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Sancho McCann

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FINDING HARMONY: LAW SOCIETY OF BRITISH COLUMBIA V TRINITY WESTERN UNIVERSITY

Sancho McCann*

ABSTRACT

This case comment focuses on what the Supreme Court of Canada's 2018 decision in *Law Society of British Columbia v Trinity Western University* tells us about how courts should review the discretionary decisions of administrative decision-makers for compliance with the *Charter*. The majority describes this as an application of the framework from *Doré* and *Loyola*, and I argue that the Court missed a chance to bring that framework into conceptual harmony with that from *Oakes*. The Court should be reluctant to use the framework of reasonableness and deference set out in *Doré* and *Loyola* when the decision-maker (the Law Society of British Columbia) fails to produce explicit written reasons for their decision. I also argue, though, that the Court *didn't* actually defer to the Law Society. As a descriptive matter, I argue that the Court here used a correctness standard, albeit with a degree of deference and leeway akin to that used in the *Oakes* framework. As a normative matter, I argue that this is the correct approach, and that the court should highlight the conceptual harmony between the two approaches rather than allowing language of reasonableness and deference to obscure what courts are doing here. I conclude by presenting a path to harmonizing the approaches from *Doré* and *Loyola* with that from *Oakes*.

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* JD candidate at the Peter A Allard School of Law at the University of British Columbia. I would like to thank Professor Margot Young for encouraging me to develop these ideas into an article after a discussion during office hours, and James Barth, a friend from 1L who read through an early draft. Much of the content has changed since those early stages; any errors are my own.

INTRODUCTION

On June 15, 2018, the Supreme Court of Canada released its decision in *Law Society of British Columbia v Trinity Western University*.¹

In this case comment, I examine the administrative law questions raised by this case and argue that the Supreme Court missed a chance to bring the framework from *Doré*² and *Loyola*³ into conceptual harmony with that from *Oakes*.⁴

The Court leaves us with three open and intertwined questions: 1) To what extent is the analysis focused on the process or the outcome of administrative decision-making? 2) When does the Court require written reasons from the administrative decision-maker? and 3) Is the Court deferring to administrative decision-makers when *Charter* rights are infringed?

This lack of clarity stems from unnecessary divergence between the *Doré/Loyola* framework and the *Oakes* framework. I argue that the Court can still capture the harmony between these frameworks. They are not different in nature. They flex the same justificatory muscles in different contexts. I first present the approach taken in *LSBC v TWU*, then present a path to harmonizing these tests and argue that written reasons should be a factor bearing on the degree of deference afforded to the administrative decision-maker.

BACKGROUND

Trinity Western University (TWU) is a private Christian liberal arts university in Langley, British Columbia. TWU wanted to offer a law degree program and, in 2012, submitted its proposal to the Federation of Law Societies of Canada (the Federation).⁵ In 2013, the Federation approved the proposal. That approval would typically be sufficient for the school to be an “approved common

¹ See *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [LSBC v TWU].

² See *Doré v Barreau du Québec*, 2012 SCC 12 [Doré].

³ See *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [Loyola].

⁴ See *R v Oakes*, [1986] 1 SCR 103, 25 DLR (4th) 200 [Oakes].

⁵ In 2010, the provincial law societies delegated to the Federation of Law Societies of Canada the authority to approve new law programs.

law faculty of law”⁶ for the purposes of the Law Society of British Columbia (LSBC). Graduates of the program would be eligible for admission as lawyers in BC.⁷ However, the Law Society Rules provide that the LSBC Benchers could pass a resolution to overrule this approval.⁸

The LSBC Benchers had concerns with TWU’s covenant which, among other things, “calls on students to abstain from sexual intimacy outside of opposite-sex marriage.”⁹ The LSBC described the issue: “[a]s a result of the exclusionary impact of these aspects of the Covenant, the issue of whether law societies should approve TWU’s proposed law school has divided benchers, courts, law societies, the legal profession, and the public generally.”¹⁰

On April 11, 2014, the LSBC Benchers voted on, but failed to pass the following resolution:¹¹

Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies’ Canadian Common Law Program Approval Committee, the proposed School of Law at Trinity Western University is not an approved faculty of law.

