To Defer or Not to Defer? The Judicial Review of *Charter*-Impacting Decisions Post-*Vavilov**

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This paper addresses the application of Doré to judicial review post-Vavilov. Doré places a premium on deference to the administrative decision-maker, noting both the expertise of the decision-maker and the fact that a proportionate balancing of rights and statutory objectives under section 1 of the Canadian Charter of Rights and Freedoms (Charter) admits multiple acceptable outcomes. This contrasts with the binary "yes or no" standard of correctness. Pre-Vavilov Doré jurisprudence leaves Doré cases with a two-step analysis on judicial review, the first being to identify whether a Charter right or value is engaged (the "threshold question"), and the second being an analysis of whether the decision-maker appropriately balanced the Charter right with statutory objectives. The standard of review for the first stage is unclear in the jurisprudence.

The two cases appear to have a different conception of administrative law. Despite this, the two are unified as being prime examples of the "culture of justification", a concept that has grown to define Canadian administrative law post-Vavilov. This conception brings the two in harmony and allows for the continued application of Doré.

However, the standard of review for discretionary, Charter-impacting decisions is unclear, despite five years of jurisprudence post-Vavilov. This paper argues that the standard should be bifurcated, such that the threshold question is reviewable under correctness and the proportionality analysis is reviewable under reasonableness. The threshold question has bright-line yes or no answers as to the Charter's applicability. In contrast, the proportionality analysis is a highly fact-specific analysis where review on the decision-maker's balancing process is sufficient.

There is mixed support for the idea of bifurcation at all levels of court. This paper surveys the development of bifurcation jurisprudence at all court levels. In considering two recent Supreme Court of Canada decisions, it concludes that some aspects of bifurcation have been adopted in Canada, but it has yet to be fully endorsed. Doré review and the future of bifurcation is still unclear and wanting for further jurisprudence.

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Introduction

Under the judicial review scheme set out in *Canada (Minister of Citizenship and Immigration) v Vavilov* (*Vavilov*),[1] constitutional questions must be reviewed under the correctness standard. This is because the Constitution[2] defines the limits of all state action and, as such, those limits must be precisely defined; there is no room for a range of interpretations.[3] This pronouncement runs contrary to the ruling in *Doré v Barreau du Québec* (*Doré*),[4] in which the Supreme Court of Canada allows for just that by reviewing *Charter*-impacting discretionary decisions of administrative bodies under reasonableness, rather than

1. 2019 SCC 65, at para 56 [*Vavilov*].

2. By Constitution, I refer to the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5; the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11; and other written Constitutional documents and unwritten Constitutional principles.

3. *Ibid.*

4. 2012 SCC 12 [*Doré*].

correctness.[5] Despite the apparent contradiction, *Vavilov* insists that it does not reconsider *Doré*, confining its definition of a constitutional question to those which deal with an enabling statute, not a discretionary decision.[6]

From the outset, *Doré* operates in apparent contradiction to *Vavilov* by prescribing reasonableness review of certain *Charter* issues. Post-*Vavilov* case law has failed to settle this issue. Even recent Supreme Court of Canada of Canada jurisprudence, while emphatically upholding *Doré*, has offered unclear answers to this question and failed to adequately address lower-court decisions. While courts have agreed that the *Doré* review still applies, there remains division on how it ought to be conducted.

This paper aims to answer that question. It endorses the structure posed by Mark Mancini that the review of discretionary *Charter*-impacting administrative decisions ought to be bifurcated.[7] With this model, the core proportionality analysis (the section 1 issue) ought to remain under the reasonableness standard. The antecedent question of whether a *Charter* right or value is engaged would be reviewed under correctness.[8]

This paper proceeds in five parts. The first recaps *Doré*'s framework and its development up to *Vavilov*, as well as pre-*Vavilov* criticism. The second part discusses *Vavilov*'s changes to judicial review in Canada and its conceptual underpinnings. The third analyzes the conceptual underpinnings between *Doré* and *Vavilov*, arguing that the two can be read harmoniously. The fourth part introduces and provides a conceptual argument for bifurcation. The fifth and final part analyzes the treatment of bifurcation in the courts, including recent Supreme Court of Canada of Canada jurisprudence on *Doré*.

