SCC File No.: 40360

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

YORK REGION DISTRICT SCHOOL BOARD

APPELLANT

AND

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO

RESPONDENT

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PART I – OVERVIEW

1. The framework set out by this Court in *Doré*[1] and *Loyola*,[2] and affirmed by a bare majority in *Trinity Western*[3] (the "*Doré/Loyola* framework"[4]) instructs lower courts on how to judicially review administrative decisions that infringe Canadians' *Charter* rights. Under this framework, reviewing courts must assess these decisions on a standard of reasonableness, affording deference to administrative decision makers on their interpretation of the scope of *Charter* rights and their determination of whether any infringement of those rights is justified under section 1.[5]

2. However, in *Vavilov* this Court clarified and simplified the law of judicial review.[6] Notably, it held that constitutional questions should be reviewed on a standard of correctness because the "constitutional authority to act must have determinate, defined and consistent limits."[7] While it seems clear that questions about the interpretation of the *Charter* are constitutional questions, the Court declined to reconsider the *Doré/Loyola* framework as it was "not germane to the issues" in that appeal.[8]

3. If reconsidering the *Doré/Loyola* framework was not necessary to resolve *Vavliov*, the same cannot be said in this case. The judges of the courts below all commented on the applicability of the *Doré/Loyola* framework, but came to three different conclusions about whether and how it should apply.[9] The parties have also raised the applicability of the *Doré/Loyola* framework and the related standard of review in this appeal.[10] This case is an important opportunity for the Court to provide much needed clarity on the application of the *Doré/Loyola* framework following *Vavilov*.

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[1] *Doré v. Barreau du Québec*, 2012 SCC 12.
[2] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12.
[3] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32.
[4] This factum adopts the same label for this framework as employed by this Court in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 57.
[5] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at paras. 57-59.
[6] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 4-15.
[7] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 56.
[8] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 57.
[9] *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2020 ONSC 3685 at paras. 103, 121; *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2022 ONCA 476 at paras. 43-44.
[10] Appellant's factum at paras. 56-58; respondent's factum at paras. 47-64.

4. Much has been written by both academic commentators and judges—before and since *Vavilov*—identifying concerns with how the *Doré/Loyola* framework could lead to inconsistent protection of Canadians' *Charter* rights.[11] Chief Justice McLachlin captured the essence of this concern in her last judgment for this Court. She wrote: "the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. A decision based on an erroneous interpretation of a *Charter* right will be unreasonable. Canadians should not have to fear that their rights will be given different levels of protection depending on how the state has chosen to delegate and wield its power."[12]

5. The British Columbia Civil Liberties Association ("BCCLA") argues that this Court must reconsider the *Doré/Loyola* framework in light of *Vavilov* to address the issues raised in this case. Regardless of the decision maker, procedure, or *Charter* right at issue, reviewing courts should employ the same framework on a standard of correctness. This will ensure that Canadians' *Charter* rights receive consistent protection.

PART II – QUESTION IN ISSUE

6. Does the *Doré/Loyola* framework apply in this case, and, if so, how?

PART III – STATEMENT OF ARGUMENT

7. The state of the law on when and how the *Doré/Loyola* framework applies is uncertain. This case provides a clear example of that ongoing uncertainty. At the Divisional Court, Justice O'Bonsawin for the majority determined (implicitly on a standard of correctness) that the *Charter* was not engaged and so a *Doré* analysis was not required.[13] Justice Sachs, in dissent, determined that section 8 of the *Charter* was engaged, and applied the *Doré/Loyola* framework to balance that

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[11] See *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 111, footnote 1 (per McLachin CJ). See also Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dalhousie LJ 793; Anthony Sangiuliano, "The Dawn of *Vavilov*, the Twilight of *Doré*: Remedial Paths in Judicial Review of Rights-Affecting Administrative Decisions and the Unification of Canadian Public Law" (2022) 59:3 Alberta LR 725.

[12] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 116 (per McLachlin CJ, concurring in result). The Court of Appeal cited this passage in *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2022 ONCA 476 at para. 43.

[13] *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2020 ONSC 3685 at para. 103.

Charter right with the relevant statutory objectives.[14] Then, on appeal, Justice Huscroft for a unanimous Ontario Court of Appeal determined that section 8 was engaged, but that the *Doré/Loyola* framework had no application because the state action at issue was not a discretionary administrative decision.[15] In other words, the judges of the courts below took three different approaches to this issue.

