Court 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

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA TEACHERS' FEDERATION, CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION, CENTRAL DES SYNDICATS DU QUÉBEC, CENTRE FOR FREE EXPRESSION, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, EGALE CANADA, NATIONAL POLICE FEDERATION, ONTARIO COLLEGE OF TEACHERS, ONTARIO PRINCIPALS' COUNCIL, POWER WORKERS' UNION AND SOCIETY OF UNITED PROFESSIONALS, and QUEEN'S PRISON LAW CLINIC

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(pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Attorney General of Canada ("Canada") intervenes to make the following submissions: (a) the standard of review of decisions where the facts before an administrative decision-maker engage rights protected under the *Canadian Charter of Rights and Freedoms* ("*Charter*") is reasonableness; and (b) in the public sector employment context, s. 8 of the *Charter* should be applied in a flexible and contextual manner.

2. On the first issue, reasonableness accords with the presumption, articulated in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[1] that all administrative decisions – absent rule of law or legislative intent concerns that do not arise in the present case – are reviewed on this standard. Adopting reasonableness in reviewing the arbitrator's decision is also consistent with the approach taken by this Court in *Doré v Barreau du Québec* and *Loyola High School v Québec (Attorney General).*[2]

3. On the second issue, in cases where a claimant alleges a limitation of s. 8 rights in an employment setting where the employer is subject to the *Charter*, the analysis must take into account the operational realities of the particular workplace. In the public sector employment context, the s. 8 analysis must recognize the unique role and responsibilities of the state when it is acting as an employer, including the state's need to protect various public interests.

4. Canada takes no position on the proper disposition of this appeal. Further, Canada takes no position on the facts in this appeal or on the issue of whether the *Charter* applies to public school boards.

PART II – QUESTIONS IN ISSUE

5. Canada's intervention addresses two issues: a) What is the proper standard of review in relation to administrative decisions that engage *Charter* rights; and b) What is the proper scope and application of s. 8 of the *Charter* in the public sector employment setting?

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[1] 2019 SCC 65 [***Vavilov***].
[2] 2012 SCC 12 [***Doré***]; 2015 SCC 12 [***Loyola***].

PART III – STATEMENT OF ARGUMENT

A. The standard of review for decisions that engage *Charter* rights is reasonableness

i. Reasonableness is consistent with this Court's decisions in *Vavilov* and *Doré/Loyola*

6. Reasonableness is the applicable standard of review for decisions where the facts before an administrative decision-maker engage *Charter* rights.[3] This standard is consistent with this Court's intention in *Vavilov*, and subsequent cases, to "chart a new course forward,"[4] aligning the standard of review analysis with the fundamental purpose of judicial review, which is "to maintain the rule of law while giving effect to legislative intent".[5]

7. As the presumptive standard of review, courts may only depart from the reasonableness standard in rare and exceptional cases.[6] When, for example, this Court added a further category to the five exceptions to reasonableness review in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*,[7] it did so because the new category – where a tribunal and the court share concurrent jurisdiction over the interpretation of a statute – accords with legislative intent and rule of law concerns. The fact of concurrent jurisdiction demonstrates an express legislative intention to involve the courts in the statute's interpretation – at issue in *SOCAN* was the interpretation of s. 2.4(1.1) of the *Copyright Act*.[8] This new category for correctness review also accords with the rule of law because it prevents the problem of competing interpretations arising between the tribunal and the courts.[9]

8. Similar rule of law or legislative intent considerations do not arise in this appeal. Here, this Court is reviewing an administrative decision that determined whether particular conduct by the principal and the school board was consistent with the *Charter*. Though this question includes consideration of constitutional principles, it is distinct from the "constitutional questions" category identified in *Vavilov*. That category comprises questions concerning the constitutional validity of

