SCC file no. 40360

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

BETWEEN:

YORK REGIONAL DISTRICT SCHOOL BOARD

APPELLANT

AND

ELEMENTARY TEACHERS' FEDERATION OF ONTARIO

RESPONDENT

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PART I and II – OVERVIEW AND ISSUES

1. The focus of the Asper Centre's submissions is how administrative actors, decisionmakers, and courts of review should understand this Court's reasons in *Doré*,[1] especially in light of the revised approach to standard of review adopted in *Vavilov*[2] and the culture of justification to which this Court has so emphatically committed.[3]

2. The Centre draws two sets of distinctions: (1) between governmental and non-governmental actors exercising powers pursuant to a statutory regime; and (2) between administrative, adjudicative, and legislative-like actions by such non-governmental actors. In light of these distinctions, the Centre makes three related submissions.

3. First, the Centre submits that the standard of judicial review for administrative decisions affecting *Charter* rights must be distinguished from the analytical framework or 'mode of reasoning'[4] that *Doré* sets out for assessing the justifiability of those decisions under section 1 of the *Charter*. The Asper Centre will argue that these two questions are separate and distinct.

4. Second, the Centre submits that whether the '*Doré* approach' or the '*Oakes* approach' is the appropriate analytical framework for determining if a rights limitation imposed by a contested action is justified should depend on which of these two analytical frameworks will allow the actor to explain her decision as fully and clearly as possible. The Centre proposes a two-stage inquiry to determine whether *Doré* or an *Oakes* analysis should be applied:

a. Is the actor a part of government?[5] If so, the full *Charter* analysis, including the *Oakes*

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[1] *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].
[2] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].
[3] *Vavilov*, *supra* at para 2.
[4] Richard Stacey, "Public Law's Cerberus: A Three-Headed Approach to Charter Rights-Limiting Administrative Decisions" (2023) *Canadian Journal of Law & Jurisprudence* 1–36.
[5] This Court's jurisprudence under s. 32 of the *Charter* provides guidance on how to determine if an entity is part of "government". It has considered a number of factors: e.g. (i) whether the government appoints the entity's governing body; (ii) whether the government can exercise legal control over the entity; (iii) whether the entity is stated to be an agent of the government; (iv) whether the entity receives government funding; and (v) how much control the entity has over managing its funds see e.g. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at paras. 20-

tests, is appropriate.

b. If the actor is non-governmental, then, once it has been demonstrated that a *Charter* right or value is breached or otherwise engaged, the inquiry is into the nature of the actor's function: the *Oakes* approach is applicable to the exercise of 'legislative' functions;[6] while the *Doré* approach is applicable to the exercise of administrative or adjudicative functions, including adjudications which evaluate those administrative actions.

5. The Centre argues in this respect that *Doré's* analytical framework for assessing the justifiability of administrative decisions limiting *Charter* rights is on all fours with *Vavilov* and continues to be valuable in allowing certain decisionmakers to fully explain their decisions.

6. Third, the Centre argues that whenever a decision about the justifiability of a rights limitation under section 1 is taken on judicial review, the standard of review must be correctness. This is required regardless of the analytical framework utilized by the actor subject to review.

7. The Centre's submissions aim to allay a concern that the *Doré* approach exposes *Charter* rights to a greater threat of limitation than the full *Oakes* analysis.[7] This concern has arisen from *Doré's* dictum that the standard of review for adjudicated decisions affecting *Charter* rights is reasonableness, and from conflating *Doré's* analytical framework with reasonableness review. Separating *Doré's* analytical framework from the reasonableness standard of review ensures consistency in the review of all decisions relating to the scope and limitation of *Charter* rights.

45; *Stoffman v. Vancouver General Hospital,* [1990] 3 SCR 483 at para. 39; *Eldridge v. British Columbia (Attorney General),* [1997] 3 SCR 624 at paras. 40-44; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570 at p. 584.

[6] The Court has long recognized that administrative bodies can exercise legislative-like functions: see e.g. *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at p. 558.