8. The decisions of the courts below raise three inconsistencies that show how the *Doré/Loyola* framework can lead to differing protection of *Charter* rights. First, it is unclear to which administrative decision makers the *Doré/Loyola* framework applies. Second, it is unclear how the *Doré/Loyola* framework operates when applied to *Charter* rights with internal limits, including section 8. Third, it is unclear what standard of review applies at each stage of the *Doré/Loyola* framework.

A. The decision maker

9. Following *Doré*, lower courts have disagreed on whether the *Doré/Loyola* framework applies to all administrative decision makers. The consequence of different standards of *Charter* assessment applying to different decision makers is clear: two individuals whose rights have been impacted in the same or similar ways may face different treatment on adjudication based—not on the nature of the infringement—but on the identity of the decision maker. This is precisely what Chief Justice McLachlin warned against.

10. The Ontario Court of Appeal, for instance, has noted that in *Doré*, this Court developed a framework that would apply to "an adjudicated administrative decision."[16] It noted that there are "serious difficulties" in applying the same framework to the decisions of line officials.[17] The Court questioned whether such line officials could ensure impartiality and fairness when reviewing their own decisions.[18] It further doubted whether deference should be owed to such decision makers in

[14] *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2020 ONSC 3685 at para. 121.
[15] *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2022 ONCA 476 at paras. 43-44.
[16] *ET v. Hamilton-Wentworth*, 2017 ONCA 893 at para. 112, citing *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 4.
[17] *ET v. Hamilton-Wentworth*, 2017 ONCA 893 at para. 113.
[18] *ET v. Hamilton-Wentworth*, 2017 ONCA 893 at para. 123.

constitutional matters.[19] More recently, a Federal Court judge has questioned whether "deference can be given to the very administrative actor who is alleged to have infringed … *Charter* rights and freedoms without inherently undermining those rights and freedoms."[20]

11. In other cases, including this one, courts have emphasized that the *Doré/Loyola* framework only applies where an exercise of discretionary power is being reviewed.[21]

12. Courts have also expressed doubt as to whether the *Doré/Loyola* framework applies where an individual brings an action for *Charter* damages for an infringement of *Charter* rights caused by an administrative decision maker.[22] It is not difficult to imagine a scenario where two individuals have been subjected to the same *Charter*-infringing conduct, but one pursues a *Charter* remedy through an application for judicial review while the other brings an action for *Charter* damages. Applying differing standards and methodologies of review to the same state conduct could result in one individual having greater *Charter* protections than the other.

13. In short, courts remain uncertain about whether the *Doré/Loyola* framework applies for some decision makers and not others, or when one procedural vehicle is chosen (judicial review) and not another (an action for *Charter* damages). This uncertainty makes it likely that Canadians' *Charter* rights will be inconsistently protected by the courts.

B. The *Charter* right at issue

14. It is also not clear how the *Doré/Loyola* framework applies in the context of different *Charter* rights, particularly *Charter* rights with internal limits.

15. *Doré*, *Loyola*, and *Trinity Western* all involved alleged breaches of section 2 of the *Charter*. Showing that a section 2 right is engaged is a comparatively simple exercise; generally, it can easily be concluded that freedom of expression or freedom of religion is limited, and most of the analysis is undertaken at the proportionality stage under section 1. This works well within the *Doré/Loyola* framework where the reviewing court must determine "whether, in assessing the

[19] *ET v. Hamilton-Wentworth*, 2017 ONCA 893 at para. 125.
[20] *Ewert v. Canada*, 2023 FC 1054 at para. 58.
[21] See e.g. *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 at paras. 84-87; *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2022 ONCA 476 at paras. 43-44.
[22] *Ewert v. Canada*, 2023 FC 1054 at para. 57. See also *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053 at paras. 302-305.

impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."[23]

16. However, the same is not true for all other *Charter* rights. For example, this Court has repeatedly found that where a section 7 right is infringed, it will not easily be saved by section 1. This stems from the fact that section 7 has its own internal limit: a person cannot be deprived of their life, liberty, or security of the person "except in accordance with the principles of fundamental justice." It is difficult to conceive of how a limitation that is not in accordance with the principles of fundamental justice would nonetheless constitute "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" under section 1. This Court has observed that where section 7 rights are infringed, justification under section 1 may only be possible "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[24] If section 7 is engaged, therefore, the balancing exercise under the *Doré/Loyola* framework will generally be unnecessary.

17. The same is true for section 8, which is at issue in this case. Like section 7, section 8 contains an internal limit—everyone has the right to be secure from *unreasonable* search and seizure. In determining whether section 8 has been infringed, therefore, a key question is whether the search was reasonable. As a result, this Court has repeatedly found that an unreasonable search is unlikely to be justified under section 1 because of the overlap between the section 8 reasonableness standard and the section 1 proportionality analysis.[25] Again, this leaves little room for the balancing exercise that is supposed to take place under the *Doré/Loyola* framework.

