Social Rights & Administrative Justice*

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A. Introduction

When the topic of social rights arises, people rarely think of administrative tribunals. Yet more people have their rights relating to housing, social benefits, employment, and human rights determined in tribunals than in courts. While administrative decisions are subject to the oversight of judicial review, the barriers of cost and complexity mean that for the overwhelming majority of people, an administrative tribunal will be their first and final recourse to protect their social rights.

Administrative justice is defined by its diversity. While courts in every part of the country look remarkably similar, few people can close their eyes and picture what a landlord tenant board, immigration and refugee board, or social benefits tribunal looks like. Yet that is where a vulnerable tenant goes to stave off eviction, where a refugee claimant goes to avoid deportation, and where a person whose benefits have been curtailed goes for recourse. There are hundreds of tribunals, at the federal, provincial, and municipal levels, involving thousands of full and part-time adjudicators applying a myriad of statutory schemes and regulatory regimes.

The diversity of administrative justice extends beyond the appearance and jurisdiction of tribunals. Tribunals also vary with respect to procedure—some are as adversarial as courts while others adopt a more activist approach to adjudication, and some involve inquisitorial processes which place the decision-maker in the position of eliciting the necessary information from the parties. Hearings may occur electronically, over the phone, in person, or in writing. Appearances before the Human Rights Tribunal may stretch into weeks of complex evidentiary testimony while some hearings before the Landlord Tenant Board take less than thirty minutes. Fundamental human rights may be at stake in both.

Thus, any discussion of social rights in administrative justice must confront the realities and implications of this diversity. For example, to say that the Health Professions Appeal and Review Board has jurisdiction over the *Canadian Charter of Rights and Freedoms*[1] does not address the question of how a self-represented patient might identify or develop submissions on a *Charter* issue. To say that international human rights norms should constrain the decisions of the Social Benefits Tribunal raises obvious problems of how those norms are communicated to decision-makers, who may or may not be

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* This is a pre-publication draft of a chapter for the forthcoming book *Social Rights in Canada* (edited by Martha Jackman & Bruce Porter) to be published by Irwin Law.

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

legally trained, or to parties coming before those decision-makers. Complicating a rights-based approach to administrative justice is the fact that those decision-makers are not protected by judicial independence,[2] and there is a long history of partisan and patronage appointments to tribunals expected to act in an impartial fashion. The assumption in cases such as *Nova Scotia v Martin* (2003),[3] *Tranchemontagne v Ontario* (2006)[4] and *R v Conway* (2010)[5]—which affirm the jurisdiction of administrative tribunals over human rights legislation and the *Charter*—is that it is up to the legislature to determine the mandate of these adjudicative bodies, up to Government to decide their budget and appointments, and up to the courts to correct serious errors when and if a party seeks judicial review.

It is striking how out of touch with reality the Court's analyses in those cases appear to be—the majority judgment in each case simply finds 'practical considerations', such as a tribunal's capacity to undertake the hearing and adjudication of rights to be irrelevant. While it may be irrelevant to the question of jurisdiction, practical capacity is the defining set of considerations as to whether the rights in question will be meaningful and accessible. Put differently, is it open to the government to create administrative bodies with jurisdiction over social rights, and then fail to provide the necessary resources to permit those bodies to discharge that jurisdiction? Because administrative decision-makers in Canada are part of the executive and not the judicial branch, however, they also are subject to additional constraints in relation to social rights, which flow from the *Charter*, and arguably from the international commitments to which Canada is subject. While such commitments may not have the force of law until incorporated into domestic legislation, these commitments create a meaningful framework that shapes the discretion of administrative bodies (until and unless such a framework is inconsistent with a domestic act).

We consider tribunals and administrative justice from this dual perspective: as adjudicative bodies with jurisdiction over decisions on social rights and as executive bodies subject to rights protecting constitutional and international law instruments. We argue that a rights-based culture can, and should, be developed within the sphere of administrative justice.This paper is divided into three parts. In the first part, we canvass the social rights literature and its relevance to the realities of administrative justice. In the

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2 See *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 (for discussion of the doctrinal distinction).

3 *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 [*Martin*].

4 *Tranchemontagne v Ontario (Director, Disability Support Program),* 2006 SCC 14 [*Tranchemontagne*].

5 2010 SCC 22 [*Conway*].

second part, we consider the *Charter* and international human rights obligations and the ways in which they may enhance a rights-based culture within administrative justice. In the third and concluding part, we argue that only a vantage point that is firmly rooted in constitutional and international human rights commitments, in the lived realities of the boards and tribunals that comprise the administrative justice community, and in the parties who come before these adjudicative bodies can lead to a meaningful and accessible system of establishing and protecting social rights.