The general membership of the LSBC requested a special general meeting and at that meeting, on June 10, 2014, the membership voted (3210–968) to direct the Benchers to adopt the resolution to not approve the law school.¹²

The Benchers decided to hold a referendum to get even broader input from the membership. They “agreed to be bound by the results only if one-third of members voted in the referendum and two-thirds of the votes were in favour of

⁶ *Law Society Rules 2015*, Rule 2-54(2)(a), online: <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/>>.

⁷ *Ibid*, Rule 2-54(3), formerly rule 2-27 (“[f]or the purposes of this rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law”).

⁸ *Ibid*.

⁹ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Factum of the Respondent at para 16 [FOR]).

¹⁰ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (Factum of the Appellant at para 42 [FOA]).

¹¹ *LSBC v TWU*, *supra* note 1 at para 16.

¹² *Ibid* at paras 17–18.

implementing the June 10, 2014 resolution.”¹³ 5951 members voted in favour of the resolution to not approve the law school; 2088 members voted against the resolution.¹⁴ Adhering to the results of the referendum, the Benchers passed a resolution declaring that TWU’s proposed law school was not approved. In response, BC’s Minister of Advanced Education also withdrew their approval.¹⁵

JUDICIAL HISTORY

TWU challenged this resolution in the British Columbia Supreme Court, claiming that the Benchers’ decision infringed their religious freedom, a *Charter*-protected right. The BCSC agreed and said that by binding themselves to the referendum results, the Benchers did not conduct the balancing that is required when the government infringes a *Charter* right. The Court quashed the Benchers’ resolution, leaving in place the national Federation’s approval of the law school.¹⁶

The LSBC appealed to the Court of Appeal for British Columbia. The Court dismissed the appeal, agreeing with the BCSC that the Benchers “improperly fettered their discretion by binding themselves to the referendum results.”¹⁷

The LSBC then appealed to the Supreme Court of Canada.

At the Supreme Court

Both parties argued that the appropriate standard of review was correctness.¹⁸ TWU’s argument was that if the Court were to use a different proportionality test depending on whether a right is infringed by statute or by an administrative decision-maker, “[a] person’s rights are not uniform but their content will depend in part on whether they are subject to interference by administrative decision or legislation.”¹⁹ LSBC argued for correctness because

¹³ *Ibid* at para 20.

¹⁴ *Ibid* at para 21.

¹⁵ *Ibid* at para 22.

¹⁶ *Ibid* at paras 23–24.

¹⁷ *Ibid* at para 25.

¹⁸ See FOA, *supra* note 10 at paras 75–90; FOR, *supra* note 9 at para 50.

¹⁹ FOR, *supra* note 9 at para 52, citing Tom Hickman, “Adjudicating Constitutional Rights in Administrative Law” (2016) 66 U Toronto LJ 121 at 166.

this issue demands “a single answer from the courts”²⁰, and because a reasonableness analysis that depends on “justification, transparency, and intelligibility ... cannot be meaningfully conducted in the absence of a single set of reasons.”²¹

The majority (Justices Abella, Moldaver, Karakatsanis, Wagner and Gascon) decided in favour of the LSBC, but under a reasonableness standard following *Doré* and *Loyola* (both also authored by Justice Abella). The majority held that the Benchers, as administrative decision-makers, were entitled to deference under the *Doré/Loyola* framework. Given that the Benchers’ resolution implicated a *Charter* right,²² the reasonableness review requires the Court to ensure that the resolution reflects a proportionate balance between the administrative decision-maker’s mandate and the *Charter* right that is burdened.²³ The majority found that the Benchers’ resolution was consistent with such a proportionate balance. It was therefore reasonable and allowed to stand. Chief Justice McLachlin wrote a solo concurrence that worked toward bringing *Doré* and *Loyola* into harmony with *Oakes*. As in *Loyola*, Chief Justice McLachlin splits from the majority’s approach to deference.²⁴

DISCUSSION

The Court had an opportunity to clarify the *Doré/Loyola* framework and its relationship with the *Oakes* test in a manner that would have brought them into clearer harmony.

