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Charter Values: The Uncanny Valley of Canadian Constitutionalism

Matthew Horner*

I. INTRODUCTION

Thirty years after the patriation of the Constitution, it is trite to say that the advent of the *Canadian Charter of Rights and Freedoms*¹ brought about a seismic change in the Canadian constitutional landscape. Following the entrenchment of a written Charter, civil and human rights were now expressly enshrined in the Constitution of Canada. No longer would courts need to mine the backwaters of the federal division of powers or administrative law to protect the civil rights of individual Canadians.^{1A} Constitutionally protected and judicially reviewable rights now existed, in black and white (or sepia), on posters hung on classroom walls and in lawyers' offices across the nation. Legislation — and government action taken pursuant to such legislation — was now subject to the constitutional limits imposed by those enshrined rights. Parliamentary sovereignty was thus limited in an important and specific way following protracted and complex constitutional negotiations.

In the intervening years the interpretation of those rights has been subject to vigorous debate and modification through the courts. Such debate was inevitable.

What was not as inevitable is the emerging line of cases that appears to further limit the scope of legislative and government action by creating a version of unwritten Charter protections ambiguously termed

* Counsel, Constitutional Law Branch, Ministry of the Attorney General (Ontario). The views expressed herein are solely those of the author, and do not represent the position of the Attorney General or the Government of Ontario. Many thanks to my colleagues Courtney Harris and Michael Dunn for reviewing an earlier draft of this paper. I am also grateful to the anonymous reviewers from the Osgoode 2013 Constitutional Cases Conference for their helpful suggestions.

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

^{1A} See, e.g., *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299 (S.C.C.); *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

“Charter values”. These Charter values look much like Charter rights, but are somehow (presumably) different. Their substance is allegedly derived from the Charter, but their content is amorphous.

Most significant of the recent Charter values cases was the Supreme Court’s 2012 decision in *Doré v. Barreau du Québec*.² Strictly speaking, the *Doré* decision simply confirmed that the discretionary decisions of statutory decision-makers must comply with the Charter, and provided clarification of the doctrinal process for determining whether the breach of a Charter right by a statutory decision-maker is “reasonable”. However, some of the language of that decision has caused considerable confusion among litigants, tribunals and other courts. In particular, the Court’s reasons repeatedly refer to the “Charter value” of freedom of expression despite the fact that the Charter claim raised by the applicant related to a specific Charter right — freedom of expression under section 2(b). Why does the Court in *Doré* transition to the term “Charter values”? Is the scope of the Charter value broader? Is the threshold of proof lower? The decision itself provides no answer to these questions.

In my view, the concept of Charter values should be rejected. A review of the more than 100 Supreme Court decisions referencing the term reveals that in most circumstances the concept of Charter values provides little assistance to Charter analysis. Instead, Charter values create ambiguity when previously there was none, turning every case into a “Charter” case, and thereby undermining the important role of direct Charter review. In addition, because the substantive scope of Charter values is ill defined, they provide little to no guidance for decision-makers, and potentially provide — for no principled reason — a greater limit on the scope of legislation and government decision-making than would be expected under a traditional Charter rights analysis.

This amorphous and ill-defined area of constitutional law is what I refer to as the “uncanny valley” of Canadian constitutionalism.

In the 1960s, robotics professor Masahiro Mori examined the emotional response of humans to robots, and observed that while greater human likeness generally correlates to increased comfort or familiarity, when the features of a robot look and move almost — *but not quite* — like a natural human being, it will stir a negative emotional response in some people. This point of revulsion was termed the “uncanny valley” to

² [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395 (S.C.C.) [hereinafter “*Doré*”].

describe the sudden drop in comfort experienced by observers of things or movements that are just shy of human likeness.³ Since that time, the term has been used to describe a variety of flawed attempts to recreate human form or movement (dolls, zombies, video game characters). Like an eerie robot or computer-generated animated character that stirs discomfort in our unconscious mind because it looks almost — *but not quite* — human, the concept of Charter values is where we fall into the “uncanny valley” of modern Canadian constitutionalism: unwritten yet somehow justiciable values hidden within a written and enshrined Constitution.

Almost — *but not quite* — like a Charter right.

This paper is divided into three main parts. First, I examine *where* Charter values have arisen, first in the context of judicial interpretation of the common law, then extending to the interpretation of statutes and the exercise of statutory powers of discretion.

Second, I consider the substantive meaning of Charter values — *what* does the term “Charter values” mean? Is it simply a term of art? Is it a form of Charter rights “lite”? Or do Charter values refer to an entire series of unwritten but enforceable constitutional principles?

Finally, I address the *why* of Charter values. In doing so, I examine some recent cases and conclude that the concept of Charter values provides little value to Canadian constitutional law, undermining the important role of direct Charter rights analysis while creating ambiguity and undue complexity for courts, tribunals and other statutory decision-makers.

II. WHERE DO CHARTER VALUES ARISE?

There are a number of different circumstances in which the Supreme Court has made reference to the term “Charter values”, not all of which are the subject of this paper. In some instances, the term has been used to describe a purposive approach to interpreting Charter rights themselves.⁴ Although the use of “Charter values” in this sense has been the subject of

³ M. Mori, “Bukimi no tani [The uncanny valley]” (1970) 7(4) *Energy* 33-35; Karl F. MacDorman, *et al.*, “Too real for comfort? Uncanny responses to computer generated faces” (2009) 25(3) *Computers in Human Behavior* 695; “Crossing the Uncanny Valley” *The Economist* (November 18, 2010).

⁴ See, *e.g.*, *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, [2001] 3 S.C.R. 209, at para. 9 (S.C.C.), *per* Bastarache J.; *Health Services and Support-Facilities Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391, at paras. 39, 81 (S.C.C.).

criticism,⁵ for the most part it can be reconciled with the Court's long-standing purposive approach to Charter interpretation, whereby the Court considers the principles (or "values") underlying a Charter right when analyzing the scope of the given right (*e.g.*, that the search for truth, participation in social and political decision-making and self-fulfilment are some of the values and principles underlying the Charter, section 2(b) right to freedom of expression).⁶

The notion of Charter values becomes considerably less helpful — and more confusing — when those "values" are applied independently, in the same manner as properly enshrined rights. As Bastarache J. wrote, in *Gosselin v. Quebec*: "'Charter' values are an important concept that may help to inform a Charter right, but they cannot be invoked to modify the wording of the Charter itself."⁷

The focus of this paper is on those circumstances in which Charter values operate not to understand Charter rights, but to provide a direct limit on the exercise of a power — in other words, the use of Charter values *as* Charter rights. The Supreme Court has relied on Charter values as an enforceable rights-like concept in three types of legal circumstances: (1) when developing the common law; (2) when interpreting genuinely ambiguous legislation; and (3) when reviewing the exercise of a statutory discretion by a statutory decision-maker.

1. Charter Values in the Development of the Common Law

The notion of "Charter values" as an analytical tool first arose in circumstances where Charter rights themselves were found to have no direct application. In the 1986 case, *R.W.D.S.U., Local 580 v. Dolphin Delivery Inc.*, the Supreme Court had occasion to determine whether and how the Charter would apply to a common law dispute between private actors. In its decision, the Court held that Charter rights did not apply directly to private litigation because section 32 limits the Charter's application to the legislative, executive and administrative branches of

⁵ *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3, at paras. 174, 253 (S.C.C.), *per* Rothstein J.; R.K. Basu, "Revolution and Aftermath: *B.C. Health Services* and Its Implications" in J. Cameron, P. Monahan & B. Ryder, eds. (2008) 42 S.C.L.R. (2d) 165, at 198-99.

⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at para. 53 (S.C.C.); *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 344 (S.C.C.); *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 at 119 (S.C.C.).