[7] Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561 at 580-81; Christopher D Bredt & Ewa Krajewska, "Doré: All that Glitters is Not Gold" (2014) 67 SCLR (2d) 339 at 353-55, 357-59; Paul Daly, "Unresolved Issues after *Vavilov* II: The *Doré* Framework" (5 May 2020), online (blog): *Administrative Law Matters* <administrativelawmatters.com/blog/2020/05/06/unresolved-issues-after-vavilov-ii-the-doreframework/>; *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 at paras. 113-114. ["*E.T.*"]

8. The Centre's submissions proceed as follows: (1) the confusion *Doré* has generated requires clarification; (2) *Oakes* and *Doré* provide different analytical frameworks or modes of reasoning for determining the section 1 justifiability of rights limitations; (3) the circumstances under which *Oakes* or *Doré* provides the appropriate analytical framework; (4) the standard of review for administrative decisions limiting *Charter* rights is correctness; and (5) application to this case.

PART III - ARGUMENT

1. CONFUSION AFTER *DORÉ*

9. Since *Doré* was decided in 2012, both courts[8] and academic commentators[9] have expressed confusion about the principles the judgment articulates. Indeed, three recent Court of Appeal decisions concerning strikingly similar public health orders during the COVID-19 pandemic further illustrate confusion about when the *Doré* approach is appropriate.[10]

10. The decisions from the courts below in this case illustrate the continued lack of clarity that shrouds the application of *Doré*, including with respect to the appropriate standard that should be applied on judicial review.[11]

11. This case presents an opportunity for this Court to clarify when the *Oakes* framework or the

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[8] See e.g. *Beaudoin v British Columbia (Attorney General)*, 2022 BCCA 427 at paras 248-259 ["*Beaudoin*"]; *ET, supra* at paras 108-125;

[9] See e.g. Mark Mancini, "The Conceptual Gap Between *Doré* and *Vavilov*" (2020) 43:2 Dal LJ 793; Justin Safayeni, "The *Doré* Framework: Five Years Later, Four Key Questions (And Some Suggested Answers)" (2018) 31:1 Can J Admin L & Prac 31; Christopher D Bredt & Ewa Krajewska, "*Doré*: All that Glitters is Not Gold" (2014) 67 SCLR (2nd) 339.

[10] In *Beaudoin* , *supra* the BCCA took the view that the framework under which the public health orders were to be considered was *Doré.* whereas in *Gateway Bible Baptist Church et al v Manitoba et al*, 2023 MBCA 56 ["*Gateway Bible*"].and *Ontario (Attorney General) v. Trinity Bible Chapel*, 2023 ONCA 134 ["*Trinity Bible*"] the courts held that the *Oakes* framework was appropriate. The courts also entertained the question of how much deference they ought to show the administrators, under either analytical framework.

[11] On judicial review a majority of the Divisional Court applied a reasonableness standard, the dissent applied a reasonableness standard using the *Doré* approach and the Court of Appeal applied a standard of correctness but not the *Doré* approach.

Doré framework should be utilized to reason through the question of a rights limitation's justifiability, and to affirm that courts of review should apply the same standard of review to administrative decisions taken under either framework, i.e., correctness.

2. OAKES AND *DORÉ* OFFER ALTERNATIVE APPROACHES TO SECTION 1 ANALYSIS

12. Section 1 provides that the rights protected in the *Charter* are subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society. This Court developed the *Oakes* test, consisting of an inquiry into the pressing and substantial objectives the government aims to achieve and a three-leg proportionality analysis, as a means to assess the justifiability of legislation that limits *Charter* rights.