In *Doré* (confirmed in *Loyola*) the Court held that when an administrative decision is reviewed for compliance with the *Charter*, the standard of review is

²⁰ FOA, *supra* note 10 at para 75.

²¹ *Ibid* at paras 87–89.

²² Eight of the nine justices found that the Benchers’ decision did infringe upon the religious freedom of the TWU community. My focus here is how that infringement had to be balanced against the statutory mandate given to the LSBC.

²³ There is a disagreement between the majority and the concurring and dissenting justices regarding the role that *Charter* values play compared to *Charter* rights. This comment does not focus on that aspect of the opinions. See generally *LSBC v TWU*, *supra* note 1 at paras 166–175, Rowe J, concurring; *LSBC v TWU*, *supra* note 1 at para 115, McLachlin CJC, concurring.

²⁴ See *Loyola*, *supra* note 3 (McLachlin CJC and Moldaver J did not use the *Doré* analysis in their concurrence).

reasonableness rather than a full Section 1 *Oakes* analysis.²⁵ The reasonableness review of *Doré* asks whether the “decision reflects a proportionate balancing of the *Charter* protections at play.”²⁶ This proportionality analysis looks at both minimal impairment and balancing.²⁷ By contrast, the *Oakes* analysis has a preliminary step that asks whether the limit of a *Charter* protection is designed to serve a pressing and substantial objective. It then has the court assess whether there is a rational connection between the limitation and the objective, whether the impairment of the *Charter* protection is as minimal as possible in light of the objective, and whether there is a proportionate balance between the deleterious effects of the limitation, the pressing and substantial objective, and the salutary effects actually resulting from the implementation.²⁸

As a descriptive matter, I argue that the Court here used a correctness standard, albeit with a degree of deference and leeway akin to that used in the *Oakes* framework. As a normative matter, I argue that this is the correct approach, and that the court should highlight the conceptual harmony between the two approaches rather than allowing language of reasonableness and deference to obscure what courts are doing here.

Instead of leaving us with conceptual harmony, the Court leaves us with several open and intertwined questions stemming from the above discrepancy. 1) To what extent is the analysis focused on the process or the outcome of administrative decision-making? 2) When does the Court require written reasons from the administrative decision-maker? and 3) Is the Court deferring to administrative decision-makers when *Charter* rights are infringed?

Whose Proportionate Balancing?

Does the decision under challenge need to merely reflect *a* proportionate balancing? Or does it need to reflect the *decision-maker's* proportionate balancing?

²⁵ See *Doré*, *supra* note 2 at paras 3–5.

²⁶ *Doré*, *supra* note 2 at para 57.

²⁷ See *Loyola*, *supra* note 3 at para 40.

²⁸ See *Oakes*, *supra* note 4 at paras 73-74; *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at paras 96-97.

If the decision needs to only reflect *a* proportionate balancing (for example, one that the reviewing court happens to work through), then the review becomes entirely outcome-focused. This approach to review would not distinguish between good-faith efforts to balance and processes that are improperly tainted by invidious motives. As long as the outcome is within the range of outcomes that the court could imagine as striking a proportionate balance, the decision would stand.

Can proportionate balancing (on the part of the decision-maker) even take place through a referendum process? The concern is that the decision-maker is prevented from doing proportionate balancing if they rely exclusively on the outcome of a referendum and are bound by its results. The majority addresses the appropriateness of the referendum process:

The Benchers concluded that they were authorized under the *LPA* to proceed as they did. Section 13 of the *LPA* provides that the *LSBC members* can elect to bind the Benchers to implement the results of a referendum of members in certain circumstances. This provision indicates the legislature's intent that the *LSBC's* decisions be guided by the views of its full membership, at least in some circumstances. However, s. 13 does not limit the circumstances in which the *Benchers* can elect to be bound to implement the results of a referendum of members. The Benchers were therefore not precluded from holding a referendum merely because all of the circumstances described in s. 13 were not present.²⁹

Even if Section 13 does not limit the Benchers this way, the requirement for proportionate balancing might. The majority even says: "that reasonableness review is concerned *both* with 'the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome'."³⁰

Certainly, it was open to the Benchers to seek the "guidance or support of the membership as a whole."³¹ However, that does not imply that a binding referendum is a display of discretion and proportionate balancing. Nor does a referendum preclude proportionate balancing. It is possible to exercise discretion

²⁹ *LSBC v TWU*, *supra* note 1 at para 49.