I. *Doré*

A. Limiting Rights in the Administrative Context

The pre-eminent test for the justification of a *Charter* right infringement under section 1 in the judicial context comes from *R v Oakes*

5. *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 (that is, review of administrative decisions under s 1 of the *Canadian Charter of Rights and Freedoms*. All references to statute in this paper are to the *Charter*) [*Charter*].

6. *Vavilov*, *supra* note 1 at para 57.

7. Mark Mancini, "The Conceptual Gap between Doré and Vavilov" (2020) 43:2 Dalhousie LJ 793 [Mancini, "Conceptual Gap"].

8. *Ibid* at 801–03, 806.

(*Oakes*).[9] This test requires that the limit be prescribed by law, and its objective be pressing and substantial.[10] If it is, a three-step test is then followed. The measure must be found to have a rational connection to the statutory objective, minimally impair the right or freedom limited, and there must be "proportionality between the effects of the measures which are responsible for limiting the *Charter* right to freedom, and the objective".[11] This test lays out clear thresholds that the government must meet at each stage.

Oakes emphasizes proportionality, in achieving a balance between pressing and substantial government objectives and the need to safeguard *Charter* rights. Further, certain steps of *Oakes*—notably minimal impairment—involve deference to legislative choices (though, not all steps are deferential).[12] *Oakes* is concerned with taking government objectives seriously while scrutinizing them against *Charter* rights.

While *Oakes* is concerned with challenges to the constitutionality of a statutory provision, *Doré* is concerned with judicial review of administrative decisions that impact *Charter* rights and values under section 1.[13] Writing for a unanimous court, Abella J concluded that the *Oakes* test would be inappropriate in the administrative law context. Instead, she held that a deferential reasonableness standard is sufficient to meet the same need for proportionality between the statutory objective and rights limitation that animates *Oakes*.[14]

Mr. Doré was counsel in the criminal trial of Mr. Lanthier. In Boilard J's reasons for that trial, he said of Doré that "an insolent lawyer is rarely of use to his client", alongside several other invective personal comments.[15] In response, Doré wrote a personal letter to Boilard J referring to the comments as "unjust and unjustified", and directly calling Boilard J "aggressive and petty".[16] This letter ultimately caused Doré to be suspended by the Barreau du Québec, the regulatory body of the Quebec legal profession, for twenty-one days.[17]

In Doré's appeals, he argued that the application of the legislation under which he was disciplined was unconstitutional, as his comments were protected as free expression under section 2(b) of the *Charter*.[18] None of the

9. 1986 CanLII 46 (SCC) [*Oakes*].

10. *Ibid* at para 69.

11. *Ibid* at para 70 [emphasis in original].

12. Vincent Roy, "The Implications of the Vavilov Framework for Doré Judicial Review" (2022) 48:1 Queen's LJ 1 at 8.

13. *Doré*, *supra* note 4 at para 3.

14. *Ibid* at paras 7, 35–37.

15. *Ibid* at para 9, citing *R c Lanthier*, 2001 CanLII 9351 (QCCS).

16. *Doré*, *supra* note 4 at para 10.

17. *Ibid* at para 17.

18. *Ibid* at para 18.

bodies agreed with Doré, each finding that his section 2(b) rights were not unduly limited. The Tribunal des professions and Quebec Superior Court did not apply an *Oakes* analysis, while the Quebec Court of Appeal did.[19] This mirrors the inconsistency in other pre-*Doré* cases.[20]

The bulk of the *Doré* judgment is in determining the appropriate framework for reviewing *Charter*-impacted discretionary decisions made by administrative bodies. Justice Abella begins with the starting point that administrative decision-makers must comply with *Charter* values and proceeds to analyze the appropriate framework.[21] In doing so, she traced the evolution of Canadian administrative law to *Dunsmuir v New Brunswick* (*Dunsmuir*).[22]

The key aspect of *Dunsmuir* that underpins *Doré* is deference to the administrative decision-maker. It presents deference as requiring "respect for the legislative choices to leave some matters in the hands of administrative decision-makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system".[23] In defining reasonableness review, *Dunsmuir* places great emphasis on deference and respect for the administrators rather than presenting them as less than courts.