B. Part One: Administrative Tribunals as Adjudicative Space for Social Rights

Social rights have been described as rights to the meeting of basic needs that are essential for human welfare, such as the right to adequate housing, freedom from poverty, and access to opportunities for social and economic advancement.[6] Margot Young has observed that social rights are "necessary correctives" to classic liberal rights; the rights to life, liberty, and expression are not meaningful absent adequate standards of living, education, and other standards of material and social well-being.[7]As Virginia Mantouvalou[8] has observed, "[W]e realize that living a life deprived of fundamental necessities like shelter, food and basic healthcare… is a terrible plight."[9] Redressing social deprivation is not simply a "moral yardstick" for government, but also the foundation of the commitment of states, ultimately tracing their heritage back to the *Universal Declaration of Human Rights*.[10]

This correlation of social rights with human rights was weakened, however, in 1961 when the rights recognized in the *UDHR* were split[11] between two United Nations covenants: the *International Covenant on Civil and Political Rights*[12] and the *International Covenant on Economic, Social*

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6 See for example, Conor Gearty & Virginia Mantouvalou, *Debating Social Rights* (Portland: Hart Publishing, 2011) at 90 [Gearty and Mantouvalou].

7 Margot Young,"Introduction" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) at 4.

8 Gearty & Mantouvalou, above note 6.

9 *Ibid* at 86.

10 *Ibid* at 91. *Universal Declaration of Human Rights,* GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71[*UDHR*].

11 Gearty & Mantouvalou, above note 6 at 92.

12 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976) [*ICCPR*].

and Cultural Rights.[13] Many civil and political rights, such as freedom of religion and the prohibition of torture, were incorporated into the former and a number of positive material entitlements, including social rights, were addressed by the latter.[14] The *ICESCR*, which was ratified by Canada in 1976,[15] recognizes a number of specific socially-oriented rights, including:

- The right to work, and to freely choose one's work[16]
- The right to just and favourable conditions of work[17]
- The right to social security, including social insurance[18]
- The right to the broadest possible support for families as they are established and as they grow[19]
- The right to an adequate standard of living, including adequate food, clothing, and housing[20]
- The right to the highest attainable standard of physical and mental health[21]
- The right to education.[22]

The nature, content, and evolution of social rights in international and domestic law are discussed in greater detail elsewhere in this volume. The focus of social rights, however, includes not only direct legal challenges to deprivation and discrimination against those in need, but also challenges to government for failing to develop plans, policies, and infrastructure to address

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13 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6 ILM 368 (entered into force 3 January 1976) [*ICESCR*].

14 *Ibid*.

15 United Nations Treaty Collection, *International Covenant on Economic, Social, and Cultural Rights*. *Ratifications and Reservations*, online: UNTS http://treaties.un.org.

16 *Ibid* art 6.

17 *Ibid* art 7.

18 *Ibid* art 9.

19 *Ibid* art 10.

20 *Ibid* art 11.

21 *Ibid* art 12.

22 *Ibid* art 13.

such deprivation and discrimination. As Martha Jackman and Bruce Porter have argued,

> The new conception of rights creates the foundation for a more principled and strategic approach to rights-based policy development, bringing future-oriented, strategic aspects of policy and program development and planning, that were previously beyond the lens of human rights, squarely into an expanded human rights framework. A failure to adopt appropriate strategies and plans to realize rights to adequate housing or adequate income within a reasonable period of time can now be seen as actionable violations, subject to rights claims and to adjudication in the present.[23]

Patrick Macklem[24] has suggested that Canada's domestic implementation of its commitment to social rights and the *ICESCR* has occurred on two "planes": a legislative plane, where the government establishes and administers social policy programs associated with social rights, and a juridical plane, where courts implement social rights by interpreting statutory and constitutional provisions in light of Canada's international legal obligations. [25] In our view, while these areas deserve attention, the most meaningful activity in the field of social rights in Canada may happen neither in the legislature nor in the courts. Rather, it occurs in the sphere of administrative justice, where decisions are made and discretion is exercised. Too often this is a sphere of rights protection that is overlooked or discounted in the social rights literature. If the focus of social rights is shifting to the plans and policies of the state, then the scrutiny of the agencies, boards, and commissions of the state charged with implementing those plans and policies should be enhanced.

The dilemma in the context of administrative justice is that adjudicators do not have inherent jurisdiction or authority (in contrast to the judiciary); rather, they derive all of their powers from statutory or other delegated authority. In other words, if administrative adjudicators are to interpret and implement social rights, they must be given a mandate to do so in their governing statute. This mandate is sometimes clear, as in the case of human rights tribunals, immigration and refugee boards, or labour boards, but other times may be oblique. An energy board regulator or import and trade tribunal member may not at first glance be understood as presiding over dispute resolution involving social rights, but a rights-based approach to their jurisdiction may have profound consequences for vulnerable communities.

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23 Martha Jackman & Bruce Porter "International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection" at 5, online: CURA http://socialrightscura.ca [Jackman & Porter, "Making the Connection"].

24 Patrick Macklem, "Social Rights in Canada" in Daphne Barak-Erez & Aeyal M Gross, eds, *Exploring Social Rights* (Portland: Hart Publishing, 2007).

25 *Ibid* at 213-14.

Therefore, there is a crucial role for advocacy organizations and activists to also focus on administrative justice.

Bruce Porter proposes understanding and evaluating access to justice in relation to access to adjudicative forums and engagement with decision-makers, even where there is little prospect of success.[26] He illustrates this proposal by reference to a Poor People's Conference held in Ottawa in October of 1993, during which "claims to adjudicative space for social rights in Canada were… affirmed as victories, although neither legal remedies nor policy changes had been obtained."[27]

Many of those seeking to advance social rights recognize the potential paradigm shift simply in approaching administrative justice from a rights-based perspective. For example, the Income Security Advocacy Clinic (ISAC) has litigated dozens of "special diet" cases before the Ontario Human Rights Tribunal, claiming that the province of Ontario systemically underfunds or fails to fund certain medical conditions in this program.[28] By so doing, ISAC is transforming a benefit funding discourse based on scarce resources into a rights-based discourse based on minimum guarantees of equality and fairness.

