S.C.C. Court File No. 37748

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT (Respondent)

-and-

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RESPONDENT (Appellant)

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PART I – GENERAL OVERVIEW

1. Not all tribunals are created the same and not all have the same capacity to decide important questions of legal interpretation or the application of the *Canadian Charter of Rights and Freedoms*[1]. While the framework set out in *Doré*[2] and *Loyola*[3] has provided guidance to decision-makers in interpreting legislation and the *Charter* within their own discretion, the reasonableness standard of review has created uncertainty and a lack of comity across administrative tribunals.

2. Some tribunals are composed of legal specialists and have procedures which permit a full hearing of issues, whereas others are single administrators making important decisions in the lives of the most vulnerable in our society. Too high a deference to administrators without considering the nature of the decision, the nature of the decision-making process, the background of the decision-maker and the nature of the legal or *Charter* issue creates a wide range of possible decisions.

3. Yet, as was the case in *Trinity Western*, in many cases the wide range of possible decisions ultimately vary between only "yes" or "no".[4] Without stronger intervention from the judiciary on such decisions, the administrative law system in Canada risks losing its access to the principle of *stare decisis* and with it, a progressive approach to legal and constitutional interpretation.

PART II – STATEMENT OF POSITION

4. The Community& Legal Aid Services Programme (CLASP) at the Osgoode Hall Law School does not take a position regarding the outcome of the within matter. Instead, its submissions are restricted to the level of deference owed to decision-makers in administrative law, particularly where issues pertaining to the *Canadian Charter of Rights and Freedoms* are raised.

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[1] *Canadian Charter of Rights and Freedoms, s 8, Part 1 of the Constitution Act, 1982,* being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[2] *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395
[3] *Loyola High School v. Quebec (Attorney General),* 2015 SCC 12
[4] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; at para 84

5. CLASP's position is that the breadth of administrative decision-making under Canadian law has become too broad to permit one standard of review for all decision-makers and that a nuanced approach which considers the nature of the decision, the nature of the decision-making process, the *Charter* right or value at issue and the nature of the decision-maker is required. CLASP argues that a rebuttable presumption must take these factors into consideration in an analysis of deference to be accorded to administrative tribunals.

6. CLASPS's argument will be presented as follows:

(a) The role of *stare decisis* in progressive *Charter* interpretation;
(b) The range of decision-makers and tribunals;
(c) The *Doré / Loyola* Framework and a rebuttable presumption;
(d) The impossibility of one standard of review.

PART III – STATEMENT OF ARGUMENT

A. *Stare Decisis* and Progressive *Charter* Interpretation

7. The principle of *stare decisis* is a cornerstone of Canadian common law and, particularly, Canadian administrative law. This principle not only sets out the hierarchy in which the judiciary finds itself in relation to administrative tribunals, but provides the mechanism for the progressive growth of the law.

8. Justice Brian Dickson referred to the "living tree" philosophy of legal interpretation which advanced the notion that the constitution must be read in a progressive manner. While not proposing unlimited growth; the living tree was meant to embody a progression in law to adapt for new ideas, realities and conventions, while remaining true to its original intent: "not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts."[5]

9. At the heart of this progress is the role of *stare decisis* and the development of the law through binding legal analysis and review. However, an overly deferential approach to

[5] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at para 117.

administrative decisions, particularly decisions implicating the *Charter*, insulates such decisions from judicial scrutiny. As a teaching clinic, CLASP recognizes the importance of judicial interpretation on the continued evolution of the law.

10. Under a correctness standard in judicial review, administrative bodies are bound by declarations of courts. As such, applicants with sufficiently similar grounds can expect comity in decisions. However, under a reasonableness standard, the range of possible decisions restricts a court in providing legal guidance. As a result, comity and predictability in the law are not crystalized through *stare decisis*. This was pointed out, albeit in dissent, by Justices Brown and Côté JJ. in *Wilson v. Atomic Energy of Canada Ltd.*[6]

11. This is certainly not to suggest that all decisions must be decided on a correctness standard. As explained in *Doré*, there is benefit in placing specialist decision-makers in a position to interpret their own statute and its interaction with the *Charter*. However, as will be pointed out in the next section, *the nature of the decision-maker* is an important factor in deciding how much deference should be accorded. It is respectfully submitted that one standard of reasonableness for all decision-makers is not possible.

B. The Range of Decision-Makers and Tribunals

12. There is a wide range of legislated decision-makers within Canadian administrative law. Some, like the disciplinary committee in *Doré*, are clearly specialists in legal matters, others such as members of Immigration and Refugee Board of Canada [IRB], have a variety of skills and backgrounds. Still, other decision-makers, like those from the Social Justice Tribunals of Ontario (SJTO), may or may not be appointed according to a merit-based scheme.