Dunsmuir prescribes two standards of review: correctness and reasonableness. It described reasonableness as a "deferential standard", which is animated by certain questions not lending themselves to "one specific, particular result".[24] Deference by this definition is respect for the decision-making process of administrative bodies, partially rooted in respect for the legislative decision to delegate powers.[25] In its guidance on selecting the standard of review, several

19. *Ibid* at paras 18–21.

20. *Ibid* at para 23.

21. *Ibid* at para 24. This arose from a consideration of the statement in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 56, which held that administrative decision makers were required to consider the values first held that administrative decision-makers were required to consider "the fundamental values of Canadian society, and the principles of the *Charter*". It should also be noted that the Quebec Court of Appeal decision in *Doré* concerned rights: Charter values were introduced at the Supreme Court of Canada (see Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2nd) 561 at 568).

22. 2008 SCC 9 [*Dunsmuir*].

23. *Ibid* at para 49.

24. *Ibid* at para 47.

25. *Ibid* at para 48, citing *Canada (Attorney General) v Mossop*, 1993 CanLII 164 (SCC).

factors point to choosing the deferential reasonableness standard, including the decision-maker's expertise, and whether the question is one of fact, discretion, or policy.[26]

The focus on deference led Abella J to adopt reasonableness as the standard for reviewing discretionary administrative decisions under section 1 of the *Charter*, embracing a "richer conception of administrative law".[27] *Oakes*' rigidity was meant to apply to laws of general application, making it ill-suited to the "conflict between principles" involved in discretionary, fact-specific decisions.[28] The administrative decision-maker is instead better poised to make the decision, which attracts a deferential standard of reasonableness.[29]

In such discretionary cases, Abella J stresses the expertise of the decision-maker. Administrative decision-makers are held to be experts in applying their home statutes, giving them a "distinct advantage" in "applying the *Charter* to a specific set of facts and in the context of their enabling legislation".[30] Essentially, because administrative bodies are experts at working within the context of their home statute, it would be wrong to assume that a court of general jurisdiction will be better positioned to make that judgment. The use of a correctness standard, rather than the deferential reasonableness standard, would amount to "courts 'retrying' a range of administrative decisions that would otherwise be subjected to a reasonableness standard".[31]

Justice Abella then concludes that administrative decision-makers must apply *Charter* values by balancing them with statutory objectives. This creates a two-step process. The first is to consider the statutory objectives, and the second is to ask how the *Charter* value at issue will be best protected in light of those objectives.[32] This second step is a balancing act, weighing the severity of interference with a *Charter* protection against the statutory objectives. This is in alignment with *Oakes*, where the second step of *Doré* is satisfied where the decision "falls within a range of possible, acceptable outcomes".[33]

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26. *Dunsmuir*, *supra* note 22 at paras 53–55.

27. *Doré*, *supra* note 4 at para 35, citing *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 152.

28. *Doré*, *supra* note 4 at paras 36–40.

29. *Ibid* at para 45.

30. *Ibid* at paras 45–48; see also *Douglas/Kwantlen Faculty Assn v Douglas College*, 1990 CanLII 63 (SCC).

31. *Doré*, *supra* note 4 at para 51; the *Oakes* test is often taken as the test that would be used under correctness. See Richard Stacey, "Public Law's Cerberus: A Three-Headed Approach to *Charter* Rights-Limiting Administrative Decisions" (2023) 37:1 Can JL & Jur 1 at 287 [Stacey, "Public Law's Cerberus"].

32. *Doré*, *supra* note 4 at paras 55–56.

33. *Ibid* at para 56, citing *Dunsmuir*, *supra* note 22 at para 47 and *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC) at para 160.

On judicial review, post-*Doré* jurisprudence has settled on a two-stage test for the reviewing court. First, the reviewing court asks, "whether the administrative decision engages the *Charter* by limiting *Charter* protections —both rights and values" (the threshold question).[34] This step is typically done through an established test for the infringement of a *Charter* right or freedom.[35] Second, the reviewing court considers whether the "decision reflects a proportionate balancing of the *Charter* protections at play" ("proportionality balancing").[36] This reflects the two-step analysis laid out in *Doré*.