⁷ [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429, at para. 203 (S.C.C.), *per* Bastarache J.

government.⁸ The Court rejected the argument that court orders are a form of government action because to do so would “widen the scope of Charter application to virtually all private litigation”.⁹

Nonetheless, the Court went on to hold that while the Charter does not apply to private, common law litigation directly, the judiciary must “apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”.¹⁰

This reference to the “fundamental values” enshrined in the Constitution evolved into the concept of “Charter values” subsequently used in the development of common law principles relating to defamation, publication bans and other judge-made legal concepts.¹¹ This incorporation of the Charter into the development of the common law was later described by the Court as a way of shifting judge-made common law toward Charter compliance, without subjecting an impugned rule to a full Charter analysis:

Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.¹²

In adopting the language of Charter values in these common law cases, the Court was initially careful to distinguish Charter values from Charter rights, limiting the application of the former to the interpretation of the common law.¹³ According to the Court in *Hill* (in which the Court considered the effects of the Charter on the law of defamation), while Charter rights “do not exist in the absence of state action”, a Charter values claim is meant to address a “conflict between principles” and

⁸ [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.) [hereinafter “*Dolphin Delivery*”].

⁹ *Id.*, at para. 36.

¹⁰ *Id.*, at para. 39.

¹¹ See, e.g., *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 (S.C.C.) [hereinafter “*Salituro*”]; *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) [hereinafter “*Dagenais*”]; *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.) [hereinafter “*Hill*”]; *M. (A.) v. Ryan*, [1997] S.C.J. No. 13, [1997] 1 S.C.R. 157 (S.C.C.); *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, [2008] 2 S.C.R. 420 (S.C.C.); *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640 (S.C.C.) [hereinafter “*Grant*”].

¹² *Salituro, id.*, at para. 49.

¹³ *Hill, supra*, note 11, at para. 95.

must therefore be subject to a “more flexible” balancing than the traditional section 1 analysis.¹⁴

This approach was described in more detail in *Dagenais*, in which the Court rebalanced the principles underlying the common law rule governing publication bans on court proceedings, based on Charter values.¹⁵ In imposing publication bans prior to the Charter, courts had traditionally emphasized the fair trial rights of the accused over the free expression rights of those affected by the ban. In light of the Charter, however, the Court found that this balance was inconsistent with the equal status given to fair trial and free expression rights under sections 2(b) and 11(d) of the Charter, holding that “[i]t would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b).”¹⁶ The Court therefore rebalanced the common law test for publication bans, requiring the reviewing judge to determine whether a ban was necessary to prevent a risk to trial fairness and whether the salutary effects of the ban outweighed the deleterious effects on freedom of expression rights.¹⁷

Following the same approach, the Supreme Court in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*¹⁸ resolved conflicting common law decisions respecting the legality of secondary picketing with reference to the value of freedom of expression expressed in section 2 (b) of the Charter. The Court in that case, recognizing that the right protected under section 2(b) is “subject to justificative limits under s. 1”, held that the same principles apply when interpreting the common law to reflect Charter values: “The starting point must be freedom of expression. Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society.”¹⁹ On that basis, the Court went on to adopt the line of cases that limited freedom of expression in a manner that it found to be justified.

Thus, in these early Charter values cases governing the development of the common law, the Court recognized that judge-made law, while not subject to the Charter, could not continue to develop without regard to

¹⁴ *Id.*, at para. 97.

¹⁵ *Dagenais*, *supra*, note 11.

¹⁶ *Id.*, at paras. 69, 72.

¹⁷ *Id.*, at para. 73.

¹⁸ [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.).

¹⁹ *Id.*, at paras. 36-37, 67.

the Charter’s terms. When a common law rule came into direct conflict with a Charter right, the principles underlying that rule would have to be rebalanced on the basis of Charter values. This approach further recognizes that while judge-made common law may develop in accordance with Charter values, it is always subject to being overridden by legislation, which will be directly subject to a Charter rights analysis.

2. Charter Values as a Tool of Statutory Interpretation

Following the Court’s decision in *Dolphin Delivery* establishing that Charter values could be used to infuse the development of the *common law*, a parallel jurisprudence developed regarding the use of Charter values to interpret *statutory* law. Indeed, the earliest use of the phrase “Charter values” is found in *Hills v. Canada (Attorney General)*, which involved the interpretation of a provision of the *Unemployment Insurance Act*.²⁰ At issue in that case was whether unemployment benefits extended to employees who were not working due to a strike by members of their own union (though a different union local). In determining whether the non-striking workers were “financing” the striking local for the purposes of the Act, L’Heureux-Dubé J. noted that “the values embodied in the Charter must be given preference over an interpretation that would run contrary to them”.²¹

However, even from this earliest case, at least two risks associated with the adoption of a Charter values approach in statutory interpretation cases can be identified. First, there does not appear to have been any need to resort to Charter values, and yet the Court felt the need to refer to them to offer further support for its conclusion. In her reasons, L’Heureux-Dubé J. appears to have reached her ultimate conclusion on the basis of a purposive interpretation of the Act.²² Moving on to note that such an interpretation also has the benefit of being consistent with Charter values provided little assistance to the legal question at hand, and needlessly adds complexity and ambiguity to the analysis.²³

Second, and as will be dealt with in more detail below, it is apparent that the meaning of Charter values, while rhetorically powerful, is substantively unclear. In *Hills*, L’Heureux-Dubé J. highlights her support

²⁰ [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513 (S.C.C.) [hereinafter “*Hills*”].

²¹ *Id.*, at para. 93.

²² *Id.*, at paras. 92, 95-96.

²³ *Id.*, at para. 93.

of a Charter values approach by noting and agreeing that the appellant union, “while *not relying on any specific provision of the Charter*, nevertheless urged that preference be given to Charter values in the interpretation of a statute, *namely freedom of association*”.²⁴

In applying Charter values in this way, L’Heureux-Dubé J. seems to suggest that a claim to Charter values need not rely on any specific provision of the Charter, but then, somewhat confusingly, references freedom of association, which is in fact specifically guaranteed by section 2(d) of the Charter. As will be discussed further below, this ambiguity continues to exist in defining the substantive content of Charter values.

While L’Heureux-Dubé J. continued for many years to argue for a broad application of Charter values in the context of statutory interpretation,²⁵ subsequent majorities of the Court have highlighted the risk of over-reliance on Charter values in the interpretation of statutes and have established a jurisprudence that strictly limits the scope of their use in this context. As the Court recognized in its 1993 decision in *Symes*, reliance on Charter values to interpret a statute must be limited to those instances in which the Court is faced with statutory language that is genuinely ambiguous. To infuse statutory interpretation with Charter values in all cases would undermine the importance of the Charter itself, depriving

the Charter of a more powerful purpose, namely, the determination of a statute’s constitutional validity. If statutory meanings must be made congruent with the Charter even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the Charter. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the Charter, since the interpretive process would preclude one from finding infringements in the first place.²⁶

This concern that the use of Charter values would undermine the more powerful role of direct Charter review was expressed again in *Bell ExpressVu Limited Partnership v. Rex*,²⁷ in which the Court emphasized

²⁴ *Id.*, at para. 93 (emphasis added).

²⁵ See, e.g., *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554, at para. 94 (S.C.C.), *per* L’Heureux-Dubé J.; *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695, at para. 190 (S.C.C.), *per* L’Heureux-Dubé J [hereinafter “*Symes*”].

²⁶ *Symes, id.*, at para. 105, *per* Iacobucci J.