³⁰ *Ibid* at para 52.

³¹ *Ibid* at para 50.

and proportionate balancing even after holding a referendum, but without written reasons, we cannot know whether this happened. The majority says this does not matter, though.³² They say it is sufficient that the Benchers were “alive to the issues.”³³

The majority relies on *Catalyst Paper Corp v North Cowichan (District)* for the proposition that not all administrative decision-making requires formal reasons and that requirements “vary with the context and nature of the decision-making process...”³⁴ In *Catalyst*, the Court held that “there was no duty to give formal reasons in a context where the decision was made by elected representatives pursuant to a democratic process.”³⁵ However, this is a different context. *Catalyst* is distinguishable because the elected representatives in that case were elected by the general population, and democratically accountable to the general population. In this case, the elected representatives of the LSBC are elected only by the membership of the LSBC, and not democratically accountable to those whose rights are infringed by their decision. In *Catalyst*, the Court said:

To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the Council Chamber.³⁶

However, when an administrative decision-maker who is insulated from democratic accountability to the general population infringes a *Charter*-protected right, we can require that the process have a different nature, at least if the Court is going to continue to review these decisions under the guise of deference. This may all be beside-the-point, though. The standard of review is strict—in fact,

³² *Ibid* at para 55 (“... the LSBC was not required to give reasons formally explaining why the decision to refuse to approve TWU’s proposed law school amounted to a proportionate balancing of freedom of religion with the statutory objectives of the LPA”).

³³ *Ibid* at para 56 (“[as] the Benchers were alive to the issues, we must then assess the reasonableness of their decision. Reasonableness review requires a respectful attention to the reasons offered or which *could be* offered in support of a decision” [emphasis in original]).

³⁴ LSBC v TWU, *supra* note 1 at para 53; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 29 [Catalyst].

³⁵ LSBC v TWU, *supra* note 1 at para 53.

³⁶ *Catalyst*, *supra* note 35 at para 29.

approaching correctness—despite the language of “reasonableness” and “deference.”³⁷

Is This Really Deference?

Reasonableness may make sense as the standard of review for administrative decision-makers more generally, when their actions do not burden a *Charter* right. But when their actions do burden a *Charter* right, the Court has clarified that reasonableness necessitates a proportionate balancing.

The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. . . . However, *if there was an option or avenue reasonably open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes.*³⁸

This is a correctness review, or at least as much as is *Oakes*. The requirement to choose an option or avenue that has a lesser impact on the protected right (while sufficiently furthering the statutory objectives) is akin to the minimal impairment component of the *Oakes* framework. It obscures the law to call this a reasonableness review.

Chief Justice McLachlin observed:

I would note that relying on the language of “deference” and “reasonableness” in this context may be unhelpful. Quite simply, where an administrative decision-maker renders a decision that has an unjustified and disproportionate impact on a *Charter* right, it will always be unreasonable.³⁹

In the case of a yes-or-no decision, this review even more obviously collapses to a correctness review, but this can get lost in language like “the range

³⁷ See *LSBC v TWU*, *supra* note 1 at para 118, McLachlin CJ, concurring.

³⁸ *Ibid* at para 81 [emphasis added].

³⁹ *Ibid* at para 118, McLachlin CJ, concurring.

of possible, acceptable outcomes.”⁴⁰ Given the binary choice available to the Benchers, the range of possible, acceptable outcomes was a single outcome: that the LSBC not approve the law school.

