

# Doré-Loyola Framework

***“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.”***

Section 1 of the *Canadian Charter of Rights and Freedoms* explains that while the *Charter* guarantees specific rights and freedoms, these rights and freedoms may be lawfully limited if such limits are “demonstrably justified in a free and democratic society.” In 1986, the Supreme Court of Canada created a general framework — known as the *Oakes* test — for deciding whether laws or policies that limit *Charter* rights are justified. Learn more about that [here](#).

The government does not only act by enacting laws and policies though. Governmental entities also make thousands of discretionary administrative decisions every day — decisions on things as simple as issuing development permits<sup>[1]</sup> or reviewing visa admissions.<sup>[2]</sup> Where these kinds of discretionary decisions potentially engage an individual’s *Charter* rights, the *Doré-Loyola* framework is used — not the otherwise applicable *Oakes* test. Under this framework, courts are required to proceed in two steps:

Step 1: Determine whether a *Charter* protection is engaged by the administrative decision;

Step 2: Consider whether the decision maker has proportionately balanced the *Charter* protections and the administrative body’s objectives?<sup>[3]</sup> This includes identifying the statutory objectives of the administrative body and the *Charter* interest at stake, and considering the nature of the decision and its factual context.

## **Why do we need a separate framework for discretionary administrative decisions?**

The Supreme Court of Canada provided a different approach for assessing the justifiability of discretionary administrative decisions under the *Charter* because the *Oakes* test is clearly geared towards reviewing legislation (and not discretionary decisions).<sup>[4]</sup> Attempting to apply parts of the test to administrative decisions emphasizes this point. Does it make any sense to talk about the “objectives” of administrative decisions? How could we determine whether a decision was rationally connected to its presumed objective? And is there really

an array of decisions available for administrative decision-makers to choose from in order to select least drastic means of achieving the goal? As the Court noted in *Doré*, such questions illustrate that the *Oakes* test is arguably an “awkward fit” when it comes to justifying administrative decisions that engage the *Charter*.<sup>[5]</sup>

## ***Charter* rights and *Charter* values**

Additionally, the framework refers to *Charter* protections as opposed to *Charter* rights. *Charter* protections include *Charter* rights, which are the guarantees specifically listed in the *Charter* like freedom of expression or the right to life, liberty, and security of the person. However, *Charter* protections also include *Charter* values, which are the foundational (but unwritten and implicit) values reflected by the *Charter*'s written guarantees.<sup>[6]</sup> These include equality, human rights, and democracy.<sup>[7]</sup>

## **The *Doré-Loyola* framework in action**

Examples of the *Doré-Loyola* framework being used in case law include professional organizations issuing punishments against professional members<sup>[8]</sup> or provincial ministries requiring that education be taught using certain approaches.<sup>[9]</sup> In the coming years, the Supreme Court of Canada will release a decision reviewing a case regarding a minister's decision to deny a non-Francophone family's request for access to education in French in a territory with an Anglophone majority.<sup>[10]</sup> This may provide an opportunity for the Court to re-envision the *Doré-Loyola* framework.<sup>[11]</sup>

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[1] *Minster Enterprises Ltd v City of Richmond*, 2020 BCSC 455.

[2] *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77.

[3] *Doré v Barreau du Québec*, 2012 SCC 12, paras 7, 56-58; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 para 31.

[4] *Doré v Barreau du Québec*, 2012 SCC 12, paras 4, 39.

[5] *Ibid* at para 4.

[6] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, para 4.

[7] *Ibid* at para 47.

[8] *Doré v Barreau du Québec*, 2012 SCC 12.

[9] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

[10] *Commission scolaire francophone des Territoires du Nord-Ouest, AB, et al v Minister of Education, Culture and Employment of the Northwest Territories, et al*, 2022 CanLII 28613 (SCC). Docket number 39915.

[11] Adam Schenk, “*AB v Northwest Territories: A New Low for the Doré/Loyola Framework*” (2023) 32:1 *Constitutional Forum* 39 at 40.