²⁷ [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559 (S.C.C.) [hereinafter “*Bell ExpressVu*”].

the distinction between judge-made common law and statutory provisions. Because the latter embody legislative intent, the Court held that “to the extent this Court has recognized a ‘Charter values’ interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations”.²⁸ In reaching this conclusion, the Court emphasized that expanding the use of Charter values to interpret all legislation risks shearing the legislature of its constitutional power to enact reasonable limits on Charter rights and freedoms, which rights would in turn “be inflated to near absolute status”.²⁹ The importance of direct Charter review was again emphasized in Abella J.’s concurring reasons in *R. v. Gomboc*, where she stressed that Charter values “cannot be used as a freewheeling *deus ex machina* to subvert clear statutory language, or to circumvent the need for direct *Charter* scrutiny with its attendant calibrated evidentiary and justificatory requirements”.³⁰

Absent ambiguity, a court that interprets a clear statutory provision “so as to accord with its view of minimal constitutional norms” risks “effectively [trumping] the constitutional analysis, [rewriting] the legislation, and [depriving] the government of the means of justifying, if need be, any infringement on constitutionally guaranteed rights”.³¹

Two Supreme Court decisions from the last year have confirmed the limited role that Charter values can play in statutory interpretation. In *R. v. Clarke*, the Supreme Court once again affirmed that a consideration of Charter values only arises if the statute is found to be genuinely ambiguous, holding that “[i]f the statute is unambiguous, the court must give effect to the clearly expressed legislative intent”.³² The Court further cautioned courts and tribunals against using Charter values to “create ambiguity when none exists”.³³

Similarly, in *Martin v. Alberta (Workers’ Compensation Board)*, the Court confirmed that Charter values cannot be used as means of avoiding

²⁸ *Id.*, at para. 62 (emphasis in original).

²⁹ *Id.*, at para. 66.

³⁰ [2010] S.C.J. No. 55, [2010] 3 S.C.R. 211, at para. 87 (S.C.C.), *per* Abella J [hereinafter “*Gomboc*”].

³¹ *Id.*, at para. 88, *per* Abella J.; see also *R. v. Rodgers*, [2006] S.C.J. No. 15, [2006] 1 S.C.R. 554, at paras. 18, 20 (S.C.C.) [hereinafter “*Rodgers*”]; *Charlebois v. Saint John (City)*, [2005] S.C.J. No. 77, [2005] 3 S.C.R. 563, at para. 23 (S.C.C.).

³² [2014] S.C.J. No. 100, 2014 SCC 28, at para. 12 (S.C.C.) [hereinafter “*Clarke*”].

³³ *Id.*, at para. 1.

the evidentiary and legal requirements of a direct Charter challenge.³⁴ At issue in *Martin* was whether an Alberta federal worker's claim for compensation due to chronic onset stress was subject to provincial rules governing chronic stress claims, or was exclusively subject to the federal *Government Employees Compensation Act*.³⁵ In arguing that the provincial policies should not apply under the terms of the GECA, the worker argued that the GECA should be interpreted in accordance with Charter values to prevent the application of the provincial rules, which the worker claimed would result in discrimination on the basis of mental disability. The Supreme Court rejected this argument, recognizing, in part, that reinterpreting the legislation to accord with Charter values would create an end run around a constitutional challenge to the underlying provincial policies without a proper record to directly consider their compliance with Charter rights:

[T]he appellant relied on the values in the *Canadian Charter of Rights and Freedoms* to argue that the definition of "accident" must be interpreted in a way that does not impose additional causality burdens on claimants for mental health injuries as compared to claimants for physical injuries. However, the constitutionality of the provisions was not challenged before this Court. For this Court to make a determination based on *Charter* values would in effect be to decide a *Charter* challenge to the Policy without a proper record.³⁶

Thus, the Supreme Court has clearly held that Charter values can play a role in the interpretation of statutes, but has expressly limited the circumstances in which those values will have relevance to cases of genuine ambiguity. In so doing, the Court has recognized that an overly broad interpretation or application of Charter values risks undermining the important role of Charter rights and placing unjustified limits on the scope of legislation.

It should be noted, however, that in adopting the language of Charter values in these cases, the Court has offered no explanation for why "Charter values" are being assessed as opposed to Charter rights. While the common law cases at the origin of this case law emphasized that Charter rights were not directly applicable under section 32 of the Charter and therefore required a degree of analytical separation from the concept of the direct Charter right violation, the same doctrinal concern

³⁴ [2014] S.C.J. No. 25, 2014 SCC 25 (S.C.C.) [hereinafter "*Martin*"].

³⁵ R.S.C. 1985, c. G-5 [hereinafter "GECA"].

³⁶ *Martin*, *supra*, note 34, at para. 53.

does not arise when interpreting a legislative Act. As discussed further below, this change in language suggests that there is a substantive difference between Charter rights and Charter values.

3. Charter Values to Limit the Exercise of Statutory Discretion

Finally, the concept of Charter values has most recently been raised in a third category of case, the application of a statutory decision-maker's power of discretion.

Since its decision in *Slaight Communications Inc. v. Davidson*,³⁷ 25 years ago, the Supreme Court has recognized that a statutory decision-maker must exercise any power of discretion in a manner that accords with the Charter. This has traditionally been addressed through the standard lens of Charter rights, not Charter values. In *Slaight Communications* itself, for instance, the question was whether the order of a labour arbitrator requiring the employer to provide a letter of recommendation violated the employer's freedom of expression under section 2(b) of the Charter in an unreasonable (under section 1) manner.³⁸

Twenty-three years after *Slaight Communications*, Abella J., for a unanimous Court in *Doré*, confirmed that the exercise of a statutory discretion must conform with the Charter, but restated the process for applying and reviewing the Charter in such contexts, holding that the reasonableness of rights violations should be assessed not through the lens of a traditional Charter, section 1 *Oakes* analysis, but instead through the "administrative law" approach of reasonableness and proportionality.³⁹

Leaving aside the differences (if any) that could be said to exist between these two approaches to determining reasonableness, what is of particular note in *Doré* for the purposes of this paper is the Court's repeated use of the term "Charter values" to describe the constitutional entitlements before it.⁴⁰ At issue in *Doré* was whether a Barreau du Québec disciplinary committee's exercise of its statutory discretion to reprimand a lawyer for statements he made about a judge violated his freedom of

³⁷ [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at para. 87 (S.C.C.) [hereinafter "*Slaight Communications*"].

³⁸ *Id.*, at para. 88. See also *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.).

³⁹ *Doré*, *supra*, note 2, at para. 35; *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

⁴⁰ *Id.*, at paras. 23-59.

expression under the Charter. In this context, the use of the term “Charter values” throughout Abella J.’s reasons is notable, given that Mr. Doré had never argued that the Barreau’s penalty violated some amorphous Charter value or values. The argument was that *his* Charter *right* to freedom of expression had been violated.⁴¹ And yet, in its decision the Court adopts the language of Charter values throughout its analysis.

Thus again, as in *Hills*, the Court in *Doré* expressly chose to rely on a concept of Charter values even though the Charter value at issue was freedom of expression, which is clearly and expressly enshrined as a Charter right. The Court offers no explanation of why such a shift in language was necessary.

The Court’s discussion of Charter values in *Doré*, although limited in that case to the exercise of a statutory discretion, also raised the possibility that courts, tribunals and other statutory decision-makers would improperly expand the use of Charter values beyond the principled confines of genuinely ambiguous laws and the exercise of statutory discretions. This potential was seen most recently in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*.⁴² In that case, the claimants alleged that the failure of Alberta’s *Personal Information Protection Act*⁴³ to provide an exception for union activities violated their freedom of expression under section 2(b) of the Charter. While the Alberta Court of Appeal undertook a traditional constitutional analysis, it also suggested that the Court’s decision in *Doré* could mean that the adjudicator had jurisdiction to consider whether the legislation could be interpreted in accordance with Charter values. It reached this conclusion despite the fact that the legislation was not ambiguous and did not confer a statutory discretion upon the decision-maker.⁴⁴ Indeed, the statutory adjudicator under the Alberta Act lacked constitutional jurisdiction to consider the validity of the Act at all, and declined to do so. The argument in favour of a Charter values approach was advanced by the Information and Privacy Commissioner before the Supreme Court, which ultimately chose not to deal with the issue. Nonetheless, the Alberta Court of Appeal’s decision

⁴¹ *Id.*, at paras. 17, 18.