If we think about the "adjudicative spaces" most relevant to people in need, tribunals matter far more than courts. For example, in 2009 and 2010, the Landlord-Tenant Board of Ontario alone received a total of 78,072 applications and resolved 82,464 applications.[29] By contrast, the Ontario Small Claims Court, historically referred to as the "people's court" as it promotes broad public access to justice by providing a simple and cost-effective forum for dispute resolution,[30] saw 64,254 small claims proceedings during the same period across all ninety provincial locations.[31] While the courts rarely hear social rights cases involving people in need, courts have been instrumental in broadening the jurisdiction of tribunals to do so. In *Tranchemontagne*, the Supreme Court of Canada expanded the jurisdiction of administrative tribunals to encompass consideration of the *Human Rights*

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26 Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, Legal Activism* (Vancouver: UBC Press, 2007) at 77.

27 *Ibid*.

28 See Income Security Advocacy Center, "Current Legal Challenges", online: ISAC www.incomesecurity.org.

29 Government of Ontario, Landlord and Tenant Board, *Annual Report 2009-2010* at 20 (2010) online: Landlord Tenant Board www.ltb.gov.on.ca.

30 Ontario Superior Court of Justice, *Report 2008-2010. 20th Anniversary Edition* at 15, online: Ontariocourts www.ontariocourts.on.ca.

31 *Ibid*.

Code[32] in the course of its determinations regarding eligibility for disability support. In other words, it is not simply the Human Rights Tribunal with jurisdiction over rights cases. Rather, these cases now may be brought in any tribunal whose legislation has not expressly precluded such cases.

Chief Justice McLachlin seemed to anticipate this state of affairs more than a decade ago when she wrote in dissent in *Cooper v Canada*,[33] a case which, like *Tranchemontagne*, probed the extent to which tribunals had jurisdiction to consider the constitutionality of their enabling legislation. The majority in *Cooper* held that a human rights commission lacked the authority to decide *Charter* questions because its purpose and structure were not aligned with the adjudication of *Charter* rights. Chief Justice McLachlin's dissent in *Cooper* included the following memorable reference to the "holy grail" which has underscored the debate about how vulnerable parties gain access to legal processes through which to assert their rights:

> The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.[34]

This passage was later adopted by a majority in *Martin* where the Court reversed *Cooper* and confirmed that tribunals that have the power to decide any question of law will presumptively have the power to hear and adjudicate the *Charter*.[35]

In *Conway*,[36] the Supreme Court extended administrative jurisdiction even further by establishing that tribunals that are competent to decide questions of law also have jurisdiction not only to consider *Charter* issues, but also to grant Charter remedies to the extent those remedies are consistent with their enabling legislation. Tribunals can therefore be understood as adjudicative spaces that enjoy both full access to the *Charter* and a broad capacity for public engagement. While opening up tribunals for claimants seeking to advance human rights and *Charter* rights appears at first glance as a victory for proponents of social rights, it may be a hollow victory (at best) so long as government can circumscribe the jurisdiction and curtail the

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32 RSO 1990, c H.19.

33 *Cooper v Canada (Human Rights Commission),* [1996] 3 SCR 854 [*Cooper*].

34 *Ibid* at para 70.

35 *Martin* above note 3.

36 *Conway* above note 5.

resources available in such settings. We return to this concern in the third part of this paper.

Tribunals have not only been accorded jurisdiction to adjudicate and apply rights, but also have been made subject to those rights as decision-makers who form part of the executive branch of government. As we explore in the next section, a promising (if not always clear) line of jurisprudence has evolved which elaborates on the constraints applicable to such bodies based on the *Charter* and international human rights obligations.

C. Part Two: Tribunal Discretion, the *Charter* and International Human Rights Norms

To the extent parties seek to assert social rights in the context of administrative justice, one of two kinds of decisions will follow. The first kind is where the statutory jurisdiction of the board or tribunal dictates a result. If the criteria are met, then eligibility for the benefit will follow and if it is not, then the benefit cannot be granted. Most rights, however, depend on the second kind of decision—the exercise of administrative discretion—where either a positive or negative outcome is possible and the decision-maker must apply a set of principles to the circumstances and determine the appropriate outcome. This is particularly relevant in the administrative justice context where tribunals, boards, and other decision-makers usually have discretion to fashion a remedy appropriate for the circumstances.

The exercise of discretion is subject to administrative law guarantees of procedural fairness and substantive reasonableness. For example, in *Baker v Canada*,[37] the Supreme Court of Canada found that an immigration officer's decision that a woman did not have humanitarian and compassionate grounds to exempt her from deportation notwithstanding that she had four Canadian-born children, was an unfair exercise of discretion (since the reasons offered by the decision-maker disclosed a reasonable apprehension of bias), as well as unreasonable (since the decision-maker ignored the Ministry's own guidelines, the applicable international human rights norms, and the relevant criterion of the best interests of the children affected by the decision). Beyond the common law requirements that administrative decision-makers, whether immigration officers, tribunals, or boards, act fairly and reasonably, those decision-makers, when exercising discretion, are also subject to the *Charter*. In this sense, even highly adjudicative tribunals are distinct from courts, whose exercises of judicial discretion are not subject to the *Charter*.[38]

In the early days of *Charter* jurisprudence, the Supreme Court explored the possibility of reconciling *Charter* and administrative law

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37 *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 [*Baker*].

