

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

FACTUM OF THE INTERVENER,
WORLD SIKH ORGANIZATION OF CANADA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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APPELLANTS
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-and-

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AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

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-and-

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PART I: OVERVIEW AND STATEMENTS OF FACTS

1. Administrative decision makers routinely decide issues that impact the *Charter* rights and values of individuals and communities.
2. This Court has developed the *Doré* framework to assist administrative decision makers in the determination of questions that engage *Charter* protections, and provide an approach through which such decisions can be judicially reviewed. Many *Charter* claims are first made in the administrative setting, resulting in the *Doré* framework playing a central role in the adjudication of such claims.
3. These appeals present an opportunity to clarify this framework. The World Sikh Organization of Canada (“**WSO**”) submits that the framework must be interpreted in a manner that is more consistent with the nature of the rights and liberties protected under the *Charter*. The framework permits administrative decision makers a high degree of deference in the determination of *Charter* rights and values, even in circumstances where the *Dunsmuir* factors would suggest that no deference should be provided.
4. Administrative decision makers should be afforded no deference when making decisions that engage *Charter* protections. Imposing a standard of review of correctness in such instances is most consistent with Canadian constitutional theory and the rule of law, and ensures the robust protection of *Charter* rights and values.
5. WSO adopts the facts as set out in the facts of the Appellants and Respondents in both appeals. It takes no position on the contested facts or merits of this appeal, and confines its submissions to the adequacy of the *Doré* framework as a basis to review administrative decisions that engage *Charter* rights and values.

PART II: QUESTION IN ISSUE

6. WSO’s submissions outline why correctness is a more appropriate standard to review the decisions of administrative bodies that engage *Charter* rights and values. WSO’s submissions will:

- a. overview the *Dunsmuir* factors for determining which standard of review applies to an administrative decision;
- b. examine the stages of the *Doré* framework and ascribe the degree of deference that should be afforded to each stage based on a decision maker's task, expertise, and impact; and
- c. outline how a standard of review of correctness for the *Doré* framework is more consistent with the *Dunsmuir* factors, Canadian constitutional theory, and the rule of law.

PART III: ARGUMENT

A. The *Dunsmuir* Factors for Determining the Standard of Review

7. In determining the standard by which to review the decisions of administrative bodies, this Court developed a range of factors in *Dunsmuir v New Brunswick*¹ to identify which standard of review applied: correctness or reasonableness.²

8. Generally, questions of law or jurisdiction will be decided on a standard of correctness: did the administrative body reach the *correct* decision.³ The reason for this is that questions of pure law and jurisdiction fall within the purview of section 96 courts, as they have the expertise to determine these issues, unlike administrative bodies.⁴ Exceptions exist when a privative clause exists in legislation that provides deference to the decision maker, a specialized administrative tribunal or body made the decision, and the question of law is not of central importance to the legal system or is within the specialized expertise of the decision maker.⁵

9. However, questions of law that are of “central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” will be reviewed on a standard of correctness.⁶ These questions impact the administration of justice as a whole, and “require uniform and consistent answers.”⁷

¹ *Dunsmuir v New Brunswick*, 2008 SCC 9.

² *Ibid.*, at ¶34.

³ *Ibid.*, at ¶50.

⁴ *Ibid.*, at ¶58.

⁵ *Ibid.*, at ¶55.

⁶ *Ibid.*, at ¶60.

⁷ *Ibid.*

10. By contrast, the standard of reasonableness will apply to questions of fact, discretion, or policy, and in instances where legal and factual issues are so closely intertwined that they cannot be easily separated.⁸

11. An administrative body's interpretation of its home statute will also be afforded deference, and be reviewed on a reasonableness standard.⁹ This is because administrative decision makers have "habitual familiarity with the legislative scheme they administer" or panel members may have certain qualifications that provide the administrative tribunal certain expertise.¹⁰ However, exceptions are carved out for the following questions, which are reviewed on a standard of correctness:¹¹

- a. constitutional questions regarding the division of powers;
- b. true questions of jurisdiction or *vires*;
- c. issues of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; and
- d. issues concerning the jurisdictional lines between two or more competing specialized tribunals.