⁴² [2013] S.C.J. No. 62, [2013] 3 S.C.R. 733 (S.C.C.) [hereinafter “*Alberta IPC*”].

⁴³ S.A. 2003, c. P-6.5.

⁴⁴ *United Food and Commercial Workers, Local 401 v. Alberta (Attorney General)*, [2012] A.J. No. 427, 2012 ABCA 130, at paras. 38-42 (Alta. C.A.) [hereinafter “*UFCW*”].

demonstrates the confusion surrounding the appropriate use of Charter values, and the tendency toward expanding the scope of their application.

Another example of this potential expansion of Charter jurisdiction through the application of a Charter values analysis has recently arisen in a series of cases coming out of Ontario's Health Services Appeal and Review Board ("HSARB"). As with the adjudicator in *Alberta IPC*, the Ontario legislature has passed specific legislation indicating that the HSARB does not have the jurisdiction to determine the constitutional validity of any law or regulation.⁴⁵ However, in a recent Divisional Court decision upholding a Board finding that it lacked the jurisdiction to consider the constitutional validity of a statutory provision, the Court went on to discuss in *obiter* the possibility that a claimant could argue before the Board that the "application" of the law violated the Charter.⁴⁶ This has led to some confusion on the part of claimants, who in several instances have attempted to recast constitutional challenges to provisions of the *Health Insurance Act*⁴⁷ as Charter values challenges to the statutory decision-maker's "application" of the law, even where the decision-maker has no discretion and is simply implementing an explicit provision of the law.⁴⁸ In response to this, the Board held in a subsequent case that where a Charter challenge is to a non-discretionary decision based on the regulation, it is in essence a challenge to the validity of the regulation and therefore beyond the jurisdiction of the Board.⁴⁹ However, the courts have not expressly confirmed this conclusion, and so a lack of clarity remains as to the extent to which Charter arguments may be advanced before the Board despite the express statutory revocation of its constitutional jurisdiction.

This confusion appears (hopefully) to have been resolved by the Supreme Court's recent decision in *Clarke*, in which the Court clearly held that in the administrative law context, the "divining rod that attracts Charter values" is "whether the *exercise of discretion* by the administrative decision-maker unreasonably limits the Charter protections in light of the

⁴⁵ *Ministry of Health and Long-Term Care Appeal and Review Boards Act, 1998*, S.O. 1998, c. 18, Sch. H, s. 6(3).

⁴⁶ *H. (E.) v. Ontario (Health Insurance Plan, General Manager)*, [2012] O.J. No. 4376 (Ont. Div. Ct.). I acted as counsel for the Attorney General in this matter.

⁴⁷ R.S.O. 1990, c. H.6.

⁴⁸ *G. (J.) v. Ontario (General Manager)*, 2013 CanLII 42937 (H.S.A.R.B.), aff'd *Graham v. Ontario Health Insurance Plan (General Manager)*, [2014] O.J. No. 1185, 2014 ONSC 1623 (Ont. S.C.J.). I acted as counsel for the Attorney General in this matter.

⁴⁹ *Id.*, at para. 61 (H.S.A.R.B.).

legislative objective of the statutory scheme”.⁵⁰ The Court’s decision in *Clarke* underlines that it is only in the exercise of a statutory discretion that Charter values are properly raised in the administrative context. Charter values are not, therefore, applicable when an administrative decision-maker is tasked with interpreting and applying an unambiguous statute.

Nonetheless, while the Court has narrowly defined the circumstances in which Charter values may be relied upon, the recent *UFCW* and *HSARB* cases suggest that the power of Charter rhetoric is likely to expand the application of Charter values, despite the Supreme Court’s admonitions that such values must not be used as a *deus ex machina* to subvert clear statutory language, and that doing so undermines the role of the Charter and of Charter review.

In sum, it appears from the language of *Doré* and *Clarke* that the exercise and review of discretionary decisions by statutory decision-makers is now, like the interpretation of the common law and ambiguous statutes, an area in which Charter values may be applied.⁵¹ The question this leaves is whether the adoption of Charter values language in *Doré* actually expands the scope of Charter-based restrictions that a decision-maker must consider when exercising a statutory discretion. To answer this question, we must consider the substantive content of Charter values.

III. WHAT ARE CHARTER VALUES?

As suggested above, the Supreme Court has had difficulty describing the substance of Charter values. From the very first reference to Charter values in *Hills*, in which the Court relied on the “Charter value” of freedom of association instead of the “Charter right” to freedom of association, the amorphous, ill-defined nature of Charter values has been apparent. The frustratingly indeterminate nature of Charter values was implicitly highlighted most recently in the dissenting reasons in *R. v. Cairney*, in which the minority held that the objective element of the defence of provocation should be informed by contemporary norms, “including Charter values”.⁵² However, no description of the content of those values was provided. Instead, all that is offered is an example of values that are *not* Charter values, with the minority (although

⁵⁰ *Clarke*, *supra*, note 32, at para. 16 (emphasis added).

⁵¹ *Doré*, *supra*, note 2.

⁵² [2013] S.C.J. No. 55, 2013 SCC 55, at para. 82 (S.C.C.), *per* Abella J.

presumably not on this point) stating specifically that Charter values “do not include aggressively proprietary atavistic attitudes”.⁵³ That much, at least, is clear.⁵⁴

Nonetheless, the case law suggests three possible answers to this question. Occasionally, Charter values are referred to when, in fact, a Charter right is clearly at issue (*Doré, Hills*). In other instances, they are used to describe a more amorphous version of an enumerated right (*Conseil scolaire, infra*). Finally, in still other cases the Court appears to suggest that Charter values represent a broad array of principles and values, which underlie the Charter but are not limited by those enumerated rights (*Salituro, Hill*).

1. Charter Values as Co-extensive with Charter Rights

As noted above, the origins of the Court’s “Charter values” discussion can be found in its approach to developing the common law in accordance with the Charter. In that limited scenario, it was acknowledged by the Court that recourse to section 1 of the Charter was not appropriate given that there was no legislatively prescribed limit on the right to analyze. Instead, the Court held in *Hill* that a Charter values claim must be subject to a “more flexible” balancing than the traditional section 1 analysis.⁵⁵

Thus, one possible explanation for the Court’s use of the term “Charter values” is that it is not describing a different body of rights, but is using the phrase as a term of art meaning “the application of Charter rights without recourse to a full section 1 analysis”. The Court’s decision in *Doré* offers some support for this conception of “Charter values”. In rejecting the section 1 *Oakes* framework for assessing the Charter compliance of discretionary decisions by statutory decision-makers, the Court in *Doré* relies on the common law Charter values case law of *Hill* and *Grant* to reject a strict *Oakes* analysis under section 1 in the circumstances of discretionary administrative decision-making.⁵⁶

⁵³ *Id.*, at para. 82, following *R. v. Tran*, [2010] S.C.J. No. 58, 2010 SCC 58 (S.C.C.).

⁵⁴ This builds on the Court’s remark in *R. v. Hape*, [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292, at para. 109 (S.C.C.), that gathering evidence through means such as torture is “contrary to fundamental Charter values”. One would hope that gathering evidence through means such as torture is also contrary to some, or many, Charter rights.