38 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573.

principles.[39] The *Charter* may justify intervention in administrative decisions in several different circumstances involving different degrees of discretion.[40] First, a law granting discretion may be unconstitutional by its very terms. For example, a law authorizing a tribunal to grant a benefit to a defined group creates a discretion which, by its very terms, might violate section15 of the *Charter* if it necessarily excludes another group from the benefit based on race, religion or one of the other enumerated or analogous grounds. For example, in *M v H* a provision of Ontario's *Family Law Act* was held to be discriminatory since it granted courts the discretion to award spousal support only to heterosexual spouses and not to same-sex couples.[41]

The second circumstance involves a law that grants discretion to a tribunal that is not unconstitutional on its face, but such that it might nevertheless be applied in an unconstitutional manner. For example, in *Eldridge v British Columbia (AG)*, a law authorizing the British Columbia Medical Services Commission to fund certain health services was found not to violate the *Charter*, but the exercise of discretion by that Commission deciding not to fund interpreters for deaf patients was found to be unconstitutional.[42] Similarly, in *PHS Community Services Society*,[43] a federal minister's discretion not to provide a statutory exemption to a safe injection site that satisfied all of the factual criteria was held to violate the *Charter*. The Court held, "The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the Charter."[44]

In the third circumstance, a law granting wide discretionary authority without sufficient guidance as to its application or without safeguards against arbitrary conduct might violate the procedural component of section 7 of the

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39 See especially *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 [*Slaight*]; *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 [*Ross*]. Portions of this analysis are drawn from Lorne Sossin, "Discretion Unbound: Reconciling the *Charter* and Soft Law" (2003) 45 Canadian Public Administration 465. Portions of the analysis to follow are drawn from Susan Gratton & Lorne Sossin, "In Search of Coherence: The Charter and Administrative Law under the McLachlin Court" in David Wright & Adam Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 145.

40 In most cases, the grounds for a *Charter* challenge in administrative discretion cases are based on violations of sections 2, 7, or 15 but the unconstitutional exercise of discretion might also be located elsewhere under the *Charter*.

41 *M v H*, [1999] 2 SCR 3.

42 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624.

43 *Canada (AG) v PHS Community Services Society*, 2011 SCC 44.

44 *Ibid* at para 117.

Charter. This basis for challenging discretion was relied upon by the majority of the Supreme Court in *R v Morgantaler*.[45] In *Morgentaler*, the impugned provision was a law prohibiting abortion unless a physician determined that the life or health of a woman was endangered. The procedures that therapeutic abortion committees established in hospitals to decide whether this threshold was met in individual cases were found by the majority to lack coherence, predictability, and fairness.

Fourth, a law granting a discretion that is too vague to provide sufficient notice to those who might infringe it might violate the substantive component of section 7.[46] For example in *R v Morales*, the Court held that a provision granting pre-trial detention where it was justified in "the public interest" was unconstitutionally vague.[47] The Supreme Court's first detailed examination of the relationship between the *Charter* and administrative discretion was in *Slaight*.[48] At issue in that case was a remedial discretion in the federal *Labour Code* that allowed adjudicators to resolve grievances under collective agreements.[49] The grievance in *Slaight* concerned an allegation of wrongful dismissal. The adjudicator found that the dismissal had been wrongful and ordered the company, first, to provide the employee with a factual reference and, second, to refrain from expressing any other views about the employee. Chief Justice Dickson for the majority chose to conduct a *Charter* analysis and held that neither aspect of the adjudicator's order violated the *Charter*. Justice Lamer dissented in part and would have resolved the dispute on administrative law grounds. However, Lamer J wrote for the Court on the issue of the proper approach to discretionary decision-making under the *Charter*. He identified two kinds of discretion, each of which led to different remedies under the *Charter*:

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45 *R v Morgentaler*, [1988] 1 SCR 30.

46 See generally *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606.

47 *R v Morales*, [1992] 3 SCR 711.

48 *Slaight* above note 39. See June Ross, "Applying the Charter to Discretionary Authority" (1991) 29:2 Alta L Rev 382 (on the significance of *Slaight*).

49 *Canada Labour Code*, RSC 1970, c L1, as amended by SC 197778, c 27, ss 21, 61.5(9) ("[w]here an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person; (b) reinstate the person in his employ; and (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal").

> 1. The exercise of discretion was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected *Charter* right.
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> --It is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.
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> 2. The legislation pursuant to which the exercise of administrative discretion was made confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.
>
> --It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society; … [50]

In the circumstances of *Slaight*, the Court found that the *Code* did not require expressly, or by necessary implication, that a *Charter* right be infringed, since the arbitrator could have remedied the wrongful dismissal through other means; and therefore the *Code* created an imprecise discretion that permitted a *Charter* right to be limited. Thus, it was the order, and not the legislation that was subjected to *Charter* scrutiny.[51]

The central holding of *Slaight* was that no public official could be authorized by a statute to breach the *Charter* and, therefore, all discretionary authority had to be read down to authorize only decision-making which is consistent with *Charter* rights and guarantees. Lamer J explained this reasoning in the following terms:

> Although this court must not add anything to legislation or delete anything from it, in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an

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[50] *Slaight*, above note 39 at 1080.