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[3] *Vavilov* at para 57.
[4] *Vavilov* at para 2.
[5] *Vavilov* at para 2.
[6] *Vavilov* at para 10.
[7] 2022 SCC 30 [***SOCAN***].
[8] *SOCAN* at para 31.
[9] *SOCAN* at paras 33-39.

legislation and/or the scope of "Aboriginal and treaty rights" under s. 35 of the *Constitution Act, 1982*.[10] This category of legal questions must be reviewed on a standard of correctness because the Constitution is the source of all limits on state action.[11] To the extent that an administrative decision-maker must determine whether a statute operates within constitutional limits, the rule of law requires "a final and determinate answer from the courts".[12]

9. On the other hand, where the facts before an administrative decision-maker engage *Charter* rights, evaluation of the resulting decision generates different kinds of questions for the court. These are questions such as whether the decision-maker was alive to the implicated *Charter* protections and whether they reached a decision that considers these protections in light of competing values embedded in the applicable statutory scheme. An administrative decision-maker's treatment of these questions does not raise the same rule of law concerns as envisioned by the "constitutional questions" exemption in *Vavilov* because the answers to these questions are intrinsically linked to the specific statutory and factual context before the decision-maker.[13] In these types of cases, the decision-maker is not determining the scope of a *Charter* right in the abstract. Instead, they are considering the application of *Charter* protections to a particular, individualized context.

10. Adopting reasonableness conforms with the recalibration of the standard of review analysis in *Vavilov* and accords with the notion that judicial review ought to be guided by an overall policy of deference. The mere fact that *Charter* rights may be engaged by an administrative decision does not displace the reasonableness standard. Indeed, deference in such cases is consistent with *Vavilov* and reflects the fact that courts do not possess a monopoly over the adjudication of administrative matters, or on the adjudication of the *Charter*.[14]

11. In *Doré*, this Court sought to achieve "conceptual harmony" between the principles of reasonableness and the traditional justificatory analysis under the *Charter*.[15] This approach aims

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[10] *Vavilov* at paras 55-57.
[11] *Vavilov* at paras 55-56, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 **[*Dunsmuir*]** at para 58 and *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322.
[12] *Vavilov* at para 55.
[13] *Vavilov* at para 55.
[14] See, for example, *Dunsmuir* at para 49, cited in *Doré* at para 30.
[15] *Doré* at para 57.

to balance the *Charter* rights at issue in the case with the relevant statutory objectives. Under this framework, the administrative decision-maker first considers the statutory objectives. The decision-maker then asks how the *Charter* rights at issue can be reconciled with those objectives.[16] On judicial review, the role of the court is to assess whether, "given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."[17] If the reviewing court determines that the decision-maker has proportionately balanced these interests, it will uphold the decision as reasonable.[18]

12. In its subsequent decision in *Loyola*, this Court affirmed that the concept of proportionate balancing from *Doré* "is one that gives effect, as fully as possible, to the *Charter* protections at stake given the particular statutory mandate."[19] Even though this balancing exercise is distinct from the traditional *Oakes* test under s. 1, it does not constitute a less strenuous or hyper-deferential form of review. Rather it remains a "robust" analysis that works the same "justificatory muscles" as the *Oakes* test.[20]

13. The relevance of *Doré* and *Loyola* to the judicial review of administrative decisions dealing with *Charter* issues is, however, not limited to administrative decisions whose primary focus is the balancing of *Charter* protections with statutory objectives. Before conducting this balancing exercise, an administrative decision-maker must first consider whether and to what extent the relevant *Charter* right is engaged on the facts before them. An administrative decision-maker's assessment of engagement, like their assessment of proportionality, is inextricably linked to the factual context before them.

14. Assessment and evaluation of the facts of individual matters is at the core of the statutory decision-maker's jurisdiction. So is evaluating whether and to what extent the facts engage a *Charter* right. It follows that a reviewing court should apply the same standard of review (i.e. reasonableness) to all aspects of the decision-maker's consideration of the *Charter* right at issue.