B. The Stages of the *Doré* Framework and Degree of Deference

1. The *Doré* Framework

12. In *Doré v Barreau du Québec*,¹² this Court set down the analytical framework for courts to review the decisions of administrative bodies that engage *Charter* protections. The framework requires a reviewing court to determine if the decision engages the *Charter* by limiting its protections.¹³ If such a limitation exists, the court must then assess whether the decision reflects a proportionate balancing of the *Charter* protections in relation to the nature of the decision and the statutory and factual context.¹⁴

⁸ *Ibid*, at ¶51.

⁹ *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at ¶16.

¹⁰ *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at ¶33.

¹¹ *Dunsmuir v New Brunswick*, 2008 SCC 9 at ¶¶58-61.

¹² 2012 SCC 12.

¹³ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at ¶39.

¹⁴ *Doré v Barreau du Québec*, 2012 SCC 12 at ¶57.

13. A reviewing court must apply the framework to determine if the decision is reasonable by ensuring a proportionate balance has been reached between the *Charter* protections at stake and the relevant statutory mandate of the decision maker.¹⁵ The court is not permitted to review the decision based on whether it reflects a correct balance of the *Charter* rights and values at issue with the administrative body's statutory and factual context.

14. Applying the framework involves three distinct stages:¹⁶

- a. identify the *Charter* protections at issue and how it will be infringed;
- b. consider the statutory objectives of the regulatory regime; and
- c. determine how the *Charter* protections at issue will best be preserved in view of the statutory objectives (balancing the severity of the infringement with the statutory objective).

2. The Degree of Deference at Each Stage of the *Doré* Framework

15. Deference is afforded to administrative decision makers under the *Doré* framework due to their expertise with the objectives of their regulatory regime and proximity to the facts of a case.¹⁷ Concerns over judicial expediency also led to the imposition of a reasonableness standard.¹⁸ However, if the *Doré* framework is broken down to its constituent parts, with each stage assessed in relation to the *Dunsmuir* factors, it becomes apparent that these decisions do not necessarily deserve a high level of deference.

16. The first step warrants no degree of deference and should be reviewed on a correctness standard. Identifying the specific *Charter* right or value engaged, and how it could be infringed, is a pure question of law that involves the interpretation of the *Constitution*. This is often an abstract examination, requiring a thorough and wide ranging investigation of the nature of a *Charter* right or value from a cultural, historical, social, political, and legal perspective. This exercise explores foundational questions of our legal system that concern the relationship between the state and individual that only courts can answer.

¹⁵ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at ¶41.

¹⁶ Christopher Bredt and Ewa Krajewska, "Dore: All That Glitters Is Not Gold" (2014) 67 SCLR (2d) 339 at 348.

¹⁷ *Doré v Barreau du Québec*, 2012 SCC 12 at ¶35 and ¶54.

¹⁸ *Ibid*, at ¶¶51-52.

17. Deference is afforded to administrative decision makers interpreting their home statutes and any other statutes closely connected to their function.¹⁹ An administrative body will be granted a high degree of deference at the second stage of the *Doré* framework, unless it ventures into any of the exceptions where the interpretation must be reviewed on a standard of correctness.²⁰

18. The final step involves a determination of mixed fact and law: whether the decision-maker exercised its statutory mandate in a manner that best preserves the *Charter* right or value at stake. The standard of review for questions of mixed fact and law is dependent on the nature of the question under appeal and the circumstances.