⁵⁵ *Hill, supra*, note 11.

⁵⁶ *Doré, supra*, note 2, at paras. 40-42.

This could explain the Court's use of the term Charter values despite the fact that it was clearly a specific Charter right that was at issue.

Similarly, as noted above, the Court has remarked upon the lack of section 1 Charter analysis when applying Charter values as a tool of statutory interpretation. Again, this lack of section 1 analysis could explain the Court's use of the "Charter values" term in that context.⁵⁷

Accordingly, on this reading, it could be that Charter values create no new substantive limits on legislative or government action, but simply reflect a legal assessment of Charter rights in circumstances that do not permit a full section 1 analysis. This is the least disruptive conception of Charter values, but it is still one that is subject to overuse. As described above in relation to the *UFCW* and *HSARB* cases, the rhetorical power of Charter values language frequently threatens to erode the purportedly strict doctrinal limits on their use.

2. Charter Values as Charter Rights "Lite"

The difficulty with this narrow reading of Charter values is that in many instances, claimants and courts are in fact using the concept of Charter values to expand the scope of the Charter's protections beyond the rights that would be protected under a traditional Charter challenge. Even in the common law Charter values cases discussed above, in which the term "Charter values" was expressly used to create an analytical distinction between the direct application of Charter rights and the development of the common law, we see that the Courts would refer to Charter values other than those enumerated and enshrined as constitutional rights. For example, in *Hill*, the Court elevated the concept of the "good reputation of an individual" to a Charter-protected value.⁵⁸

This expanded substantive notion of Charter values can be observed in two ways. First, in some instances, courts applying Charter values may refer to specific Charter rights, but ignore or minimize the textual or jurisprudential restrictions on the application of those rights. This is what I refer to as the "Charter-lite" conception of Charter values. In still other instances, described in more detail in the next section, Charter values have been offered even more expanded substantive content, to include concepts that have little or no basis in the Charter text.

⁵⁷ *Symes, supra*, note 25; *Bell ExpressVu, supra*, note 27.

⁵⁸ *Hill, supra* note 11, at para. 120.

The Charter-lite conception of Charter values has been seen in those cases in which Charter values claims are made with respect to “equality” or “liberty”, both of which are protected rights under the Charter, but are internally limited.⁵⁹ The fundamental problem with this Charter-lite conception of Charter values is that it creates a constitutional limit on legislative conduct or government action that was expressly not reflected in the text of the Charter. For example, courts have been clear that section 7 of the Charter requires claimants to demonstrate not only that they have been deprived of life, liberty or security of the person, but that such deprivation fails to accord with a principle of fundamental justice.⁶⁰ When a claim of Charter values is made on the basis of “liberty” alone, however, this nuanced analysis (or, what Abella J. in *Gomboc* calls the “attendant calibrated evidentiary and justificatory requirements” of direct Charter scrutiny) is lost, and legislative and government action may be limited for reasons that would not otherwise amount to the violation of a Charter right.⁶¹

Similarly, the Court has repeatedly recognized that the equality guarantee in section 15 of the Charter protects against substantive discrimination, not mere distinctions.⁶² The determination of whether a law is substantively discriminatory has been shown to be a complex, contextualized process that necessarily considers the purpose of the legislation and the historical disadvantage suffered by a claimant group. A Charter-lite conception of Charter values risks having courts, tribunals and other decision-makers abandon this nuanced, finely calibrated conception of the right in favour of simply applying legislation as broadly as possible to avoid creating any distinctions, even though such distinctions might, on a direct Charter challenge, be found to be consistent with the equality guarantee of section 15.⁶³

Such an approach is also doctrinally unsound because it creates a broader right in the case of statutory interpretation and government

⁵⁹ See, e.g., *R. v. Tse*, [2012] S.C.J. No. 16, [2012] 1 S.C.R. 531 (S.C.C.) [hereinafter “*Tse*”]; *Rodgers*, *supra*, note 31; *R. v. Mabior*, [2012] S.C.J. No. 47, [2012] 2 S.C.R. 584 (S.C.C.); *Gyorffy v. Drury*, [2013] O.J. No. 3108 (Ont. Div. Ct.) [hereinafter “*Gyorffy*”].

⁶⁰ See, e.g., A. Cameron & P. Daly, “Furthering Substantive Equality Through Administrative Law: Charter Values in Education” in J. Cameron, B.L. Berger & S. Lawrence, eds. (2013) 63 S.C.L.R. (2d) 169, at 188 [hereinafter “*Cameron & Daly*”].

⁶¹ *Tse*, *supra*, note 59, at para. 21; *Gomboc*, *supra*, note 30, at para. 87.

⁶² *Quebec (Attorney General) v. A*, [2013] S.C.J. No. 5, [2013] 1 S.C.R. 61, at paras. 324-325 (S.C.C.); *Withler v. Canada (Attorney General)*, [2011] S.C.J. No. 12, [2011] 1 S.C.R. 396, at paras. 30-39 (S.C.C.).

⁶³ See, e.g., *Gyorffy*, *supra*, note 59, at paras. 40, 47.

action than would be protected under a direct challenge to legislation. If Charter values are interpreted as “Charter rights without any doctrinal framework”, one can imagine that Charter claimants will have greater success arguing that legislation should be interpreted in accordance with Charter values than in arguing that the law infringes his or her Charter rights. Courts would reach different results, and Charter protections would be broader or narrower, depending on whether the legislation restricts behaviour directly and unambiguously (in which case specific Charter rights are engaged), or confers a discretion upon a government decision-maker to restrict the same behaviour (in which case, broader Charter values are engaged). There is no principled basis for different outcomes to result from these two scenarios.

A recent example of the Charter-lite approach, in which Charter values can be used to subsume the express limits of the Charter text, was seen in arguments made (although ultimately rejected by the majority) in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*.⁶⁴ In that case, the Court was required to determine whether a 1731 Act requiring that non-English documents be translated into English for use in court had been received into British Columbia law, and whether such requirements had been implicitly modified. One argument raised by the appellants was that the interpretation of the law, including the 1731 Act, must accord with Charter values and constitutional principles, and in particular the Charter’s explicit recognition that English and French are the official languages of Canada.⁶⁵

In addressing these arguments, the Court made no mention of whether the law is genuinely ambiguous (and, therefore, what role Charter values should play in the analysis). Nonetheless, the minority reasons would have required the Court to exercise its inherent jurisdiction in accordance with the Charter value of bilingualism.⁶⁶ It would have done so despite the fact that, as the majority notes, while section 16 of the Charter does recognize that English and French are the official languages of Parliament and the Government of Canada, section 16.1 to 20 of the Charter expressly detail the scope of constitutionally protected bilingual services. In all instances, those rights are limited to the federal and New Brunswick governments and the courts of those

⁶⁴ [2013] S.C.J. No. 42, 2013 SCC 42 (S.C.C.) [hereinafter “*Conseil scolaire*”].

⁶⁵ *Id.*, at para. 55.

⁶⁶ *Id.*, paras. 107-108.

jurisdictions. No constitutional right is established with respect to bilingual services in other provinces.⁶⁷

Thus the Charter values argument advanced in *Conseil scolaire* would have limited the scope of the legislation at issue on the basis that it conflicts with a Charter right that the British Columbia legislature had clearly chosen not to enshrine. As the majority noted, under section 16(3) of the Charter the legislature is free to promote the use of French in its courts or to seek a constitutional amendment enshrining such rights in the province, but it is not constitutionally required to do so, and has not done so.⁶⁸

The majority of the Court recognized this latter point as a “principle of federalism”.⁶⁹ But, more simply, it is logically incoherent that where there exists no Charter right obligating a specific legislative or government action (and where, in fact, the text suggests that such right exists in some jurisdictions but not others), the Charter values underlying that Charter right could somehow be read to require the exact opposite conclusion.