This jurisprudence leaves us with a procedural duty on the part of administrative decision-makers. Paul Daly understands *Doré* as imposing a duty on decision-makers to account for *Charter* values in the way the case sets out before coming to their final decision.[37] A failure to comply with the duty is justification to invalidate the decision made, even if the final conclusion was otherwise reasonable.[38] If the decision-maker properly considered and balanced the *Charter* and statutory objectives, the decision is reasonable. The reviewing court does not need to consider whether the decision-maker came to the same conclusion they would have, as under correctness review, but rather that the appropriate process was undertaken.[39]

This does not mean that outcome is entirely irrelevant, however, Abella J still stresses that a reasonable judgment is one that falls within a range of acceptable outcomes.[40] An outcome that is outside this acceptable range is still unreasonable, even if the proper analysis was done. What *Doré* prescribes is that, where the decision-maker undertook the proper balancing and landed on an acceptable outcome, a reviewing court cannot pick a different outcome and invalidate the decision for reaching a different one.

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34. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 58 [*LSBC*].

35. See e.g. *ibid* at para 63. See also *Robinson v Canada (Attorney General)*, 2020 FC 942 at para 48 [*Robinson FC*].

36. *LSBC*, *supra* note 34 at para 58, citing *Doré*, *supra* note 4 at para 57 and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 39 [*Loyola*].

37. Paul Daly, "The Doré Duty: Fundamental Rights in Public Administration", (2023) 1 Can Bar Rev 297 [Daly, "Doré Duty"]; see also Paul Daly, "The Charter in Administrative Decision-Making: Defending the Duty to Take Charter Values (or Purposes) Into Account" (2024) Forthcoming Ottawa L Rev, online:<https://papers.ssrn.com> [https://perma.cc/DYA5-XAQ8] at 7–12.

38. Daly, "Doré Duty", *supra* note 37 at 311. In this respect the process aspect of *Doré* is separable from whether the conclusion is reasonable. Both are considered on judicial review, however.

39. *Ibid*.

40. *Doré*, *supra* note 4 at para 56, citing *Dunsmuir*, *supra* note 22 at para 47.

Respect for the administrative process is at the heart of the *Doré* framework. Reviewing courts are not performing a *de novo* analysis in a *Doré*-type case. Courts are giving the administrator deference to make a judgment call as to the proportionate balancing of *Charter* values and statutory objectives in their decision. This follows along with *Oakes*' commitment to proportionate balancing while affording a more flexible means of review instead of strict, prescribed steps.

B. Pre-Vavilov Criticism of Doré: Rights or Values?

Central to *Doré* and its succeeding cases is the focus on *Charter* values, rather than *Charter* rights.[41] This concept originated in *RWDSU v Dolphin Delivery* (*RWDSU*),[42] which noted a separation between the enumerated rights granted by the *Charter*, and the fundamental values which underpin them. The role these values play in the context of the *Doré* duty is to "help determine the extent of any given infringement [on *Charter* rights]" and "when limitations on that right are proportionate in light of the applicable statutory objectives".[43] *Charter* values are the philosophical underpinnings of *Charter* rights, which help determine their contents and the proportionality of limits. Notably, this definition defines *Charter* values in relation to their role in interpreting *Charter* rights, something at odds with *Doré*'s focus on values in themselves rather than enumerated rights.

The idea of *Charter* values has been the subject of significant criticism in both the literature and the courts. The argument against them is that values, unlike the enumerated *Charter* rights, lack clarity.[44] *Doré* itself provides little guidance on this issue. This is the position of Rowe J's concurrence in result in *Law Society of British Columbia v Trinity Western University (LSBC)*, where he asserts that reliance on *Charter* values has "muddled the adjudication of *Charter* claims in the administrative context".[45] According to Rowe J, *Charter* values lend themselves to subjective application as they contain no doctrinal structure, and as such *Charter* rights ought to be the focus in *Doré*-type cases, rather than

41. *Loyola*, *supra* note 36 (*Loyola* brings rights into the discussion but focuses on values).

42. 1986 CanLII 5 (SCC). This case primarily concerns private law matters, where *Charter* rights do not apply.

43. *Loyola*, *supra* note 36 at para 36, citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 88.

44. Macklin, *supra* note 21. See also Victoria Wicks, "What Ktunaxa Can Teach Us About *Doré*" (2018) 31:2 Can J Admin L & Prac 217 at 218, and Roy, *supra* note 12 at 10.