19. Generally, if the question appears as mainly a question of law, where the factual elements can be easily extricated from the legal issue, then less deference will be afforded and a standard of review of correctness will apply.²¹ The opposite is true if the issue is more factual in nature or when the factual and legal issues are so enmeshed that it is difficult to separate them.²²

20. Questions involving an administrative decision maker exercising its discretion are not necessarily subject to deference.²³ Often, they involve questions of law and are subject to no deference. For instance, the misidentification and misapplication of relevant criteria in the administrative body's exercise of discretion is a question of law and reviewed on a standard of correctness.²⁴

21. Therefore, there is no clear answer on the degree of deference that should be afforded to a decision-maker at the last stage of the *Doré* framework. It depends on the nature of question and whether it can be separated from the factual circumstances of a case. And, while it may involve an exercise in discretion, issues with how discretion is exercised may be strictly a question of law that garners no deference.

¹⁹ *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at ¶22.

²⁰ As set out at paragraph 11.

²¹ *Supra*, at note 8.

²² *Ibid.*

²³ *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at ¶43.

²⁴ *Ibid.*

C. The Standard of Correctness Should Apply to the *Doré* Framework

1. The *Dunsmuir* Factors Establish that Correctness is Correct

22. An administrative decision maker's expertise and proximity to facts is not relevant at all stages of the *Doré* framework. The first stage involves a question of law; considerations over expertise and proximity are only relevant at the second step of the framework. These factors could also have some bearing at the final stage, in relation to whether the administrative body crafted the decision to ensure that the *Charter* protection is minimally impaired. However, the main exercise at this stage is to determine whether the decision best preserves the *Charter* right or value. The focus is on the *Charter* protection, and how best to balance infringements with statutory objectives.

23. Issues at the third stage will invariably concern the effect of the balancing on the *Charter* right and value, and whether it is adequate. The focus is on the *extent* of the infringement. This determination is a question of law, akin to the first stage, where the reviewing court has to determine the *scope* of the *Charter* protection. While an administrative body's expertise with its regulatory framework and proximity with the facts is necessary at this stage, it is secondary to making a legal determination of the adequacy of the infringement. If no deference would be afforded to an administrative body determining the scope of a *Charter* right or value based on the *Dunsmuir* factors, then the same must be true for determining the extent of an infringement and whether it is proportional.

24. The administrative decision maker has the discretion to render a decision that can limit a *Charter* protection. However, this discretion fits squarely into the category where it involves a question of law. Fashioning an infringement so that it best preserves a *Charter* right or value is a legal question. It involves identifying a threshold of infringement that is appropriate and determining whether a proposed infringement exceeds this threshold. In circumstances where an administrative actor misidentifies this threshold or authorizes an infringement that exceeds the appropriate threshold, then no deference should be extended to its decision.

25. The reasonableness standard does not conform to the *Dunsmuir* analysis set down by this Court. The substance of the exercise under *Doré* weighs more towards the imposition of the correctness standard. The first stage — determining the scope of the *Charter* right or value — is

a question of law. The final stage is a question of mixed fact and law, which is more aligned to the latter as it principally concerns determining the appropriate infringement threshold and ensuring the decision does not exceed that threshold. For the most part, the *Doré* framework is an exercise in interpreting the *Charter*, and should be subject to the same standard of review that exists for other questions that concern the *Constitution*.

2. Interpretations of the *Constitution* Should Not Receive Deference

26. Questions that touch on division of powers issues under the *Constitution* of Canada will attract no deference. The reason being the “the unique role of s. 96 courts as interpreters of the *Constitution*.”²⁵

27. This logic extends to interpreting *Charter* rights and values. *Charter* protections form the bedrock of our constitutional order, and forms the “supreme law of the land” with other sections of the *Constitution* of Canada.²⁶ Courts should be the final arbitrators of the *Constitution*. Prior to issuing *Doré*, this Court relied on the same understanding to find that “administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard.”²⁷

28. In fact, correctness applies in other cases where the *Charter* is engaged in the administrative setting. If an administrative body passes a regulation that is challenged based on its compliance with the *Charter*, it will be judicially reviewed on a correctness standard, with the administrative actor afforded no deference. The only exception arises when an administrative body renders a decision that limits *Charter* protections. While regulations or policies issued by an administrative body receive no deference if they engage in the *Charter*, the *Doré* framework establishes that a decision of an administrative body that interprets the *Charter* is subject to deference.