13. Nor are all decision makers appointed equally. For example, even under the same tribunal (the IRB), the Immigration and Refugee Protection Act ["IRPA"] provides for different appointment procedures for members of the Refugee Protection Division and Immigration Division (who are public servants) as opposed to the appellate Refugee Appeal Division and Immigration Appeal Division (who are appointed by the Governor in Council).[7] The Act further

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[6] *Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29 at paras 81 – 89
[7] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 153(1), 172(2).

makes provision for at least 10% of the Members of the Appeal Divisions to be members of a provincial Bar or *la Chambre des notaires du Québec.*[8] This is not required for members of the lower divisions who make the majority of decisions under the Act, some of which are not subject to any appeal. For example, refugees who made claims at a Canada -U.S. boarder cannot access to the Refugee Appeal Division (Safe Third Country Agreement). Those held in immigration detention have no access to the Immigration Appeal Division.

14. The deleterious effect on substantive *Charter* rights by lower level decision-makers who are appointed directly by the Executive was made apparent in the recent Federal Audit of Immigration detention decisions made by the Immigration Division.[9] CLASP cautions that an unduly high standard of deference is effectively asking the court to relinquish much of its role under the Constitution to the Executive.

15. In Ontario, the provincial government enacted the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009 (ATAGAA),* with the stated purpose of ensuring "that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making."[10]

16. The *ATAGAA* governs the SJTO, which includes the Human Rights Tribunal of Ontario, the Landlord and Tenant Board, the Criminal Injuries Compensation Board, and the Social Benefits Tribunal. While the stated intention is to create further independence from executive control, the act has been criticized on the grounds that it enhances "ministers' direct and indirect control of tribunals to a degree that effectively transfers control from the tribunal chairs to the ministers."[11] While the *ATAGAA* provides that appointments must be merit-based, it is the minister who

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[8] *Ibid*, s 153 (4).
[9] Canada, Immigration and Refugee Board, *Report of the 2017/2018 External Audit (Detention Review)*, online: https://irb-cisr.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx#intro
[10] *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009,* S.O. 2009, c. 33, Sched. 5 (*ATAGAA*) s 1
[11] The Ontario Bar Association, "Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009: Cause for Concern" (2011) 24 Can J Admin L & Prac 225 at 226; see also Laverne Jacobs, "A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario's Adjudicative Tribunals Accountability Legislation", (2010) 28:2 Windsor Yearbook of Access to Justice, 285 at 292-3. [Book of Authority, Tab 1].

specifies the details for the recruitment and selection of members.[12] The *ATAGAA* further provides that the following cannot be implemented without minister approval: mandate and mission statements, a member accountability framework, and business plan.[13] Finally, the merit-based selection process is waived under several circumstances like reappointments or in filling unanticipated vacancies.[14]

17. Moreover, not all decision-makers are tribunals. Particularly in immigration law, but just as often in decision-making for disability benefits or access to housing, the decision-maker is an individual exercising discretion on his or her own. For example, *IRPA* gives jurisdiction to individual officers or Minister's Delegates to make decisions involve fundamental *Charter* rights (separating parents from children or deporting individuals to places where there is a real risk of death). The majority of these decisions are done on paper without convoking a hearing.

18. Many of CLASP's clients, who come from vulnerable and often racialized communities, are routinely faced with individual decision-makers on a wide range of issues relating to immigration, housing, disability benefits and mental health care. Each decision-maker comes with his or her own expertise but may not necessarily be steeped in legal interpretation. While flexible decision-making is the hallmark of the Canadian administrative law system, the judiciary cannot prevent itself from reviewing such decisions due to a single deferential standard of review of reasonableness.

19. It is submitted that the nature of the decision-maker is an important factor in deciding how much deference is due to his or her decision. Decision-makers in a hearing setting may have better access to legal arguments than an Officer making his or her decision based off documentation alone. Tribunals with a legislated contingent of legally trained individuals would appear to have been intended by Parliament to provide legal analysis to decisions (for example in the Appeal Divisions of the Immigration and Refugee Board). Although tribunals or individual decision-makers with other backgrounds, such as health and social work, provide important flexibility and expert knowledge in those fields, their legal decisions may warrant additional scrutiny from the courts.

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[12] *ATAGAA*, s 14(3).
[13] *ATAGAA*, *ss* 3(3), 7(3), 12(3).
[14] O Reg 88/11, ss 2(1), 2(2).

20. In *Bell Canada v Canadian Telephone Employees Association*, this court rejected a categorical understanding of tribunals as "quasi-judicial" or "quasi-executive" in favour of a contextual approach to determining the level of a tribunal's independence.[15] CLASP submits that tribunals or decision-makers with strong connections to the executive branch should also be subject to further scrutiny than tribunals who are, both in law and in practice, at an arm's length from government. While courts must be concerned, as they are now, with entering the domain of policy, independence in legal interpretation, particularly of *Charter* issues should be a factor in determining how much deference should be given to a particular decision-maker.

21. This relationship with the executive can also have the effect of creating incentives for retrogressive approaches to human rights and *Charter* interpretation. An official whose performance is based on good enforcement may be incentivized to maintain an enforcement orientation to decision-making. A court's hesitation to look into the nature of the decision-maker and the intention created in legislation through various levels of control by the executive risks stunting the development of rights. This was surely not the intention of the legislature when the *Charter* was included in Canada's supreme law.