45. *LSBC*, *supra* note 34 at para 166.

values.[46] Justice McLachlin's concurrence makes a similar point, arguing that it is the right itself that receives protection, rather than values.[47]

Vagueness is a recurring theme with *Charter* values, with arguments that the clarification that values underpin rights has little explanatory force.[48] Bennett and Davis note that values have been referenced as "a tool of statutory interpretation", informing the content of *Charter* rights, and a tool for common law interpretation.[49] It is further unclear whether *Charter* values apply where rights are not at issue, and if they apply in all administrative law cases, or just discretionary cases.[50]

In practice, courts have generally focused on *Charter* rights rather than values, which suggested that this was a moot issue.[51] However, the Supreme Court of Canada recently, and strongly, reaffirmed the focus on values rather than rights in *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)* (*Commission Scolaire*), further muddying the analysis.[52] This is especially true when considering the debate preceding *Commission Scolaire*, which was not directly addressed in the case, through *Canadian Broadcasting Corp v Ferrier* (*Ferrier*)[53] and its subsequent line of cases. These cases and their impacts will be discussed in part five. Though the Supreme Court of Canada has given some clarification to the role of *Charter* values, the road ahead is still unclear.

II. *Vavilov*

Vavilov was a significant change to the framework of judicial review in Canada, aiming to clarify the structure of judicial review in Canadian courts. The case concerned Mr. Vavilov, who was born in Canada to two Russian

46. *Ibid* at paras 166, 171; see also Lauwers & BW Miller JJA concurring in *Gehl v Attorney General of Canada*, 2017 ONCA 319 at para 79.

47. *LSBC*, *supra* note 34 at paras 112, 115.

48. Meera Bennett & Steven Davis, "A Reasonable (or Correct?) Look at *Charter* Values in Canadian Administrative Law" (2023) 36:2 Can J Admin L & Prac 91 at 99.

49. *Ibid* at 99.

50. *Ibid* at 100.

51. *Ibid* at 100–01. See also *Doré*, *supra* note 4 at paras 6, 22, 59; *LSBC*, *supra* note 34 at para 63.

52. 2023 SCC 31 [*Commission Scolaire*].

53. 2019 ONCA 1025 [*Ferrier*].

spies and denied citizenship due to an exception for the children of foreign agents under the *Citizenship Act.*[54] The review of this denial ultimately led to significant change from "*Dunsmuir's* model".

This part first deals with the new model of judicial review in *Vavilov*'s majority. It then discusses the criticisms of the minority, and whether *Vavilov* truly represents a shift away from deference and towards a court-centric, Diceyan model of administrative law.

A. The Majority: A New Era of Judicial Review

Vavilov did away with *Dunsmuir*'s contextual analysis for determining the standard of review in exchange for a presumption of reasonableness.[55] *Vavilov*'s justification for the presumption is based not on deference or the expertise of administrative bodies, but on legislative intent.[56] Under *Vavilov*, the presumption of reasonableness is based on respect for the legislature's intent to delegate certain decisions to non-judicial decision-makers.[57] Although this is on its face similar to *Dunsmuir*, *Dunsmuir* places great importance on expertise when determining the standard of review, while under *Vavilov* it is entirely unnecessary. The be-all and end-all reason to assume reasonableness is the legislature's choice to delegate.[58] Legislative intent is thus the "polar star" of judicial review.[59]

The majority breaks this presumption in two categories of cases. The first are legislative intent cases, where the legislature clearly enumerates the standard of review, or allows for statutory appeals.[60] The presumption must also be broken where the rule of law requires it and can be grouped into questions which require a consistent answer.

Relevant to this discussion is the constitutional questions category. Because the Constitution defines the limits of all state action, the Constitution must be consistently interpreted to ensure that the limits on state power are clear and determinate.[61] Either the state has the power to take some action, or

54. *Citizenship Act*, RSC 1985, c C-29.

55. *Dunsmuir*, *supra* note 22 at paras 62–64; *Vavilov*, *supra* note 1 at para 10.

56. *Vavilov*, *supra* note 1 at para 8.

57. *Ibid* at paras 23–28.

58. *Ibid* at paras 26–33.

59. *Ibid* at para 33, citing *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.

60. *Ibid* at paras 35–36.