13. Early in its reasons in *Doré*, this Court indicated that because the *Oakes* test was developed in the context of legislation that imposes limits on rights, it was an 'awkward fit' for 'adjudicated administrative decisions'.[12] The justificatory analytical framework outlined in *Doré* was intended to tailor the inquiries of *Oakes* to better fit the context of adjudicated administrative decisions.[13] At the core of the *Doré* approach is the final inquiry of the *Oakes* test: i.e. proportionality 'in the strict sense' between the statutory objectives and the severity of rights limitations.[14]

14. In *Multani*,[15] responding to an initial framing of what later became the *Doré* approach, Justice LeBel clarified that while *Charter* rights can only ever be limited under section 1 (i.e. limits must be reasonable and demonstrably justified), a rigid application of the *Oakes* framework is not the only analytical means by which to assess a limitation's justifiability.[16]

15. In *Vavilov*, this Court acknowledged that different modes of reasoning will be appropriate in different circumstances and administrative decisionmakers may rely on different modes of reasoning than judges or lawyers:

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[12] *Doré*, *supra* at para 4.
[13] *Doré*, *supra* at para 6.
[14] *Doré*, *supra* at paras 55-56.
[15] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 ["*Multani*"].
[16] *Multani*, *supra* at paras 150-152

> Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge—nor will it always be necessary or even useful for them to do so.[17]

16. By focusing on proportionality rather than a rigid application of the full *Oakes* test, *Doré* offers a mode of reasoning which helps non-governmental actors to justify and explain a decision to those affected, in an accessible and contextualized framework.

3. SELECTING BETWEEN *DORÉ* AND *OAKES*

First Inquiry: Is the Actor Government?

17. Under the two-part inquiry that the Centre proposes to determine if the *Doré* or *Oakes* approach is required, the first inquiry is whether the rights-limiting administrative action is taken by a governmental actor or a non-governmental actor.

18. Where the action limiting a right is taken by an actor which is part of government, the *Oakes* test is the appropriate analytical framework through which to conduct the section 1 justification analysis. This is because, first, administrative officials within the apparatus of government are directly connected to and subject to the close control of the government and, second, governments hold the authority to alter the parameters of an administrative actor's power by reframing or redefining their statutory objectives or their powers to pursue them.

19. Because governments are unconstrained except by constitutional requirements and norms and it is within their discretion to choose means to achieve objectives, the *Oakes* inquiries into pressing and substantial objectives, rational connection, and minimal impairment are relevant to justifying an exercise of a government's administrative power. The culture of justification thus demands that administrative actors who are part of the machinery of government justify their rights-limiting decisions with reference to all of the inquiries of the *Oakes* test.

20. The distinction between governmental and non-governmental actors as the basis for determining the applicable analytical framework has recently been recognized in the lower courts. Both the Ontario Superior Court of Justice deciding *Trinity Bible* in the first instance, (affirmed on appeal to the ONCA) and the Manitoba Court of Appeal deciding *Gateway Bible* held the *Oakes*

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[17] *Vavilov*, *supra* at para 92.

framework to be applicable on the basis that the administrative actors responsible for issuing the public health orders were members of government, not non-governmental medical experts.[18]

Second Inquiry: The Nature of the Function

21. The second leg of the two-stage inquiry the Centre proposes concerns the nature of the function exercised by a non-governmental actor. Legislative functions will still attract the *Oakes* analysis, while adjudicative and administrative actions will attract a *Doré* analysis.[19]

22. The Centre submits the following factors are relevant to determining whether an administrative function is legislative on one hand, or adjudicative or administrative on the other:

a. **The form of the action**:[20] Regulations, policies, and rule-making functions are legislative; orders or decisions resolving a dispute are adjudicative; decisions applying law or policy in individual cases, such as an application for a permit or for an exemption from the operation of a rule, are administrative.

b. **The scope of application:**[21] When the action applies generally to people or classes of people without identifying specifically to whom it applies, it is legislative; when the action applies to specific, identified persons, it is more likely to be adjudicative or administrative.

c. **The options open to the administrative actor:**[22] When the actor is free to choose from a wide range of options in making their decision, as for example in developing policy and rules within the statutory framework, it is legislative; where the actor has a clearly defined and limited set of options from which to choose, the decision is administrative or adjudicative.