15. In some cases, such as *Doré* and *Loyola*, it may be obvious that a *Charter* right is engaged. In other cases, such as the present one, the administrative decision-maker must assess whether the

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[16] *Doré* at paras 55-56.
[17] *Doré* at para 57.
[18] *Doré* at para 58.
[19] *Loyola* at para 39.
[20] *Loyola* at para 40.

alleged *Charter* right is engaged and whether the impact on that *Charter* right is consistent with any internal limits included in that right, before addressing whether any limitation of the right is justified. While the decision should be reviewed for reasonableness, this does not mean that *Charter* jurisprudence is irrelevant. These assessments require an appreciation of the scope of the right that is consistent with the relevant jurisprudence. An administrative decision premised on an understanding of the scope or nature of a *Charter* right that is inconsistent with binding jurisprudence on these topics would be unreasonable.[21]

16. This approach aligns with this Court's intention in *Vavilov* to create a paradigm shift within administrative law – to inculcate a "culture of justification" among administrative decision-makers.[22] In a 2021 article that examines the interaction of *Doré* and *Vavilov*, Professor Stacey posits that when read together, these cases "construct a unified model of public law" where administrative decisions must be justified according to a "congruence with a hierarchy of norms which has *Charter* values at its apex."[23] He observes that *Vavilov's* emphasis on reasons and *Doré's* robust proportionality analysis are rooted in the "same commitment to a culture of justification".[24] *Vavilov* and *Doré* share the overarching aim of focusing judicial review on the question of whether a decision is "justified by its congruence with fundamental constitutional values".[25]

ii. The arbitrator's decision is reviewable on a standard of reasonableness

17. The proper standard of review of the arbitrator's decision on whether the conduct of the principal and school board respected the grievors' s. 8 *Charter* rights is reasonableness. The matter under review is not one of the exceptions to the reasonableness presumption set out in *Vavilov*, nor does it raise any legislative intent or rule of law concerns requiring correctness review.

18. The Court of Appeal's reliance on *R v Shepherd* to determine the standard of review does not accord with this Court's jurisprudence on the review of administrative decision-making.[26]

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[21] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 116.
[22] *Vavilov* at paras 2, 14.
[23] Richard Stacey, *A Unified Model of Public Law:* Charter *Values and Reasonableness Review in Canada*, (2021) 71 U Toronto LJ 338 [**Stacey, *A Unified Model***] at 338.
[24] Stacey, *A Unified Model* at 364.
[25] Stacey, *A Unified Model* at 365.
[26] 2009 SCC 35 [***Shepherd***].

Shepherd has no application here, because that decision does not deal with the judicial review of administrative decisions; rather, it deals with the proper standard of appellate review in the criminal context.

19. While reasonableness is a single standard, it is one that accounts for the great variety of decisions and decision-makers that comprise the administrative state – reasonableness "takes its colour from the context".[27] Ultimately, a reviewing court must scrutinize a decision's particular context to identify the relevant constraints that operate in the decision under review.[28]

20. The questions before the arbitrator were heavily dependent on a particular factual and statutory context, and the arbitrator's answers to those questions should be afforded deference on judicial review. The arbitrator addressed whether: (1) the principal's actions interfered with the grievors' reasonable expectation of privacy so as to constitute a "search" within the meaning of s. 8; (2) any search was reasonable having regard to the lawful authority for the search and the reasonableness of its exercise; (3) any limit on the grievors' s. 8 rights was justified under s. 1; and (4) exclusion of the results of the search was just and appropriate in the circumstances.

21. The analytical approach from *Doré* and *Loyola* applies in this case because the issue before the courts was the judicial review of the arbitrator's decision regarding the application of s. 8 of the *Charter* to a specific factual context. Reasonableness review recognizes that every stage of the *Charter* analysis is informed by the factual and statutory context, and affords appropriate deference to the arbitrator's understanding of that context throughout the *Charter* analysis, including on issues such as:

- the operational realities of the workplace and the degree to which they would or would not support a reasonable expectation of privacy in the circumstances;
- the interpretation of the *Act* and the scope of the authority it confers to engage in workplace searches;
- the reasonableness of the principal's exercise of his authority under the *Act*; and
- what constitutes a just and appropriate remedy in the circumstances, including whether the information obtained by the principal should be excluded.