18. Further, as noted by the Court of Appeal in this case, where there has been an unreasonable search and seizure, a court's task is generally then to determine whether the evidence obtained should be excluded pursuant to section 24(2) of the *Charter* and the factors enumerated by this

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[23] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 58.
[24] *Reference re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para. 85. See also *New Brunswick (Minister of Health and Community Services) v. JG*, [1999] 3 SCR 46 at para. 99; *R v. Ruzic*, 2001 SCC 24 at para. 92; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 128; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 66.
[25] See e.g. *Lavallee, Rackel & Heintz v. Canada (Attorney General)* 2002 SCC 61 at para. 46; *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 at paras. 89-91.

Court in *R v. Grant*.[26] There is a risk that the general balancing called for under the *Doré/Loyola* framework and the assessment under section 24(2) would not produce the same outcomes and would provide inconsistent *Charter* protections based on which state actor violated an individual's section 8 right. Where an individual has been subject to an unreasonable search, he or she may obtain a robust remedy under section 24(2) before a court, whereas administrative decision makers need only balance the "values" under section 8 within their decision.

19. Accordingly, once it is established that a right with an internal limit is engaged, it is not clear what analysis is left to be undertaken under the *Doré/Loyola* framework. Two possibilities arise and both are equally concerning with respect to ensuring the consistent protection of *Charter* rights.

20. One possibility is that the reviewing court finds that a right with an internal limit is infringed and then still goes on to perform an assessment of whether the decision reflects a proportionate balancing between the *Charter* protections (values and rights) with the relevant statutory mandate. This is the analysis that Justice Sachs performed (in dissent) in this case at the Divisional Court below.[27]

21. Undoubtedly, such an analysis would result in lesser protection for that right in the administrative context. While in other contexts, the *Charter* analysis would effectively be concluded once it had been determined that the right had been infringed, in the administrative law context that rights infringement would still be subject to a proportionality balancing exercise to which the reviewing court would owe deference.

22. The second possibility is that the reviewing court would determine that no section 1 analysis is required. While this would ensure more consistency in the treatment of internally limited rights, it would create inconsistency between rights. As detailed further below, this would leave claims about internally limited rights to be determined entirely on a standard of correctness, while any right that was subject to the proportionality analysis would be reviewed on a standard

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[26] *R v. Grant*, 2009 SCC 32 at paras. 67-71. See discussion on this point in *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2022 ONCA 476 at para. 44.
[27] *Elementary Teachers' Federation of Ontario v. York Region District School Board*, 2020 ONSC 3685 at paras. 172-177.

of reasonableness. This could create a hierarchy of *Charter* rights, a situation this Court has recently warned against.[28]

C. The standard of review

23. Finally, the jurisprudence leaves unclear what standard of review applies at each step of the *Doré/Loyola* framework.

24. The *Doré/Loyola* framework has two steps. The preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections.[29] If so, the second step of the analysis is to determine "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."[30]

25. A plain reading of *Trinity Western* would suggest that both stages of this framework are to be reviewed on a standard of reasonableness. The Court questioned only whether the decision was "reasonable"[31] and focussed on "reasonableness review in the absence of formal reasons."[32] At no point did the Court state that any of its analysis was correctness review.

26. However, the analysis that this Court actually undertook in *Trinity Western* at the first stage of the *Doré/Loyola* framework looks more like correctness review. The Court decides for itself that "the religious freedom of members of the TWU community is limited by LSBC's decision" with no reference to the administrative decision maker's conclusion on this point.[33]

27. This Court has conducted a similar analysis in other cases where it had to determine a threshold constitutional issue in the administrative law context. For example, in *Rio Tinto*, the Court determined the scope of the duty to consult on a standard of correctness.[34] In *Ktunaxa*

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[28] See *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023 SCC 17 at para. 180].
[29] *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32 at para. 58].
[30] *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32 at para. 58].
[31] *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32 at para. 57].
[32] *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32 at paras. 51-56].
[33] *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32 at para. 61].
[34] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010 SCC 43 at para. 67].