[51] The majority found that, while both the positive and the negative order violated the freedom of expression under section 2(b) of the *Charter*, each was a reasonable limit under section 1 and therefore the orders were upheld.

> infringement of the Charter and he exceeds his jurisdiction if he does so.[52]

Thus, discretionary authority always comes with an implied condition, which is that it be exercised in a manner consistent with all applicable *Charter* rights. The principle in *Slaight* was applied in subsequent cases[53] where the Court highlighted the overlapping nature of the *Charter* and administrative law analysis, observing that it was difficult to conceive of a case that a court would conclude was unconstitutional where it would not also conclude that it was unreasonable.

The Court confronted the dilemma of administrative discretion again in the context of *Little Sisters Books and Art Emporium v Canada (Minister of Justice)*.[54] At issue was the discretionary authority of customs officials to seize imported goods that met the obscenity test under section 163 of the *Criminal Code*. Justice Binnie, writing for the majority, characterized the administration of the *Customs Act* by customs officers as oppressive and dismissive of the appellants' freedom of expression. He concluded that the effect—whether intended or not—was to isolate and disparage the appellants on the basis of their sexual orientation.

The Court also held that, although the exercise of discretion by customs officers violated the *Charter*, the *Customs Act* provision authorizing this conduct did not. Following the *Slaight* approach, the majority of the Court characterized the discretion contained in the customs legislation as capable of being applied in a fashion consistent with the *Charter*. Therefore, the majority saw no basis to strike down the authority of customs officials to seize material on the grounds of obscenity.[55]

Sometimes, the Court may apply a *Charter* and administrative law analysis to the same exercise of discretion. *Suresh v Canada*[56], for example, dealt with the discretionary authority of the Minister to deport refugees in

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52 *Slaight*, above note 39 at 107778.

53 See *Ross* above note 39 and *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

54 2000 SCC 69 [*Little Sisters*].

55 See *ibid* at para 204 (Justice Iacobucci, writing for himself and two other members of the Court, dissented on this point. He held that the legislation itself was unconstitutional since it did not contain sufficient safeguards against unconstitutional enforcement. For the minority, simply trusting the customs bureaucracy to improve its administration of the *Act* was not enough, and they would have imposed a different decision-making structure to remedy the *Charter* breach).

56 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*].

circumstances where they faced the possibility of torture.[57] Suresh challenged the Minister's deportation order on both *Charter* and administrative law grounds. A unanimous Court conducted both a *Charter* review of the enabling provision and an administrative review of the Minister's decision pursuant to that provision, eventually determining that the process by which Suresh was ordered deported violated his *Charter* rights.

With its decision in *Multani v Commission scolaire Marguerite-Bourgeoys*[58], the Court made its first effort to develop a more comprehensive approach to the dilemma of whether a *Charter* or administrative law analysis should apply to administrative action. *Multani* involved the discretionary decision of a school board to prohibit a Sikh student from wearing his kirpan, a ceremonial dagger, to school. The student and his family challenged the decision as an infringement of his freedom of religion. The Supreme Court was unanimous in allowing the challenge and striking down the board's decision but it split six to two on whether a *Charter* or administrative law analysis should be applied in reaching this result.

Madame Justice Charron, for the majority, adopted a *Charter* analysis, since the central issue in the case was whether or not the board's decision complied with the requirements of the *Charter*.[59] In contrast, Deschamps and Abella JJ for the minority argued that an administrative law analysis should be conducted instead of a *Charter* analysis, because the instrument being assessed by the Court was an administrative decision rather than a "norm of general application" such as "a law, regulation, or other similar rule of general application."[60]

The majority defined the role of administrative law solely in terms of jurisdiction and warned against allowing the fundamental values protected by the *Charter* to be dissolved into mere administrative law principles.[61] The

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57 *Ibid* (paragraph 53(1)(b) of the *Immigration Act* gave the Minister limited discretion to deport where: the refugee's "life or freedom would be threatened" if he or she were returned to his or her country and the Minister's belief that the refugee constituted "a danger to the security of Canada" (at para 24)).

58 2006 SCC 6 [*Multani*]

59 *Ibid* at para 2 (the majority (Charron, McLachlin CJ, Bastarache, Binnie and Fish JJ) held that the board's decision infringed the student's freedom of religion under section 2(a) of the *Charter* and that the infringement could not be justified under section 1. Justice LeBel wrote a separate opinion agreeing with the majority that a *Charter* analysis was appropriate but proposing that the section 1 analysis should be modified in cases involving administrative discretion, at paras 140-55).

60 *Ibid* at paras 103 and 85 (the minority would have reviewed the board's decision on a standard of reasonableness and would have concluded that the decision was unreasonable in disregarding the student's freedom of religion).