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[27] *Vavilov* at para 89.
[28] *Vavilov* at para 89.

22. Ultimately, the Court of Appeal's assessment of the arbitrator's decision is out of step with this Court's instruction that the aim of judicial review is to give effect to legislative intent wherever possible, while maintaining the rule of law. Rather than furthering a "culture of justification" in which reviewing courts carefully assess the reasoning of an administrative decision-maker, the Court of Appeal's approach assigns to the courts a monopoly over the adjudication of administrative decisions that engage the *Charter*. Such an approach is not consistent with the "new course" charted by *Vavilov*.

B. The scope and application of s. 8 of the *Charter* in the public sector employment setting

i. Operational realities must be a key consideration in assessing the employee's reasonable expectation of privacy

23. Section 8 of the *Charter* applies to searches by government employers. However, this Court has repeatedly affirmed that s. 8 standards are more flexible in the administrative and regulatory contexts than in the criminal context.[29] The application of s. 8 in the employment context must be similarly flexible and must take into account the operational realities of the workplace. As this Court concluded in *British Columbia Securities Commission v Branch*, the "greater the departure from the realm of criminal law, the more flexible will be the approach."[30]

24. The application of s. 8 in the public employment context ought to recognize the unique role and responsibilities of the state when it acts as an employer. As an employer, the state owes obligations to both its employees, such as maintaining a healthy and safe work environment, and to the public at large, such as ensuring the proper delivery of services and the functioning of public sector organizations.

25. While a government employer may be subject to the *Charter*, an employee's s. 8 rights will only be engaged in circumstances where the employer's actions interfere with a reasonable expectation of privacy. The objective reasonableness of an employee's expectation of privacy is

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[29] *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3 [***Branch***] at para 52; *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425.
[30] *Branch* at para 52.

assessed using a context-specific approach that requires considering the totality of the circumstances in which the *Charter* claim arises.[31]

26. In general, privacy expectations are diminished in the employment context given the reasonable expectation that there will be some degree of monitoring for employment-related purposes. In the context of a public sector employer-employee relationship, an assessment of the reasonableness of an employee's expectation of privacy ought to consider, among other things, the nature of and the operational realities of the specific workplace, including relevant workplace policies, practices and customs.[32]

27. Depending on the particular context, certain types of searches may not interfere with constitutionally protected privacy interests at all. This may be the case, for example, in relation to routine monitoring for network security purposes as well as for certain types of monitoring for compliance with workplace policies. Even where employer searches do engage s. 8 rights, privacy expectations in relation to legitimate employment-related searches will generally be diminished and will, in turn, inform the "reasonableness" stage of the analysis.

ii. Employer searches and seizures are generally reasonable when limited in scope and for a management purpose

28. Section 8 of the *Charter* only protects against *unreasonable* searches. An employer search that interferes with a reasonable expectation of privacy will be consistent with s. 8 if it is: (1) authorized by a law (2) that is itself reasonable in the sense of striking an appropriate balance between privacy and the relevant state interest, and (3) carried out in a reasonable manner.[33] The reasonableness standard under s. 8 is a flexible one that is sensitive to the societal interests at play in the particular context.[34]

29. The application of s. 8 to public sector employers must be flexible, accounting for the operational realities of government workplaces and the unique roles and responsibilities of

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[31] *R v Patrick*, 2009 SCC 17 at para 81; *R v McKinlay Transport Ltd* [1990] 1 SCR 627 at 645.
[32] *R v Cole*, 2012 SCC 53 at para 52.
[33] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 [***Hunter v Southam***] at 160; *R v Collins*, [1987] 1 SCR 265 at 278.
[34] *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 55; *Hunter v Southam* at 159-60; *Comité paritaire de l'industrie de la chemise v Potash*; *Comité paritaire de l'industrie de la chemise v Sélection Milton*, [1994] 2 SCR 406 at 442.

government employers. This Court's jurisprudence has consistently affirmed the importance of a contextual approach to s. 8. In the public sector employment context, the employer's need to protect various public interests weighs heavily in the assessment of whether a search or seizure is unreasonable.