3. “Charter Values” Beyond the Text of the Charter

The third form of substantive content attributed to Charter values is that they create a broad array of justiciable claims, unrestrained by the constitutional text. This is the most troubling conception of Charter values, with nearly limitless potential to narrow the scope of legislation and administrative decision-making for reasons that are not reflected in any of the constitutionally enshrined protections of the Charter.

This broader conception of Charter values arose early on in the Court’s Charter values jurisprudence and continues to this day. In *Salituro*, for instance, the Court did not found its consideration of Charter values on any express Charter right but on the “fundamental values that provide the foundation for the Charter”, including an imprecise conception of “respect for the freedom of all individuals, which has become a central tenet of the legal and moral fabric of this country particularly since the adoption of the Charter”.⁷⁰ The difficulty with this flexible, amorphous approach to “Charter values” quickly becomes

⁶⁷ Although it should be noted that s. 16(3) provides that nothing in the Charter limits the authority of a provincial legislature to promote or advance the equality or status of English or French. *Id.*, at paras. 55-56.

⁶⁸ *Id.*, at para. 57. See also *Lalonde v. Ontario (Commission de restructuration des services de santé)*, [2011] O.J. No. 4767, 56 O.R. (3d) 505, at para. 92 (Ont. C.A.).

⁶⁹ *Conseil scolaire, id.*, at para. 56.

⁷⁰ *Hill, supra*, note 11, at para. 86; *Salituro, supra*, note 11, at para. 44.

evident when one considers the substantive content that the Court gives to the value of “respect for the freedom of all individuals”. In relying on this Charter value of generalized “freedom” to modify the rule against spousal privilege, the Court in *Salituro* states that such freedom includes the “right of the individual to choose freely whether or not to testify”.⁷¹ However, as anyone who has been a witness to a proceeding is well aware, there is very little “freedom” in fulfilling one’s legal duties to be a witness. Indeed, if there is any freedom involved in choosing whether or not to testify, it is a particularly narrow freedom, one which must give way to a legal summons, requires that the witness answer any and all relevant questions asked by counsel, and provides no opportunity for the witness to give testimony other than through the answering of questions.

Thus, from its earliest incarnations, this broad approach to Charter values was demonstrated to have a nearly limitless capacity to create enforceable Charter-based requirements, with little regard to the language of the Charter. Such a wide substantive divergence between the Charter’s rights and the Charter values that are said to underlie them reveals the ambiguity and potential arbitrariness of a Charter values analysis as well as their disconnect from the language of the Charter. Indeed, in their paper, “Charter Values and Administrative Justice”, Dean Lorne Sossin and Mark Friedman recognize and adopt this broader conception of Charter values, untethered from the constitutional text, noting that “[w]hile Charter values may be seen as limited simply to the text of Charter rights differently applied in administrative justice settings, this does not appear to be how the courts themselves have conceived of Charter values, nor would such a formalist approach be in keeping with the robust and adaptive administrative law framework invoked in *Doré*”.⁷² Sossin and Friedman go on to identify a number of these broader Charter values from the case law, including fairness, autonomy, and human dignity, while recognizing that “many of the values set out lack an important contextual dimension”.⁷³

The practical limitations of such a broad notion of Charter values are reflected in the Court’s application of Charter values to the common law of defamation. While the Court in *Hill* clarified the analytical approach to applying Charter values, it did not bring clarity to the substantive

⁷¹ *Salituro, id.*, at para. 44.

⁷² L. Sossin & M. Friedman, “Charter Values and Administrative Justice”, in this volume, at 421 [hereinafter “Sossin & Friedman”].

⁷³ *Id.*

scope of Charter values. The defendant in *Hill* argued that the common law of defamation in Canada was applied too broadly in light of Charter values of freedom of expression. However, in undertaking its Charter values analysis, the Court in *Hill* recognized and weighed additional Charter values, including elevating the protection of personal reputation to the status of Charter value, noting that “the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights”.⁷⁴

In addition to moving well beyond the language or rights of the Charter and unnecessarily creating a shadow constitution of additional enforceable interests, this broad approach to Charter values can also be seen as, in fact, diminishing the utility of a Charter-based approach. If every interest is a Charter value, then what is a decision-maker left to balance?

An example of this was seen in *Grant*, in which the Supreme Court returned, 14 years after *Hill*, to the notion of Charter values to determine whether to incorporate a responsible communication defence into the common law of defamation.⁷⁵ As in *Hill*, the Court weighed the competing values of freedom of expression and protection of reputation (the latter of which is not supported by any free-standing Charter right but was linked with concerns for personal privacy). Ultimately, the Court determined that the current law gave insufficient weight to the constitutional value of freedom of expression and that the new defence provided proportionate protection to the core concern of personal reputations.⁷⁶

While the newly recognized defence may be wholly supportable on its own terms (and the Court conducted a full analysis of international case law to support the common law policy change), it is unclear what the introduction of Charter values added to the discussion. If, as in *Dagenais*, the argument were that the freedom of expression, as an enshrined constitutional right, was deserving of greater protection than had previously been provided for under the common law, one could see the value of introducing a Charter values approach to the development of the common law. However, the Court in *Grant* (following *Hill*) adopted a broader conception of Charter values, one in which the “protection of reputation” was also included as a Charter value to be balanced.⁷⁷ The

⁷⁴ *Hill*, *supra*, note 11, at paras. 120-121.

⁷⁵ *Grant*, *supra*, note 11.

⁷⁶ *Id.*, at para. 62.

⁷⁷ *Id.*, at paras. 58, 135.

problem with this application of Charter values is that if all the values that traditionally informed the common law of defamation are now Charter values, what purpose is served by relating new common law developments to the Charter?

This brings us to the final question posed by this paper — why Charter values?

IV. WHY CHARTER VALUES?

Having discussed the circumstances in which Charter values may be raised, and the scope of what Charter values may or may not mean, the final question to be asked is — why? Do Charter values create any “value” for constitutional jurisprudence in Canada?

As the case law reviewed above confirms, the language of Charter values, although frequently relied upon, provides little value to the constitutional jurisprudence. It should therefore be rejected, for at least two reasons. First, the lack of defined Charter values provides little assistance to decision-makers in interpreting ambiguous statutes or exercising a statutory discretion. Second, reliance on Charter values risks creating ambiguity in decision-making where previously there was none, turning every conflict into a Charter issue.

Instead, conflict with Charter rights created by the interpretation of ambiguous statutes or the application of a statutory discretion should be addressed directly, so that they can be assessed in a calibrated, nuanced manner. If a rights violation is identified, the interpretation of the law or application of the discretion can then be modified to ensure that any rights violation is reasonable and proportionate in the circumstances.

Even in the common law cases — in which reliance on Charter values instead of Charter rights can be partially explained by the doctrinal need to distinguish the Charter analysis from a direct Charter review — the use of Charter values has more often than not created more confusion than it is worth: first, by relying on Charter values that go beyond the text of the Charter and second, as in *Grant*, by creating a complex Charter values balancing process when a more modest common law policy review leads to the same conclusion. Accordingly, as with the consideration of statutory instruments, courts interpreting the common law would likely be best served by refraining from introducing the complexity of Charter considerations unless absolutely necessary and, even then, should limit the scope of those considerations to actual Charter rights.

1. Charter Values Fail to Provide Adequate Guidance to Decision-makers

As discussed above, the Supreme Court has left considerable ambiguity in the substantive meaning of Charter values. As a result, directing decision-makers to interpret legislation or exercise a statutory discretion “in accordance with Charter values” is an unhelpful prospect, and risks creating significant confusion.