61. *Ibid* at paras 55–56. I set aside the issue of *Doré* for further into the discussion.

it does not; this requires correctness review. The correctness categories can be expanded, but only in exceptional circumstances.[62]

What survives from *Dunsmuir* is the animating idea of reasonableness review as a search for "justification, transparency, and intelligibility", as well as whether the administrative decision "falls within a range of possible acceptable outcomes".[63] *Vavilov* is explicit in that it is not giving reviewing judges license to ignore the decision-making process of the administrative body; rather, it places their reasoning process at the forefront of the analysis.[64] It notes that judicial justice and administrative justice may look different and retains that institutional expertise is a factor in reasonableness analysis.[65] The majority is adamant that *Vavilov*'s reasons are not a "'eulogy' for deference".[66] *Vavilov* is no such thing.

B. Save the Eulogy, Deference Lives

Justices Abella and Karakatsanis' concurrence in *Vavilov* does not agree that the majority has safeguarded deference. They instead argue that the majority moves judicial review into a more intrusive, less deferential model.[67] This is primarily based on the removal of expertise as a relevant factor in selecting the standard of review. Their concurrence cites *Canada (Director of Investigation and Research, Competition Act) v Southam Inc* (*Southam*), which notes that specialization and expertise, among other advantages, are "embedded into the legislative choice to delegate particular subject matters to administrative decision-makers".[68] It is not merely the fact that Parliament or a legislature chose to delegate its powers which attracts a deferential standard of review, but doing so has a specific advantage.[69] It is "[f]or that reason alone" that a deferential standard should be preferred.[70]

The minority describes the majority's model as too court-centric and Diceyan.[71] By a Diceyan model, they refer to one where Parliament's

62. *Ibid* at para 70. See also *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30, at para 28, Rowe J [*SOCAN*]; and *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*].

63. *Vavilov*, *supra* note 1 at para 86, citing *Dunsmuir*, *supra* note 22 at para 47.

64. *Vavilov*, *supra* note 1 at paras 83–84, 87, 91–97.

65. *Ibid* at paras 92–93.

66. *Ibid* at para 145.

67. *Ibid* at para 199, Abella and Karakatsanis JJ, concurring.

68. *Ibid* at para 231.

69. *Ibid* citing *Canada (Director of Investigation and Research, Competition Act) v Southam Inc*, 1997 CanLII 385 (SCC) at para 55 [*Southam*].

70. *Vavilov*, *supra* note 1 at para 231, Abella and Karakatsanis JJ, concurring, citing *Southam*, *supra* note 69.

71. *Vavilov*, *supra* note 1 at para 240, Abella and Karakatsanis JJ, concurring.

laws are the ultimate authority, and the rule of law is the rule of ordinary courts.[72] *Vavilov*'s emphasis on legislative intent and only legislative intent certainly supports this reading. By focusing on legislative intent, a line is drawn to Dicey's idea of Parliamentary sovereignty as the source of administrative legitimacy, rather than *Dunsmuir* and *Southam*'s discussion of the inherent value of administrative tribunals.[73] It is likewise evident with the rule of law correctness category. Drawing an analogy between correctness—essentially a *de novo* review substituting the court's view of the case—and the principle of the rule of law fits into the Diceyan scheme.[74]

The minority argues that the majority defies precedent moving towards a "pluralist conception of the rule of law", where administrative bodies are legitimate sources of law.[75] They also made a floodgates argument for more categories of correctness review, fearing that the reasonableness presumption can be easily rebutted.[76] While the recognition of a new category only three years after *Vavilov* in *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association* suggests this argument may well be borne out, further jurisprudence suggests this is not the case.[77] The Supreme Court of Canada in *Mason v Canada (Citizenship and Immigration)* (*Mason*) recently pushed back on recognizing a new correctness category out of fear for a floodgates argument and damaging *Vavilov*'s goal of simplicity and predictability in judicial review.[78]

Despite *Vavilov*'s undeniable move to a more court-centric view of administrative law, deference survives in both the presumption and application of reasonableness review. *Vavilov* synthesizes the Diceyan view with a culture of justification. This safeguards deference as a fundamental part of Canada's current scheme of judicial review.

