its earlier approach of applying reasonable limits clauses to administrative decisions, an approach that both the ACT and Victoria have followed. While the decision also provides some potential solutions to issues that the ACT and Victoria have struggled to resolve, the central problem for those jurisdictions is that it does so by substituting the reasonable limits test with one for which there is no equivalent under Australian common law. Australian administrative law lacks the tools that foreign courts have found necessary to undertake the inquiries into the substance and values of administrative decision-making that a bill of rights requires. Accordingly, Victorian and ACT courts may need to find an alternative and new methodology for inquiring as to whether any limits placed on rights by administrative decision-makers in exercising discretion are proportionate.

¹⁹¹ *Momcilovic HC* (2011) 245 CLR 1, 172 [431]–[432].