Conceptual Harmony

The Court can still capture the conceptual harmony between *Doré/Loyola* and *Oakes*. They are not different in nature. They flex the same “justificatory muscles”, just in different contexts.⁴¹ The *Doré/Loyola* analysis raises the same considerations as in *Oakes*, adjusted to make conceptual and grammatical sense when there is “no law” to review.⁴²

Oakes incorporates context and deference just as does *Doré/Loyola*.⁴³ And *Doré/Loyola* is robust oversight: the word “deference” might even be misleading.⁴⁴ The Court has emphasized that this is “strong” reasonableness not “watered-down” proportionality.⁴⁵

If we must use the word deference when reviewing *Charter* infringements in the administrative law context, a helpful alternative might be *qualified* deference.⁴⁶ The framework set out by *Doré* and *Loyola* is still inspired by *Oakes*. Yes, there is a shift in emphasis toward the proportionality step, but this shift in emphasis, and the deference, is only given to the extent that the decision-making process displays factors that warrant such deference.

The factors that attract a degree of deference are similar across both tests. These factors include proximity to the facts of the case,⁴⁷ expertise and

⁴⁰ *LSBC v TWU*, *supra* note 1 at para 52, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

⁴¹ *Doré*, *supra* note 2 at para 5; *Loyola*, *supra* note 3 at para 40; *LSBC v TWU*, *supra* note 1 at para 82.

⁴² See *Doré*, *supra* note 2 at para 39; *LSBC v TWU*, *supra* note 1 at para 114, McLachlin CJC, concurring.

⁴³ See *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, 127 DLR (4th) 1, (“[t]he tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement”); see also *R v Malmo-Levine*, 2003 SCC 74 at para 177 (not in the *Oakes* context, but says, “[w]hile somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills”).

⁴⁴ See *LSBC v TWU*, *supra* note 1 (“...where an administrative decision-maker renders a decision that has an unjustified and disproportionate impact on a *Charter* right, it will always be unreasonable” at para 118, McLachlin CJC, concurring).

⁴⁵ *Ibid* at para 80; *Loyola*, *supra* note 3 at para 38.

⁴⁶ Alternatively: *conditional* deference.

⁴⁷ *Doré*, *supra* note 2 at para 54.

specialization⁴⁸, and the balancing of competing interests in the context of conflicting evidence.⁴⁹ Moreover, these factors are precisely why the legislature would have delegated decision-making authority in the first place, so will often be present in the administrative-law context. However, consistent with *LSBC v TWU*, there should be an additional factor at play in the administrative-law context in order to attract deference when a *Charter* protection is infringed: transparency of reasons. In *LSBC v TWU*, because the Court lacked reasons from the decision-maker, the majority was forced to create its own reasons, its own balancing, and focused its analysis on the outcome.⁵⁰

Several of the justifications for deferring to administrative decision-makers are not furthered without written reasons. *Doré* mentions that administrative decision-makers are a "...rich source of thought and experience about law..."⁵¹ *Doré* also sees these administrative bodies as doing adjudication.⁵² Professor Mary Liston refers to this "institutional dialogue" as a balance between judicial accountability and public-law accountability.⁵³ Explicit, written reasons would further each of these views of deference.

CONCLUSION

When a *Charter* right is burdened by an administrative decision or by a law, courts should apply the same stringent review. In *LSBC v TWU*, the court applied such a review. *Doré/Loyola* and *Oakes* are just two flavours of the same inquiry. To the extent that the Court continues to defer to administrative decision-makers in their assessment of proportionality, a lack of explicit and transparent reasoning should be a factor that weighs against such deference. Encouraging decision-makers to explicitly reason through this balancing process furthers the

⁴⁸ *Ibid* at para 47.

⁴⁹ See *Irvin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 993; *Doré*, *supra* note 2 at para 50.

⁵⁰ *LSBC v TWU*, *supra* note 1 at para 56, Abella, Moldaver, Karakatsanis, Wagner, and Gascon JJ, and para 300, Côté and Brown JJ, dissenting.

⁵¹ *Doré*, *supra* note 2 at para 27, citing John Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 *Osgood Hall LJ* 51 at 73.

⁵² *Ibid* at para 30 ("courts do not have a monopoly on adjudication").

⁵³ Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 77 at 113.

justifications of administrative deference and can help reinforce the norm that it is the government's duty to balance competing rights in good-faith.