Administrative Law, Judicial Deference, and the *Charter*

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INTRODUCTION

The doctrine of judicial deference has been a touchstone in Canadian administrative law for thirty-five years. Put simply, the doctrine recognizes that administrative officials are legitimate interpreters of the law, which means that judicial review is warranted only if an administrative decision is demonstrably unfair or unreasonable.[1] While the tide of deference has ebbed and flowed over this period,[2] most administrative decisions these days are assessed according to a standard of reasonableness instead of correctness.[3] However, until very recently the Supreme Court has refused to defer to administrative decisions concerning human rights so that any time an administrative official ventured an opinion on the *Canadian Charter of Rights and Freedoms* the decision was relatively prone to judicial review.

This changed in *Doré v Barreau du Québec*.[4] The issue in *Doré* concerned a professional disciplinary decision—the Disciplinary Council of the Barreau du Quebec suspended Gilles Doré's license for 21 days because he had sent a private letter to a superior court judge, chastising the judge for unprofessional behaviour in the courtroom. Even though the Council's decision limited Doré's *Charter* right to freedom of expression, the Supreme Court held that the decision should be reviewed on the administrative law standard of reasonableness rather than *de novo* judicial application of the *Oakes* test. This decision is remarkable, because it signals an extension of judicial deference, which is rooted in the realm of administrative law, to the *Charter* domain. The basis for the Court's conclusion in *Doré* was similar to the traditional rationale for deference, *viz*. that administrative decision-makers, by virtue of their experience and field sensitivity, have a unique and valuable perspective regarding human rights claims in a specific regulatory context.

In this paper, I will attempt to situate *Doré* within the Court's earlier case law regarding the interplay between administrative law and *Charter* jurisprudence and, more specifically, the interrelationship between constitutionalism, courts, and the administrative state. I will argue that, while the Court's

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[1] *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation,* [1979] 2 SCR 227 [*CUPE*].
[2] Madam Justice Claire L'Heureux-Dubé, "The "Ebb" and "Flow" of Administrative Law on the "General Question of Law"" in Michael Taggart, ed *The Province of Administrative Law* (Oxford, Hart Publishing, 1997) 331.
[3] The latest spate of Supreme Court decisions in administrative law seem to confirm the general trend toward a general standard of reasonableness review. See Matthew Lewans, "Deference and Reasonableness Review after *Dunsmuir*" (2012) 38 *Queen's Law Journal* 59.
[4] *Doré v Barreau du Québec* [2012] 1 SCR 395 [*Doré*].

decision in *Doré* is a welcome development which may stimulate a more democratic discourse on human rights, the full potential of that discourse cannot be realized in the absence of further doctrinal reforms.

FROM PARLIAMENTARY SOVEREIGNTY TO DEMOCRATIC CONSTITUTIONALISM

While the notion that judges should defer to administrative judgment is well established, it remains controversial because it conflicts with traditional assumptions regarding the judiciary's constitutional role. Up until 1978, the orthodox view was that the Canadian constitutional order was premised upon a formal separation of powers whereby Parliament and the provincial legislatures wielded supreme legislative power within their constitutional spheres, superior courts had the final word on interpreting the law, and administrative officials merely implemented the law which had been enacted by legislatures and interpreted by judges. This conception of the separation of powers is formal, because it assumes that the point of judicial review is to ensure that each institution is confined to its constitutional role, and this can be accomplished through an analysis of the power being exercised instead of scrutinizing the substantive merits of an administrative decision.[5] Thus, if judges deemed that a delegated power was "judicial" in nature or involved a "jurisdictional" question of law, a reviewing court could intervene if it disagreed with the outcome; but if they deemed that the power was "administrative" or involved a "non-jurisdictional" question, they assumed that the decision was beyond the purview of judicial review.[6] The problem was that these abstract distinctions were so pliable that judges could expand or retract the scope of judicial review by manipulating the notion of implied legislative intent without providing a more explicit, principled justification for judicial review or judicial restraint under the circumstances.

These assumptions were revised in a series of landmark decisions rendered by the Laskin Court in the late 1970s. Under the new model, which was outlined in *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*[7] and *CUPE v New Brunswick Liquor Corp,*[8] the separation of powers was complicated by the recognition that administrative officials have an important role to play in interpreting the law, and the focus of judicial review shifted away from the formal separation of powers rationale towards ensuring that administrative decisions abide by fundamental legal values.

[5] David Dyzenhaus "Formalism's Hollow Victory" (2002) 4 *New Zealand Law Review* 525.
[6] See, *eg* the contrasting styles of reasoning employed by Kerwin and Cartwright JJ in *Toronto Newspaper Guild v Globe Printing Company* [1953] 2 SCR 18.
[7] *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners* [1979] 1 SCR 311.
[8] *CUPE,* above n 1.