30. When reviewing the reasonableness of searches carried out by government employers, regard must be had for the state's legitimate interests as an employer. These interests include ensuring the quality of the work and actions undertaken on the employer's behalf, ensuring a healthy and safe workplace for employees and third parties and safeguarding employer assets. Such an approach ensures that the state, as an employer, has the necessary latitude to properly fulfill its obligations to both its employees and to the public at large.

31. While assessing the reasonableness of a search or seizure will always be a highly contextual analysis, the routine monitoring of employer-issued devices for management purposes, such as for compliance with statutory obligations, employer policies or network security, will generally be reasonable. Specific examples of reasonable monitoring in the federal government context include the monitoring of network devices to protect taxpayer information, to detect fraud, to ensure the quality of public services, and to protect institutional and national security interests.

C. Conclusion

32. This appeal provides the Court with the opportunity to affirm the robustness of the reasonableness review articulated in *Vavilov*. Confirming that reasonableness applies when reviewing administrative decisions that engage *Charter* rights is consistent with the fundamental principle of judicial review, namely, giving effect to legislative intent while maintaining the rule of law. This appeal also provides the opportunity for the Court to affirm the importance of a contextual approach in determining the scope and application of s. 8 of the *Charter*. For public sector employers, such an approach is crucial given the various considerations that must be balanced when assessing whether an employee has a reasonable expectation of privacy in the circumstances and, if so, whether the employer's search or seizure was unreasonable.

PART IV - SUBMISSIONS ON COSTS

33. Canada does not seek costs and requests that no costs should be ordered against it.

PART V - NATURE OF ORDER SOUGHT

34. Canada makes no submissions respecting the proper disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver this 7th day of September, 2023.

BJ Wray / Joseph Cheng
Counsel for the Attorney General of Canada

PART VI - TABLE OF AUTHORITIES

	Cases	At Para(s)
1.	*British Columbia Securities Commission v Branch*, [1995] 2 SCR 3	23
2.	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65	2, 6-10, 16-17, 19, 22, 32
3.	*Comité paritaire de l'industrie de la chemise v Potash*; *Comité paritaire de l'industrie de la chemise v Sélection Milton*, [1994] 2 SCR 406	28
4.	*Doré v Barreau du Québec*, 2012 SCC 12	2, 10-13, 15-16, 21
5.	*Dunsmuir v New Brunswick*, 2008 SCC 9	8, 10
6.	*Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46	28
7.	*Hunter et al v Southam Inc*, [1984] 2 SCR 145	28
8.	*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32	15
9.	*Loyola High School v Québec (Attorney General)*, 2015 SCC 12	2, 12-13, 15, 21
10.	*R v Cole*, 2012 SCC 53	26
11.	*R v Collins*, [1987] 1 SCR 265	28
12.	*R v McKinlay Transport Ltd*, [1990] 1 SCR 627	25
13.	*R v Patrick*, 2009 SCC 17	25
14.	*R v Shepherd*, 2009 SCC 35	18
15.	*Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30	7
16.	*Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425	23
17.	*Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322	8

	Statute	**At Para(s)**
18.	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	1, 3-6, 8-17, 21-23, 25, 28, 32

	Secondary Source	**At Para(s)**
19.	Richard Stacey, *A Unified Model of Public Law:* Charter *Values and Reasonableness Review in Canada*, (2021) 71 U Toronto LJ 338	16