This problem was highlighted most recently in the Court’s decision in *Divito v. Canada (Public Safety and Emergency Preparedness)*.⁷⁸ The Court in *Divito* was asked to determine whether certain provisions of the *International Transfer of Offenders Act*,⁷⁹ which required the Minister of Public Safety to consider whether an offender’s return to Canada would constitute a threat to the security of Canada before determining whether to consent to his or her transfer back to Canada, violated the claimant’s mobility rights under section 6(1) of the Charter. The majority held that the provisions did not violate section 6(1), but cautioned that when the Minister exercises discretion under the Act to consent to the transfer, such discretion “must be exercised reasonably, including in compliance with relevant *Charter* values”.⁸⁰

Not unexpectedly, the Court chose not to speculate on the circumstances in which Charter values would require the Minister to depart from a purposive application of the Act. However, given the amorphous nature of Charter values, one cannot help but wonder when or how Charter values would require the Minister to permit a transfer despite the fact that he or she had reasonably determined that the offender’s return to Canada would “constitute a threat to the security of Canada”.⁸¹ Dignity? Freedom of expression? Freedom more generally? A Charter values approach requires the decision-maker to hypothesize about these possibilities in the abstract, instead of concretely determining whether an order will violate a specific individual’s specific Charter rights.

This is a clear example of Charter values raising more questions than they answer for courts, tribunals and other statutory decision-makers. A more helpful, calibrated approach would be for a decision-maker to consider the facts and apply the law consistently with its purpose. Only

⁷⁸ [2013] S.C.J. No. 47, 2013 SCC 47 (S.C.C.) [hereinafter “*Divito*”].

⁷⁹ S.C. 2004, c. 21.

⁸⁰ *Divito*, *supra*, note 78, at para. 49.

⁸¹ *Id.*

then should the decision-maker exercising a statutory power of discretion turn his or her mind to the question of whether such a decision would violate the claimant's Charter rights. And only then, if a Charter breach results from a reasonable application of the governing law, need the decision-maker determine whether limiting the Charter right would be reasonable and proportionate in the circumstances.

Nor can it be convincingly argued that a Charter values approach to decision-making would assist less-expert tribunals and other administrative decision-makers in reaching decisions that effectively incorporate Charter concerns. Given the amorphous, ill-defined character of Charter values, their application by administrative decision-makers is more likely to create confusion rather than resolve it. Sossin and Friedman, for instance, acknowledge that their proposed Charter values methodology would "generate a body of training materials, guidelines and reasons on Charter values which, if paired with thoughtful and considered judicial commentary on judicial reviews of such decisions, could result in a constructive and principled framework for the application of discretionary authority".⁸² In my view, this is not a path to simplified decision-making.

2. Charter Values Often Create Ambiguity Instead of Resolving It

Second, the use of Charter values diminishes the value of Charter rights, turning potentially every administrative decision into a "constitutional" one and creating ambiguity where there was none before.

This capacity for Charter values to turn every decision into a Charter inquiry can be seen in one of the first detailed assessments by legal scholars of how to apply the Charter values analysis from *Doré* to future administrative decision-making.⁸³ In their recent paper "Furthering Substantive Equality Through Administrative Law: Charter Values in Education", Professors Angela Cameron and Paul Daly build on the Court's decision in *Doré* to suggest a framework for decision-makers in the education sector. The authors' thesis is that the *Doré* framework would assist decision-makers in furthering substantive equality through the application of Charter values. In setting out their framework, the authors would have administrators (including, for example, teachers and

⁸² Sossin & Friedman, *supra*, note 72, at 429.

⁸³ Cameron & Daly, *supra*, note 60.

principals making decisions about textbooks) approach every decision with a view to determining its effect on substantive equality.⁸⁴ In following this approach, decision-makers would rely not only on Charter jurisprudence, but also on informal Charter-lite conception of substantive equality as a Charter value.⁸⁵

However, instead of furthering substantive equality, such an approach risks creating a significant amount of confusion and inconsistency in administrative decision-making. It would turn every decision into a potential Charter decision, requiring that all decision-makers (including those we would not consider to be adjudicative decision-makers) take into account not only the complex Charter jurisprudence respecting section 15, but broader conceptions of “substantive equality” that go beyond the text of the Charter. Such an approach risks paralyzing the decision-making process. It also ignores the fact that in any given circumstance, a decision-maker faces many options, several or many of which may be Charter compliant. Indeed, in the vast majority of decisions, no Charter right is ever engaged. In that case, it is unclear how an approach that begins the decision-making process with a consideration of Charter values in the abstract assists the decision-maker in reaching her decision in a manner consistent with the purposes of the governing statutory authority.

A more disciplined approach to ensuring substantive equality would be for decision-makers to exercise their discretion in accordance with legislative purpose. The legislative purpose may be broad, and permit a variety of outcomes, but if made in accordance with the purposes of a constitutionally valid statute (which will likely support fair, inclusive decisions), it ensures that the decision-maker will remain focused on the principles that relate most closely to his or her expertise. Only once the preferred option is identified in accordance with the statutory objective should consideration be given to whether the decision would violate an individual’s Charter rights. If that is the case then, following *Doré*, the decision-maker must consider whether such a limit is reasonable, and may calibrate the exercise of his or her discretion to insure that any rights limit is proportionate in light of the regime’s broader purposes.

Such an approach is more likely to result in consistent decisions that respect the Charter rights of participants. For example, given the amorphous and pliable nature of Charter values, it is not clear that a

⁸⁴ *Id.*, at 201-202.

⁸⁵ *Id.*, at 188, 192.

Charter values approach would achieve the goals of substantive equality for LGBT (lesbian, gay, bisexual and transgender) families and students that Professors Cameron and Daly seek. In fact, in *Chamberlain v. Surrey School District No. 36*, in which the Court overturned a school board's decision declining to approve books that reflected diverse LGBT families, it was the minority decision (which would have upheld the board's decision) that relied on Charter values.⁸⁶ In its reasons, the *Chamberlain* minority recognized the Charter value of non-discrimination but, because of the amorphous nature of Charter values, was able to also elevate the parental right to "make the decisions they deem necessary to ensure the well-being and moral education of their children" to the status of Charter value to be balanced on equal footing with the right to non-discrimination, ultimately holding that the parental value outweighed the discrimination.⁸⁷

The example of *Chamberlain* demonstrates how the amorphous character of Charter values is in fact more likely to result in policy decisions that reflect the subjective values of decision-makers, whatever those values may be.⁸⁸ To the extent that one looks to the Charter to protect vulnerable groups in administrative decision-making, a Charter doctrine that moves the legal analysis away from the specific guarantees enshrined in the Charter to the subjective discretion of an administrative decision-maker does little to advance that goal.

A final example of Charter values creating ambiguity and being relied upon at the expense of other societal interests was recently seen in the Human Rights Tribunal of Ontario's decisions in *Taylor-Baptiste v. Ontario Public Service Employees Union*.⁸⁹ In that case, a manager at a corrections facility commenced an application before the Human Rights Tribunal of Ontario on the basis that users of the blog of the Union Local had discriminated and harassed her on the basis of her sex and family status, contrary to section 5(1) and (2) of the *Human Rights Code*.⁹⁰ The Tribunal agreed with the applicant that the expressions used relied on sexist stereotypes of women "sleeping their way to the top", but ultimately

⁸⁶ [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

⁸⁷ *Id.*, at para. 79.

⁸⁸ See e.g., Sossin & Friedman, *supra*, note 72, at 428: "Because of the inherently subjective aspect of the balancing exercise envisioned in *Doré*, reasons play a dual role."