61 *Ibid* at para 16.

majority position appears either to be unaware of or to discount the significant substantive role of administrative law in supervising the exercise of discretion and the exercise of public authority more broadly. It is difficult to reconcile the *Multani* majority's thin and one-dimensional view of administrative law with the robust view of administrative law animating earlier Supreme Court judgments, such as *Baker*.

The Court returned to this issue in an attempt to reconcile *Charter* and administrative law principles in *Doré v Barreau du Québec*.[62] In that case, the Court reviewed the decision of a provincial law society that imposed a disciplinary penalty on a lawyer for inappropriate criticism of a judge. The Court of Appeal approached *Doré* as a *Charter* case, much like *Slaight*, but the Supreme Court took a different approach. Justice Abella, writing for the Court, adopts an administrative law analysis to the review of the Quebec Barreau's decision and asserts that there is nothing in such an approach inconsistent with strong *Charter* protections. This approach is set out in the following terms:

> The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised "in light of constitutional guarantees and the values they reflect" (*Multani*, at para. 152, per LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are always required to consider fundamental values.... These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100).[63]

While the Court's decision in *Doré* may have the potential to infuse *Charter* values throughout administrative justice and to develop a more "robust" approach to administrative law principles,[64] there remain important ambiguities. For example, while the onus clearly shifts from the claimant to the government in a *Charter* section 1 analysis, the onus always remains on the party challenging a decision on administrative law grounds. The real potential of *Doré* may lie less in the realm of administrative law theory and more in the day to day decision-making of administrative justice.

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62 2012 SCC 12.

63 *Ibid* at para 35.

64 *Ibid* at para 34.

If the principle that discretion should be exercised in a manner consistent with *Charter* values is incorporated into the guidelines, directives, and practices of tribunals, this could have a profound effect on the opportunity for these adjudicative spaces to advance social rights. By contrast, if such values turn out to be irrelevant in the everyday decision-making of such bodies, then the Court's rhetoric in *Doré* will suggest a rights orientated framework that is illusory.

D. International Human Rights Norms

While the constraints imposed by the *Charter* have been examined in the series of Supreme Court cases discussed above, the constraints imposed by international human rights instruments such as the *ICESCR* are far less clear. In *Baker*, the Court has affirmed that such instruments do not have the force of law unless enacted through a domestic statute, but has similarly suggested that such instruments ought not to be ignored (that case considered the application of the *Convention on the Rights of the Child*).[65] The Court held that international human rights norms from unimplemented treaties may be considered as persuasive and contextual factors in interpreting and applying statutory provisions.[66] The inconsistency between the Immigration Officer's exercise of discretion and the requirements of the Convention was cited as one of the grounds for quashing the decision as unreasonable.

Other common law jurisdictions have also considered the same dilemma. In *R v Secretary of State for the Home Department, ex parte Brind*[67], the House of Lords held that while international agreements could be used as an aid in the construction of unambiguous statutes, they could not be used to fetter the exercise of discretionary powers granted to a Minister by statute. To do so would be to 'incorporate' the Convention through the back door. In *Brind*, the House of Lords held that administrative discretion could not be read down by reference to the demands of the unimplemented *European Convention on Human Rights*[68]. Lord Bridge of Harwich wrote:

> [W]here Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be

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65 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990) [*CRC*].

66 *Baker*, above note 37 at para 70.

67 [1991] 1 AC 696 HL (Eng) [*Brind*].

68 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, 213 UNTS 221 (entered into force 3 September 1953).

> exercised within Convention limits would be to go far beyond the resolution of an ambiguity.[69]

Similarly, in *Ashby*, Richardson J rejected arguments that the Minister's discretion could only be exercised in conformity with New Zealand's obligations under the Convention.[70] Rather, the Courts were bound to give effect to domestic legislation whether or not it was consistent with New Zealand's international obligations.[71]

The idea that the presumption of conformity should be extended to encompass administrative discretion received its most emphatic support from the Court in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*,[72] where justices Mason and Deane stated that

> [R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration."[73]

Gerald Heckman has argued that Canadian courts should recognize this presumption, writing in the context of the *Ahani* case where the Ontario Court of Appeal found that the Government of Canada could deport an individual who had exhausted his appeals,

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69 *Brind,* above note 67 at para 2. Explained in Tavita v Minister of Immigration [1994] 2 NZLR 257 at 266. In *Tavita,* however, the Court of Appeal referred to *Brind* as "in some respects a controversial decision" and invoked the *CRC* and the *ICCPR* to influence the exercise of a statutory discretion. As mentioned above, while not directly addressing the issue, it indicated that, in exercising discretionary powers, the executive is not free to ignore international human rights norms.

70 *Ashby v Minister of Immigration*, [1981] 1 NZLR 22 (CA) at para 228.

71 *Ibid.*

72 (1995), 128 ALR 353 [*Teoh*].

73 *Ibid* at para 34.