23. In the context of adjudicated and administrative decisions by non-governmental actors that

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[18] *Trinity Bible*, *supra* at paras 123-25; *Gateway Bible*, *supra* at para 57.
[19] *Doré*, *supra* at paras 5-6.
[20] *Union of Canadian Correctional Officers v Canada (Attorney General)*, 2019 FCA 212 at paras 20-21; *Power Workers' Union v Canada (Attorney General)*, 2023 FC 793 at paras 42-47 and 186-87 ["*PWU v. Canada*"].
[21] *Gateway Bible*, supra at para 57, *Trinity Bible*, supra at para 19.
[22] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 84 ["*TWU*"].

limit rights, proceeding through the early stages of the *Oakes* test will not add any explanatory value to the decision, and indeed, focusing on these inquiries may distract the non-governmental actor from the important question of whether the rights limitation is strictly proportionate to the statutory objective. It is precisely where the early stages of the *Oakes* framework carry no explanatory weight that *Doré's* focus on strict proportionality is necessary and appropriate.

24. Within this decision-making paradigm, the first step of the *Oakes* test regarding the pressing and substantial nature of the legislative goal is not in issue at all[23] since the statute is not challenged. Further, the question of whether *legislatively* there is a less restrictive means to accomplish the statutory goal in a *Charter* compliant manner is not a question which is open to either the non-governmental actor or an adjudicator assessing the non-governmental actor's action. The statutory framework is a given, and the options available to that actor are defined by that framework.

25. Rational connection – the first step of the proportionality branch of *Oakes* – may also not be useful in assessing the justification of the right limiting action, since the action is presumably taken in the furtherance of the statutory objective, or, alternatively, if the action was taken outside of the actor's statutory jurisdiction it would be unlawful and could never be justified under *Doré*'s proportionality framework.

26. Minimal impairment – the second step of the proportionality inquiry in *Oakes* – may also prove unhelpful in circumstances where the administrative decisionmaker has limited options. In *TWU*, for example, while accrediting Trinity Western's proposed law school would plainly have limited its section 2(a) rights less or not at all (i.e. this was the less restrictive option), doing so would not have advanced the Law Society's statutory objectives.[24] As Professor Stacey put it in a recent article:

> To ask about minimal impairment, when the minimally impairing option fails to further statutory objectives, is the wrong question to ask. The correct question—and the one that the culture of justification requires us to ask—is whether the option

[23] *Doré*, *supra* at paras. 37-42.
[24] *TWU*, *supra* at para. 84.

that does further statutory objectives but also limits rights is justified."[25]

27. Chief Justice McLachlin directly acknowledged that in these circumstances the other legs of the *Oakes* inquiry are inapplicable: "the analysis almost invariably comes down to looking at the effects of the decision and asking whether the negative impact on the right imposed by the decision is proportionate to its objective."[26]

28. Achieving this balance requires consideration of a number of important questions which are taken directly from the *Oakes* jurisprudence itself: Is there a serious or a minimal infringement of values or rights? Is there an extremely valuable or a minimally valuable good to be achieved by the statutory objective or, in some contexts, the specific administrative or adjudicative action taken in support of that statutory objective? A minimal infringement ranged against highly valuable benefit is proportionate, while a serious infringement is not outweighed by mildly important benefits. These questions were paramount in *TWU*, where the majority concluded there was no reasonable alternative that would reduce the impact on *Charter* protections while sufficiently furthering the same statutory objective.[27]

29. As this Court has said frequently, the *Doré* and *Oakes* analyses share an underlying logic of proportionality, and 'work the same justificatory muscles.'[28] *Doré* should not be understood as a more lenient or less rigorous application of section 1's justification requirement. Rather, following the Court's adoption of the culture of justification in *Vavilov*, the *Doré* approach should be viewed as focusing the analysis on the part of the *Oakes* test that allows decisionmakers to provide justified, transparent and intelligible explanations for their decisions. In *R v KRJ*,[29] a majority of this Court emphasized that the *Oakes* inquiry into proportionality in the strict sense enhances transparency and intelligibility:

> It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society 'in direct and explicit terms'. … Although this examination entails difficult value

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[25] Richard Stacey, "Public Law's Cerberus: A Three-Headed Approach to Charter Rights-Limiting Administrative Decisions" (2023) *Canadian Journal of Law & Jurisprudence* 1–36 at p. 32.
[26] *TWU*, *supra* at para 114.
[27] *TWU*, *supra* at paras. 104-105.
[28] *Doré*,, *supra* at para. 5; *TWU*, *supra* at para. 82.
[29] *R. v. K.R.J.*, 2016 SCC 31 ["*K.R.J.*"].