C. The Doré / Loyola Framework and a Rebuttable Presumption

22. A differential, or calibrated, approach to the reasonableness standard of review, particularly in matters pertaining to the *Charter*, would fit into the *Doré / Loyola* framework. The approach sought in this submission is not to necessarily open all decisions to a correctness standard, but to use various factors to decide the level of deference to give.

23. The presumption that a decision-maker is well-placed to make decisions on proportionality arguments under the *Charter* has utility. It permits an expert in his or her field to balance factors that a court, a generalist in many matters, will not have at its disposal.

24. However, not all decision-makers are so expert. Many decision-makers are simply implementing executive policy. And though that policy may change from time to time, the

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[15] *Bell v. Canadian Telephone Employees Association* [2003] 1 SCR 884 at para 22; See also Lorne Sossin & Charles W. Smith, "The Politics of Transparency and Independence before Administrative Boards." (2012) 75:1 Saskatchewan L Rev, 13 (*The Politics of Transparency*) at 33

process of referring back to policy does not. For example, balancing the objectives of IRPA and a *Charter* question at issue is a legal matter in which an immigration officer is not necessarily in a better position to answer than a court. An unduly high standard of deference of such decisions risks reversing the very policy upon which the system is based and hands this expert area back to the generalist.

25. The presumption of a decision-makers expertise has practical effects beyond the decision itself. Again, in the immigration context, the presumption plays an important role whether a court grants a stay of removal from deportation under the regime set out in *RJR-MacDonald*.[16] The application for leave for judicial review itself requires an analysis of whether there is a "fairly arguable case."[17] In these contexts, the presumption of a decision-makers expertise resulting in the adoption of a reasonableness standard of review works against the applicant. There are plenty of examples outside of the immigration context.

26. It is respectfully submitted that this presumption of expertise/independence must be rebuttable and at an early point in the proceedings. Moreover a rebuttable presumption will allow for factors other than the nature of the decision maker (such as the nature of the decision, the nature of the decision-making process, and the *Charter* right or value at issue) to determine the level of deference to accord a decision-maker. This is an approach that can easily fall within the current *Doré / Loyola* framework.

D. The Impossibility of One Standard of Review

27. CLASP also notes that the *Vavilov* matter is to be heard at the same time as *NFL* and *Bell Canada*. CLASP's view is that it is not possible to create one standard of review for all administrative decisions. Administrative law has become simply too broad and reliant on varying types of expertise to subject all decision-making to the same rules. Large corporations, while still enjoying the rights to good administrative decision-making, do not have the same interests as marginalized individuals whose lives and dignity can be affected on a daily basis by decision-makers. Ensuring the progressive realization of Charter rights must entail a different approach, and standard of review, than decision-making on commercial interests. The two, put

[16] *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199
[17] *Hinton v. MCI*, 2008 FC 1007

frankly, are not comparable or compatible. While a highly deferential approach may be completely appropriate for a tribunal dealing with energy or communications, it may not be appropriate for human rights concerns or issues relating to liberty and security of the person.

28. Again, the factors listed above will determine the level of deference which would be accorded the decision-maker. This will include an analysis of whether the *Charter* or legal issue is of a fundamental nature or not.

29. Some matters will clearly fall within the domain of a court's expertise, including matters relating to detention. The IRPA allows for administrative detention (one of the few examples of the deprivation of liberty by an administrative tribunal). The deprivation of liberty is an area which falls squarely within the court's knowledge and expertise and should provide for a presumption that the court will come to an equal if not better decision than the administrator.

E. Conclusion

30. CLASP submits that an unduly high standard of deference undermines the role of *stare decisis* in progressive *Charter* interpretation in administrative law. Second, that there cannot be one standard or review for all administrative decision and thus the nature of decision-makers and tribunals must be factored into the amount of deference to be granted. And finally that this approach that can easily fall within the current *Doré / Loyola* framework.

31. CLASP's clients and community include numerous people with and without status in Canada, but many without a voice in our body politic. The nature of judicial review is crucial to ensure that the judiciary fulfills its constitutional mandate to ensure access to justice to the vulnerable through effective remedies and a critical approach to decision-making. While judicial review may be a discretionary remedy on the part of a court, the presumption of the reasonableness of a decision should not prevent access to justice.

32. CLASP submits that at a minimum, the incorporation of a factual analysis into the nature of the administrative tribunal will help ensure that the appropriate deference is given to administrative decisions.

PART IV – COSTS

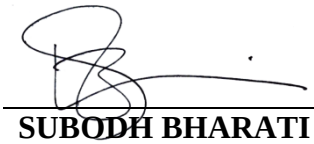
33. CLASP does not seek an order as to costs, and respectfully requests that no order as to costs be made against it.

PART V – ORDER SOUGHT

34. CLASP takes no issue on the disposition of the appeal, but seeks permission of the Honourable Court to present brief oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of October, 2018.

DAVID COTE



SUBODH BHARATI

Counsel for the Intervener, Community &
Legal Aid Services Programme

PART VI – TABLE OF AUTHORITIES

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