(including an unsuccessful appeal to the Supreme Court of Canada),[74] notwithstanding that an application had been filed with the UN Human Rights Committee alleging a breach of the Optional Protocol to the *ICCPR*, to which Canada is a signatory.[75] He concludes that Canadian judges would be justified to intervene on judicial review where an administrative decision maker fails to apply the presumption of conformity and interprets statutory powers in a manner inconsistent with international human rights obligations set out in a binding but unimplemented treaty.[76]

Applying this reasoning to the Supreme Court's judgment in *Suresh*, Heckman observes that "[a]pplying the presumption of conformity, the Court could have read down the Minister's statutory discretion consistently with the international customary prohibition on torture."[77] Similarly, Brunnée and Toope, in their analysis of the *Baker* decision, add that it was fully open to the Court to hold that Canada's immigration decision-makers were bound to consider the best interests of the child because to do so would bring the interpretation of the *Act* in conformity with international obligations binding on Canada.[78]

A corollary of the presumption of conformity is the principle of legitimate expectations. In other words, the legitimate expectations of a person subject to the discretion of an administrative decision-maker would include that the decision will conform to the international human rights obligations to which Canada is subject. This reasoning has guided the Australian High Court in reconciling

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74 *Ahani v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, which was released as a companion case to *Suresh*, above note 56.

75 UN Human Rights Committee, "Communication No 1051/2002 : Canada" (15 June 2004), online: Unhchr.ch http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/80/D/1051/2002&Lang=en (The UN Committee ultimately found Canada's deportation of Ahani to be "deficient").

76 Gerald Heckman, "International Human Rights Law Norms and Discretionary Powers: Recent Developments" (2003) 16 Can J Admin L & Prac 31 at 39.

77 *Ibid.* See also Gerald Heckman, "The Role of International Human Rights Norms in Administrative Law" (2007) (unpublished, on file with the authors) at 31–32.

78 Jutta Brunnée & Stephen Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 357.

international obligations and domestic law.[79] The question of whether international agreements that are signed and ratified by the executive, but not implemented by the legislature, can give rise to legitimate expectations in domestic decision-making was most comprehensively dealt with in *Teoh*, which also dealt with the exercise of discretion and consideration of the best interests of the child. Mr. Ah Hin Teoh argued that Australia's ratification of the *CRC* resulted in "an expectation that those making administrative decisions under the aegis of the executive government of the Commonwealth [would] act in accordance with the Convention wherever it [was] relevant to the decision to be made."[80] A majority of both the Federal and High Court agreed with Teoh. Justice Toohey stated that while ratification of an international treaty does not make the obligation enforceable in court, "the assumption of such an obligation may give rise to legitimate expectations in the minds of those who are affected by administrative decisions."[81] Melissa Poole suggests another reason for compliance. She compares New Zealand's international human rights commitments to its dealings with the Maori and argues that, in both instances, the Crown is bound by a fiduciary-like responsibility.[82]

Canada has adopted a different approach. The doctrine of legitimate expectations has been held to augment existing procedural rights rather than serve as a basis for the right.[83] Canada also has a well recognized fiduciary obligation toward aboriginal peoples, now captured in the concept of the "Honour of the Crown" which has in some circumstances been generalized to other government decision-making settings, but which has not been extended to general

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79 See Margaret Allars, "International Law and Administrative Discretion" in Brian Opeskin & Donald Rothwell, eds, *International Law and Australian Federalism* (Melbourne: Melbourne University Press, 1997) 232.

80 *Teoh*, above note 72 at 23.

81 *Ibid* at 29. See also *R v Secretary for the Home Department, ex parte Ahmed and Patel*, [1998] INLR 570 (where the English Court of Appeal followed the lead given by the High Court of Australia, "deciding that, where prerogative powers are exercised, the ratification of an international human rights convention creates a legitimate expectation in the absence of statutory or executive indication to the contrary, that administrative decision-makers will act in accordance with the convention").

82 Melissa Poole, "International Instruments in Administrative Decisions: Mainstreaming International Law" (1999) 30 VUWLR 91.

83 *Baker*, above note 37 at para 26. See Grant Huscroft, "The Duty of Fairness" in Colleen Flood & Lorne Sossin, *Administrative Law in Context,* 2d ed (Toronto: Emond Montgomery, 2012) (for discussion of this topic).

obligations to adhere to international human rights standards.[84] The Canadian approach after *Baker* has been to treat international human rights standards as non-binding. That said, *Baker* also serves as a precedent that ignoring such standards may justify a court finding a discretionary decision to be unreasonable. Building upon this middle-ground approach to international human rights standards as a guiding constraint on administrative discretion, and further elaborating upon the Court's approach to *Charter* values in *Doré,* holds out the promise of infusing a rights-based culture within administrative justice in Canada.

E. Part Three: The Future of Social Rights and Administrative Justice

The goal of a rights-based culture in Canadian administrative justice is part of a broader focus on the apparatus of government as a means of developing systemic solutions to poverty, the lack of adequate housing, and social deprivation. Jackman and Porter assert that the new understanding of social rights has inspired the emergence of innovative approaches to addressing poverty and homelessness in a rights-based framework, focused on the design of strategies and programs to realize rights within identified time-frames and with measurable goals and targets, to recognize the central role that must be played by rights claimants, and to strengthen governmental accountability through complaints procedures, monitoring, and evaluation.[85] Their argument suggests that social rights should move from the judicial to the administrative sphere. This paper has explored that administrative sphere and its potential for advancing social rights.