> judgments, it is preferable to make these judgments explicit, as doing so enhances the transparency and intelligibility of the ultimate decision.[30]

30. In sum, the *Doré* approach provides a mode of reasoning which may allow non-governmental actors in administrative or adjudicative settings to explain, as clearly, coherently and openly as possible whether or not a *Charter* rights-limitation is justified.

4. THE STANDARD OF REVIEW

31. In *Doré* this Court held that whether an administrative decision-maker has proportionately balanced statutory objectives and *Charter* rights in making a discretionary decision is reviewable on a standard of reasonableness.[31] This holding is not consistent with this Court's revised approach to the standard of review in *Vavilov*.[32] In *Vavilov*, and indeed in *Dunsmuir*[33] before it, this Court held that administrative decisions concerning constitutional questions fall into a category of decisions exempted from the presumptive standard of reasonableness, and which must be reviewed on the standard of correctness.[34]

32. Both before *Vavilov* and since, courts have held that administrative decisions going to the scope of a *Charter* right[35], whether a *Charter* right has been infringed,[36] and whether the *Charter* should have been considered at all,[37] are constitutional questions that attract correctness review. The Centre thus urges the Court to affirm that review of the first stage of the *Doré* analysis, which considers an administrator's or adjudicator's conclusion as to whether a *Charter* right is engaged, must be reviewed on a correctness standard.

33. The Centre further submits that a decision as to the justifiability (or unjustifiability) of a rights-limiting decision – whether under the *Oakes* or the *Doré* approach – should also be reviewed for correctness. There is no compelling explanation for why a decision as to the scope of a right,

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[30] *K.R.J.*, *supra* at para 79 (citations omitted).
[31] *TWU*, *supra* at para. 79 (citing *Doré*, *supra* at para. 54).
[32] *Doré*, *supra* at para 56.
[33] *Dunsmuir v. New Brunswick*, 2008 SCC 9.
[34] *Vavilov* *supra* at paras 55-57.
[35] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.
[36] *Union of Canadian Correctional Officers v Canada (Attorney General)*, 2019 FCA 212 at paras 20-21; *PWU* v. *Canada*, *supra* at paras 49-47; *Spencer v Canada (Health)*, 2021 FC 621 at para 64; *Guérin v Canada (Attorney General)*, 2019 FCA 272 at para 23.
[37] *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 at para 35.

or whether it is infringed, is considered a constitutional question subject to correctness review, while a decision as to the justifiability of a rights-limiting decision is not.

5. THE APPLICATION OF THIS ANALYSIS TO THE INSTANT CASE

34. On the facts of the instant case, the Centre submits that, if this Court determines that the School Board is a governmental entity, that a full *Charter* analysis, including the *Oakes* test, should be utilized, both at the level of the initial action and by a subsequent reviewing adjudicator.

35. If however, the Court comes to the conclusion that the School Board is a non-governmental actor operating within a statutory framework, then the following analysis should apply:

a. The actions of the principal at first instance should be seen as administrative in nature. He should have considered the justifiability of the rights limitation using the *Doré* framework.
b. The arbitration was adjudicative in nature. The Arbitrator should have used the *Doré* framework with respect to the *Charter* issues raised.
c. Upon judicial review, the Divisional Court was required to apply a correctness standard in assessing both stages of the *Doré* framework.

PART IV and V – COSTS AND ORDERS SOUGHT

36. The Centre does not seek costs and asks that no costs be awarded against it. The Centre takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September, 2023.


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PART VI – TABLE OF AUTHORITIES

A. Case Law

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Douglas/Kwantlen Faculty Assn v. Douglas College, [1990] 3 SCR 570	4
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B. Secondary Sources