29. There is no principled reason for this exception. This exception does not accord with this Court’s pronouncements on standards of review in the context of administrative decision makers’ interpretation of the *Constitution*. The *Doré* framework requires an interpretation of the *Charter*,

²⁵ *Supra*, at note 4.

²⁶ *Weber v Ontario Hydro*, [1995] 2 SCR 929 at ¶14.

²⁷ *Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Laseur*, 2003 SCC 54 at ¶31.

even if it is in the context of determining the extent of a limitation. The fact that decisions under the framework include some factual determination should not oust the ability of a court to review the decision on a standard of correctness: the decision still involves ascertaining the scope of a *Charter* protection and the extent of a limitation. These determinations are well within the purview of a court's role as the final interpreter of the *Constitution*.

30. Neither should judicial expediency push the court towards adopting a lower standard for the protection of *Charter* rights and values in the administrative context. The *Charter* is the supreme law of the land, and enumerates the inalienable rights and liberties individuals have in relation to the state. Adopting a lower standard of review for when administrative decision makers can infringe these rights undermines the protections the *Charter* provides, and the rule of law more generally.

31. Finally, subjecting administrative tribunals to two different standards of review for the different forms of *Charter* infringing conduct they engage can result in absurd outcomes.²⁸

If the law society passes a regulation precluding advertising and a member of the profession challenges it as unconstitutional as infringing upon freedom of expression, the law society's decision is reviewed on a standard of correctness. However, if a panel of the law society decides that the nature or type of advertising by one of its members constitutes conduct unbecoming to the profession even though it also affects the member's freedom of expression, that decision is reviewed on a standard of reasonableness. This would mean that decisions that affect the body of a profession, such as in the first example, are reviewed on a standard of correctness, while decisions that affect an individual member are reviewed on a standard of reasonableness. Such an outcome is akin to saying that a declaration that a statute is unconstitutional under section 52 of the *Constitution Act, 1982* should attract a standard of review of correctness, while a decision to grant an individual remedy under section 24 of the *Charter* is reviewable on a standard of reasonableness.

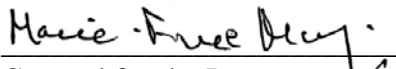
32. There needs to be consistency and clarity on how the *Charter* infringing conduct of administrative bodies can be judicially reviewed, and this can be achieved by attaching a standard of review of correctness to the *Doré* framework.

²⁸ *Supra* at note 16, at 355 and 356.

PART IV: SUBMISSIONS CONCERNING COSTS

33. WSO does not seek its costs of this appeal. WSO should not be ordered to pay the whole or any part of the costs of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 8th DAY SEPTEMBER 2017.


Counsel for the Intervener,
World Sikh Organization of Canada

Avnish Nanda
Balpreet Singh Boparai

PART V: TABLE OF AUTHORITIES

Jurisprudence	Cited At:
1. <i>British Columbia (Minister of Forests) v Okanagan Indian Band</i> , 2003 SCC 71	¶20
2. <i>Canada (Canadian Human Rights Commission) v Canada (Attorney General)</i> , 2011 SCC 53	¶11
3. <i>Doré v Barreau du Québec</i> , 2012 SCC 12	¶12, ¶15
4. <i>Dunsmuir v New Brunswick</i> , 2008 SCC 9	¶7, ¶8, ¶9, ¶10, ¶11, ¶19, ¶26
5. <i>Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.</i> , 2016 SCC 47	¶11, ¶17
6. <i>Loyola High School v Quebec (Attorney General)</i> , 2015 SCC 12	¶12, ¶13
7. <i>Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur</i> , 2003 SCC 54	¶27
8. <i>Weber v Ontario Hydro</i> , [1995] 2 SCR 929	¶27
Secondary Sources	
9. Christopher Brecht and Ewa Krajewska, " Dore: All That Glitters Is Not Gold " (2014) 67 SCLR (2d) 339	¶14, ¶31

PART VI: STATUTORY PROVISIONS

N/A