First, as suggested above in the context of *Doré*, administrative justice should be seen as advancing *Charter* values. So, for example, where two interpretations are open to a tribunal member and one will advance equality or fairness or dignity more than the other, that is the interpretation to be preferred. Similarly, we argue that the presumption that statutory discretion will be exercised in compliance with international human rights norms should also apply to adjudicative tribunals as much as immigration decision-makers. How these values and norms interact with particular statutory mandates of particular tribunals and boards, however, remains to be worked out in a contextual fashion. It will take a participatory process involving affected communities, advocacy organization, tribunal adjudicators, public officials, and courts to articulate them further.

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[84] See Brian Slattery, "Aboriginal Rights and Honour of the Crown" (2005) 29 SCLR (2d) 433 (for a discussion on the Honour of the Crown). See also Lorne Sossin, "Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law" (2003) 66 Sask L Rev 129-82 (for a discussion of the circumstances where this obligation has been extended beyond the Crown-aboriginal setting, and an argument for doing so).

[85] Jackman & Porter, *Making the Connection*, above note 23.

As part of taking their social rights jurisdiction seriously, administrative tribunals need to further develop models of "active adjudication," which may allow for meaningful adjudication of social rights. This form of more flexible adjudication may be particularly important in contexts where one or more parties often will have no legal representation and where adjudicators often will not have legal training. Tribunals are less constrained by an adversarial model of adjudication, and have developed methods to accommodate the challenges that vulnerable parties coming before the tribunal may experience. In the social rights context, this more effective and efficient model may involve the adjudicators identifying rights issues where the parties do not have the background or capacity to do so, and taking steps to obtain the information or submissions necessary to adjudicate rights issues, which may involve mechanisms that range from retaining amicus counsel to engaging in inquisitorial questioning, or developing interpretive guidelines upon which parties and decision-makers can rely.[86]

While creating adjudicative space matters, resources may ultimately matter more if those spaces are to be accessible to those in need. While it is open to government to create a tribunal, to determine its jurisdiction, and to decide on the budget of a tribunal, it is not acceptable to create such bodies and then starve them of the capacity needed to carry out their mandate.[87] This question has particular relevance for the shift in social rights to a more systemic approach. Justice Abella raised this concern in *Tranchemontagne*, in dissent, confirming that all tribunals in the province have the jurisdiction to apply the Ontario *Human Rights Code* unless expressly precluded by legislation. For Abella J, the issue was not how best to value rights, but rather how to ensure access to a forum where those rights could be protected. With respect to the Social Benefits Tribunal, she observed:

> The [Social Benefits Tribunal] is meant to be an efficient, effective, and quick process. Yet it seems to be having difficulty meeting this mandate. In 2004-2005, the SBT had a backlog of 9,042 cases and received 11,127 new appeals under the [Ontario Works Act] and the ODSPA. This Court recognized in Tétreault-Gadoury… that administrative bodies responsible for ensuring the payment of monetary benefits to eligible applicants would undoubtedly be

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86 See Samantha Green & Lorne Sossin, "Administrative Justice and Innovation: Beyond the Adversary/Inquisitorial Dichotomy" (Presented at "The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives" Conference, University of Windsor, May 2011) (for further discussion of this range of mechanisms).

87 See Lorne Sossin & Zimra Yetnikoff, "I Can See Clearly Now: Videoconference Hearings and the Legal Limit on how Tribunals Allocate Resources" (2007) Windsor YB Access Just 247-72.

> impeded from this important and time-sensitive undertaking if they were asked to decide constitutional challenges.
> Imposing Code compliance hearings on the SBT will similarly and inevitably impact its ability to assist the disabled community it was established to benefit in a timely way. It will be difficult to explain to the thousands of disabled individuals waiting for their appeals to be heard - many without any interim support - that there is any public benefit in the SBT hearing a complex, lengthy, and inevitably delaying jurisprudential issue with no precedential value. That is the real access issue in this case.[88]

Indeed, the year following *Tranchemontagne*, the Social Benefits Tribunal received over 560 human rights-based complaints, including many of the "special diet" challenges discussed above, which represented a 37 percent increase over the prior year. More rights-based challenges can be a positive sign. For organizations like the Social Benefits Tribunal (now part of Ontario's Social Justice Cluster) to fulfill a rights- based mandate, a number of practical considerations must be addressed, from the appointments process, to training and education of members and staff, to guidelines and shared interpretive practices. Such tribunals must also be accessible.[89] If administrative justice is to be an adjudicative space capable of advancing social rights, it must be apparent in the lived experience of decision-makers and those affected by their decisions.

F. Conclusion

We have argued in this chapter that advancing social rights requires a greater focus on administrative justice. We have explored two perspectives on administrative justice and social rights: first, the jurisdiction of tribunals to adjudicate and remedy human rights and *Charter* claims and second, the ways in which tribunals are subject to *Charter* and international human rights norms. We suggest that administrative justice needs a rights-jurisdiction tailored to its contexts, challenges, and realities—one that assumes the diversity of practice, capacity, and parties that defines administrative justice. We look forward to new ideas and innovative strategies to develop a rights protection framework for the adjudicative space of administrative justice, keeping in mind that in many cases, improving the social rights of vulnerable members of society was precisely the purpose in establishing these administrative bodies in the first place.

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88 *Ibid* at paras 90-91.

89 For discussion, see Lorne Sossin, "Access to Administrative Justice and other Worries" in Colleen Flood & Lorne Sossin (eds), *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery, 2012) 211.