Nation, the Court made its own determination of the scope of section 2(a) without adverting to the reasonableness of the administrative decision maker's decision.[35]

28. Several appellate courts have also undertaken the first stage of the *Doré/Loyola* framework in this way and applied a correctness standard to the determination of the scope of a *Charter* right.[36]

29. The issue, then, is that there appears to be a gap between the standard of review that the Court says should apply, and the standard of review that it actually has applied at the first step of the *Doré/Loyola* framework. As Paul Daly has put it, "the law as stated by the Supreme Court should be in line with the law as applied by the Supreme Court."[37]

30. In *Vavilov*, this Court held that constitutional matters—which undoubtedly include the *Charter*—require a final and determinative answer from the courts.[38] In order to resolve this issue, and to ensure consistent protection of Canadians' *Charter* rights, this Court should make clear that the first stage of the *Doré/Loyola* framework requires correctness review.

31. This appeal is primarily concerned with determining the scope of the section 8 *Charter* right. However, to the extent the Court considers it, there is no principled reason that correctness review should also not apply at the second stage of the *Doré/Loyola* framework. A section 1 proportionality analysis is no less a constitutional question than delineating the scope of *Charter* rights. As one commentator puts it, "the role of the courts as unique constitutional interpreters would be undermined if they could not ensure the consistent application of constitutional law across all instances of discretionary actors."[39]

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[35] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras. 68-75. On this issue see also Paul Daly, "Unresolved Issues After *Vavilov* II: The *Doré* Framework" (online: https://www.administrativelawmatters.com/blog/2020/05/06/unresolved-issues-after-vavilov-ii-the-dore-framework/).

[36] See e.g. *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025 at paras. 34-38; *Pacific Centre for Reproductive Medicine v. Medical Services Commission*, 2019 BCCA 315 at paras. 88-97; *A.B. v. Northwest Territories (Minister of Education, Culture, and Employment)*, 2021 NWTCA 8 at para. 65; *Servatius v. Alberni School District No. 70*, 2022 BCCA 421 at paras. 36, 149-245.

[37] Paul Daly, "Unresolved Issues After *Vavilov* II: The *Doré* Framework" (online: https://www.administrativelawmatters.com/blog/2020/05/06/unresolved-issues-after-vavilov-ii-the-dore-framework/).

[38] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 55-57.

[39] Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dalhousie LJ 793 at 829.

D. Conclusion – an opportunity to clarify the law

32. The inconsistencies canvassed above create the "plausible scenario of two Charters"—one that is weaker where the *Doré/Loyola* framework applies and deference is given to the administrative decision maker, and one that is stronger where correctness review applies.[40]

33. This concern is not new. When *Vavilov* was heard, this Court invited two *amici curiae* to give submissions on the reformulation of the framework for the judicial review of administrative action. The *amici* suggested that "a clarification of the *Doré/Loyola* framework" is needed because "[t]he current language of deference where administrative decisions affecting *Charter* rights are concerned risks deference to interpretations of the scope of and impact on rights that favour the state actor at the expense of the individual, as well as the development of contradictory views as to the nature of the right in question."[41] While the Court did not take up the *amici*'s invitation in *Vavilov*, it should do so in this case.

34. This Court's reconsideration of the *Doré/Loyola* framework must address the three inconsistencies identified above. Reviewing courts should employ the same framework on a standard of correctness to (1) all administrative decisions regardless of the decision maker, (2) all *Charter* rights regardless of whether they have an internal limit, and (3) any assessment of the scope of the *Charter* right.

35. Anything else will leave Canadians with inconsistent *Charter* protections. To adopt Chief Justice McLachlin's language, Canadians will have legitimate reason to fear that their rights are given different levels of protection depending on how the state has chosen to delegate and wield its power.

PART IV – COSTS

36. The BCCLA does not seek costs and asks that no costs be awarded against it.

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[40] Mark Mancini, "The Future of Section 1 in the Law of Judicial Review" (2023) SCLR 2d (forthcoming) at 11.

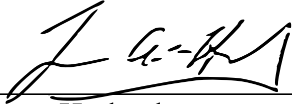
[41] Factum of the *Amici Curiae* at paras. 80, 82 in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

PART V – ORDER SOUGHT

37. The BCCLA takes no position on the outcome of the appeal.

Dated at Ottawa, Ontario this 6th day of September 2023.

Signed by



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PART VI – TABLE OF AUTHORITIES

A. Case Law

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Servatius v. Alberni School District No. 70, 2022 BCCA 421	28
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B. Secondary Sources

Source	**Paragraph(s)**
Daly, Paul, "Unresolved Issues After *Vavilov* II: The *Doré* Framework" (online: https://www.administrativelawmatters.com/blog/2020/05/06/unresolved-issues-after-vavilov-ii-the-dore-framework/)	27, 29
Mancini, Mark, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dalhousie LJ 793	4, 31
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