Vavilov's majority is careful in its language to state that deference has not been done away with and there is reason to take them at their word. In elucidating their clarification of reasonableness, the majority cites to *Dunsmuir*'s focus on the justification, transparency, and intelligibility of reasons.[79] The

72. Mancini, "Conceptual Gap", *supra* note 7 at 801-03, 806.

73. Mark Mancini, "Vavilov's Rule of Law: A Diceyan Model and Its Implications" (2020) 33:2 Can J Admin L & Prac 179 at 184.

74. *Ibid* at 182–83.

75. *Vavilov*, *supra* note 1 at para 241, Abella and Karakatsanis JJ, concurring; see also *Dunsmuir*, *supra* note 22 at para 30.

76. *Vavilov*, *supra* note 1 at para 239, Abella and Karakatsanis JJ, concurring.

77. *SOCAN*, *supra* note 62 at paras 23, 40–42 (recognizing concurrent first-instance jurisdiction as a sixth correctness category).

78. *Mason*, *supra* note 62 at para 53.

79. *Vavilov*, *supra* note 1 at para 86.

majority explicitly states they are giving effect to the "legislature's intent to *leave certain decisions with an administrative body* while fulfilling the constitutional role of judicial review".[80] As well, the majority specifically instructs the courts not to import their own view of justice onto the administrative context.

The fact that the approach given is reasons-first suggests an eye towards deference. Rather than substituting their own view, the court is looking to the reasons of the decision-maker and ensuring that those reasons are coherent and intelligible, justified, and justifiable.[81] *Mason* holds that rather than displace deference, the reviewing court looking towards the reasons given by the decision-maker "underscores a commitment to deference . . . the starting or focal point for the conducting of truly deferential reasonableness review should be the reasons provided by the decision-maker".[82] The court is ensuring the reasons given are logical and coherent. They are performing, in effect, the role of a professor grading an exam, looking not for the correct answer but the strength of the reasoning the student used to reach that answer. So long as the conclusion is justified, the court does not interfere. This is a commitment to deference, not a eulogy.

It is undeniable that the administrative decision-maker's expertise is no longer relevant to the selection of the standard of review. Yet, *Vavilov* does not do away with *Southam*'s peek behind Parliament's curtain. *Southam* notes that the legitimacy of delegation comes from its inherent advantages, such as expertise.[83] It is merely the case that the legislature's reasoning does not need to be considered by the courts on this matter. Given that reasonableness remains a deferential standard, deference ultimately comes out strengthened by *Vavilov*. Only in exceptional circumstances is deference ceded to correctness. *Vavilov* instead safeguards deference by ensuring most review is deferential.

Vavilov is best characterized not as purely Diceyan, but as an example of a culture of justification. Its focus on reasons defines administrative legitimacy through those reasons.[84] So long as reasoning is done properly, tribunals are owed deference.[85] The requirement fits with *Dunsmuir*'s requirement for transparency, and the more general idea that administrative decision-makers have a role to play in applying law. This is distinct from the expertise-first approach of *Doré,* but is not necessarily contradictory to it.[86]

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80. *Ibid* at para 82 [emphasis added].

81. *Ibid* at paras 86, 91–96, 99, 102–06.

82. *Mason*, *supra* note 62 at para 60, citing David Mullan, "Reasonableness Review Post-Vavilov: An 'Encomium for Correctness' or Deference As Usual?" (2021) 23 CLELJ 189 at 202, 215.

83. *Southam*, *supra* note 69 at para 55.

84. Mancini, "Conceptual Gap", *supra* note 7 at 801.

85. *Ibid* at 809; see also Paul Daly, "Unresolved Issues After Vavilov" (2022) 85:1 Sask L Rev 89 at 109 [Daly, "Unresolved Issues"].

86. Mancini, "Conceptual Gap", *supra* note 7 at 801.

Vavilov does not destroy deference, but its conceptual underpinning is different to that of *Doré*. It contains some Diceyan elements but ultimately focuses on a culture of justification, a reasons-first approach which continues to respect expertise, through a more formalist lens. The next part will discuss the impact of this change on *Doré*.