⁸⁹ *Taylor-Baptiste v. Ontario Public Service Employees Union*, [2012] O.H.R.T.D. No. 1336, 2012 HRTO 1393 (O.H.R.T.) [hereinafter "*Taylor-Baptiste* (HRTO)"]; *Taylor-Baptiste v. Ontario Public Service Employees Union*, [2013] O.H.R.T.D. No. 179, 2013 HRTO 180 (O.H.R.T.).

⁹⁰ R.S.O. 1990, c. H.19.

determined that the conduct was not discrimination with respect to employment.⁹¹ A subsequent judicial review was dismissed by the Divisional Court (motions for leave to appeal to the Court of Appeal have been filed).⁹²

What is striking about these decisions is that the Tribunal (upheld by the Divisional Court) appears to have reached its conclusion not on the basis of a purposive application of its home statute (the *Human Rights Code*), but in large part because of a Charter values analysis. Without first determining whether the conduct at issue violated the Code, the Tribunal determined that the expression in question, appearing as it did on a union blog, was union speech and therefore close to the “core” of the Charter’s right to freedom of expression as well as freedom of association.⁹³ The Tribunal therefore concluded that the conduct was not discrimination in relation to employment under the Code.

In adopting the Charter values language to limit the scope of the Code’s protections, the Tribunal made three errors that highlight the risk associated with a “Charter values” approach to administrative decision-making. The Tribunal’s reasons, which were largely agreed with by the Divisional Court, reflect much of the confusion created by the Supreme Court’s Charter values jurisprudence.

First, the Tribunal expanded the contexts in which recourse is properly made to the Charter. Section 5(1) of the Code, which prohibits discrimination in relation to employment, is neither ambiguous, nor does it confer upon the Tribunal a statutory discretion to determine what is or what is not discrimination with respect to employment. Such a determination is a legal question that the Tribunal is required to determine on the basis of the facts before it. As discussed above, the case law does not support courts or tribunals relying on Charter values in the absence of a genuinely ambiguous statute or a statutory exercise of discretion. Nonetheless, the rhetorical power of the Charter makes such an approach difficult to avoid. Indeed, on review the Divisional Court noted that “it is difficult to see any ambiguity in the language of the *Code* on its face”, but then accepts that the Code “becomes ambiguous” when

⁹¹ *Taylor-Baptiste* (HRTO), *supra*, note 89, at paras. 33, 40.

⁹² *Taylor-Baptiste v. Ontario Public Service Employees Union*, [2014] O.J. No. 2591, 2014 ONSC 2169 (Ont. S.C.J.) [hereinafter “*Taylor-Baptiste* (S.C.J.)”]. I acted as counsel for the Attorney General of Ontario, who intervened in the proceeding on judicial review before the Divisional Court. As of the time of writing, motions for leave to appeal to the Court of Appeal have been commenced by both the applicant and the Attorney General of Ontario.

⁹³ *Taylor-Baptiste* (HRTO), *supra*, note 89, at paras. 29, 37.

one takes into account the “context” of the respondent’s Charter rights.⁹⁴ This effectively uses the Charter to create ambiguity where previously it did not exist.

Second, by adopting a Charter values approach, the Tribunal effectively expanded the scope of the Charter rights at issue, limiting the legislative scope of the Code in a manner that would not have been available had the legislation been challenged directly for having violated a specific Charter right. For instance, the Tribunal found that the blog postings were protected under not only freedom of expression, but also freedom of association grounds.⁹⁵ However, by adopting a Charter values approach, no discussion was offered as to how a finding that the blog comments were discriminatory would have violated section 2(d) of the Charter. Indeed, instead of examining whether restrictions on discriminatory comments would render “meaningful association to achieve workplace goals effectively impossible” as would be required under a traditional section 2(d) analysis,⁹⁶ the Tribunal simply noted that the speech in question was union speech made in the course of (but not as part of) collective bargaining. Indeed, on review, the Divisional Court offered no analysis of the substantive Charter values, deferring implicitly to the Tribunal’s own Charter analysis, or lack thereof. As such, no analysis was provided by either the Tribunal or the Divisional Court as to why Charter values would weigh against a finding of discrimination in this case. This “Charter-lite” approach to applying Charter values has the perverse effect of placing greater limits on protective legislation than would result from a direct constitutional challenge.

Finally, the Tribunal’s decision in *Taylor-Baptiste* highlights the risk that a Charter values approach to decision-making turns every dispute into a Charter case, one in which Charter rights (or values), are nearly always in conflict. Worse, the resolution of that conflict must be determined in the abstract, without a clear grounding in a decision based on legislative purpose. The Tribunal in *Taylor-Baptiste* never reached a conclusion about whether the conduct was discriminatory in the absence of Charter considerations.⁹⁷ Instead, it moved first to consider whether the impact of such a finding would be consistent with the Charter values of freedom of expression and freedom of association. This effectively

⁹⁴ *Taylor-Baptiste* (S.C.J.), *supra*, note 92, at paras. 35-38.

⁹⁵ *Taylor-Baptiste* (HRTO), *supra*, note 89, at paras. 29, 37.

⁹⁶ See, e.g., *Fraser*, *supra*, note 5, at para. 98.

⁹⁷ *Taylor-Baptiste* (HRTO), *supra*, note 89.

shortcircuited the constitutional analysis, which is properly fact and context-specific. The determination of whether a finding of discrimination (and an order to support such a finding) violated a Charter right depends, at least in part, on the nature of the expression at issue, and whether such speech was close to the “core” of the freedom of expression right. By adopting a Charter values approach, the Tribunal created an ambiguity where there previously was none, leaving it the unenviable task of determining whether amorphous Charter values were engaged in the abstract.

Again, in my view the better approach is for courts or tribunals to apply the law in accordance with legislative intent, and to reach a provisional conclusion on that basis. Only if the Tribunal then determines that a subsequent exercise of discretion (*e.g.*, in the case of *Taylor-Baptiste*, an order against the respondent) would violate the claimant’s Charter rights, should the decision-maker assess whether such an infringement is reasonable in the circumstances. In the example of the *Taylor-Baptiste* case, instead of requiring the Tribunal to assess the constitutional issues in the abstract, this approach would have provided it the opportunity to finely tailor a remedy that reasonably limited the rights of the claimant. In my view, this proposed approach is consistent with the Court’s decision in *Doré*, but would clarify that the exercise of a statutory discretion is only constrained by the potential violation of a specific Charter right, with its attendant legal and evidentiary requirements.

V. CONCLUSION

The feeling of discomfort experienced when confronted with a robot or CGI character from the “uncanny valley” is based on a subconscious sense that “something is not quite right” with this picture. It looks human, but something is ... wrong. A review of the Supreme Court’s Charter values jurisprudence reveals a similar, fundamental flaw at its core.

With questionable scope to their functional use, and no real judicial consideration of their substantive scope, Charter values are unhelpful (at best) to the development of Canada’s constitutional jurisprudence, and have created ambiguity, instead of resolving it. Worse, reliance on the concept of Charter values appears in many cases to result in an undisciplined approach to Charter analysis that would limit the application of remedial legislation without reference to any Charter right

having been infringed. The framers of the Constitution negotiated and agreed to an entire Charter of enumerated rights. Developing and refining an unwritten layer of Charter values onto those rights is unnecessary and counter-productive.

As the Supreme Court itself has recognized, the overuse of Charter values deprives us of the calibrated evidentiary and justificatory requirements of direct constitutional challenges. Moreover, the amorphous nature of Charter values creates, instead of resolving ambiguity in the law and the work of statutory decision-makers, leaving the substantive rights of claimants open to determination by the “gut” feelings of decision-makers.

The concept and language of Charter values should therefore be rejected. Courts and tribunals should climb out of the uncanny valley, interpret and apply statutes in accordance with legislative intent, and then apply any relevant, enumerated Charter right directly.