III. *Doré*, *Vavilov*, and the Culture of Justification

Vavilov and *Doré* operate with distinct conceptual underpinnings. Paul Daly argues that *Vavilov*'s approach is in tension with the more functionalist, deferential *Doré*.[87] Mancini argues that the different schools of thought in *Vavilov* and *Doré* at minimum call for "different doctrinal applications"—in doing so, he compares the broad grant of correctness review for constitutional under *Vavilov* to *Doré*'s "retention of the standard of reasonableness for constitutional questions".[88] Further, even if *Vavilov* retains reasonableness review for *Doré*-type questions, *Vavilov* imposes a stricter standard than *Doré*.[89]

Mancini argues that *Doré* "mentions no requirements of reasonableness in the constitutional context", describing judicial review under it as effectively "judicial rubber-stamping".[90] He makes *LSBC* his example, where "there was no requirement *at all* for explicitly reasoned decision-making from the Law Society".[91] Under Mancini's reading, *Doré*'s proportionality analysis has little content. This lies in contrast with *Vavilov*, which presents an extensive guide for reviewing judges in performing reasonableness review.[92]

Mancini's argument does not provide a complete viewing of reasonableness review under *Doré*. Firstly, *Doré* does provide an explicit guide for the decision-maker, and for what reviewing judges must look for.[93] Secondly, there is little need for *Doré* to give an elaborate explanation on reasonableness review *itself*, as the requirements for a reasonable decision were already illuminated in *Dunsmuir*.[94] *LSBC* is also a poor example; the majority found that reasons were not required due to the context of the Law Society being a democratically elected body and so operating on different rules to other

87. Daly, "Unresolved Issues", *supra* note 85 at 105–06.

88. Mancini, "Conceptual Gap", *supra* note 7 at 796.

89. *Ibid*.

90. *Ibid* at 822.

91. *Ibid* at 823 [emphasis in original]; see also *LSBC*, *supra* note 34 at paras 55–56 and the dissenting reasons at para 294.

92. Mancini, "Conceptual Gap", *supra* note 7 at 823.

93. *Doré*, *supra* note 4 at paras 55–57.

94. *Dunsmuir*, *supra* note 22 at paras 47–49.

administrative bodies.[95] The majority in *Loyola High School v Quebec (Attorney General)* (*Loyola*) provides ample analysis of the Minister's decision.[96] While there are issues with *Doré*'s framework, it is not self-evident that it is a mere rubber-stamp. There are still differences between *Doré*'s (and by extension, *Dunsmuir*'s) framework of reasonableness review and *Vavilov*'s, but given that *Vavilov* adopts the language of "transparent, intelligible, and justified" from *Dunsmuir*, there remains continuity between the two.[97]

Although the two cases derive the standard of review from different sources (expertise for *Doré* and legislative intent for *Vavilov*), each makes a fundamentally similar demand of decision-makers: justify your decisions. Richard Stacey offers a compelling argument that both *Doré* and *Vavilov* are emblematic of a culture of justification.[98] *Vavilov* demands that administrative decisions are justified; the outcome follows the reasons given.[99] *Doré*, in requiring decision-makers to balance *Charter* rights (and values) with statutory objectives, makes the same demands.[100] As Stacey notes, this analysis was employed in *Alaloussi v Canada (Attorney General)*,[101] where the Federal Court looked to "*Doré* for the proposition that administrative decisions about the proportionality of rights limitations must be reasonable and looking to *Vavilov* for guidance on what a reasonable decision looks like".[102]

It makes sense to find harmony in a culture of justification—the idea is not new. The seminal decision of *Toronto (City) v CUPE, Local 79,*[103] LeBel J's concurrence refers to the importance of "rational justification" by administrative adjudicators.[104] It is also present in *Dunsmuir*, whose standard directly informs both *Doré* and *Vavilov*.[105]

95. *LSBC*, *supra* note 34 at paras 54-55. See also *Catalyst Paper Corp v North Cowichan*, 2012 SCC 2 at para 19.

96. *Loyola*, *supra* note 36 at paras 49–81.

97. *Vavilov*, *supra* note 1 at para 15.

98. Richard Stacey, "A Unified Model of Public Law: Charter Values and Reasonableness Review in Canada" (2021) 71:3 UTLJ 338 [Stacey, "Unified Model"]; see also Paul Daly, *A Culture of Justification: Vavilov and the Future of Canadian Administrative Law* (Vancouver, BC: UBC Press, 2023); Paul Daly, "Vavilov and the Culture of Justification in Contemporary Administrative Law" (2020) 100:1 SCLR 279.

99. Stacey, "Unified Model", *supra* note 98 at 350–51.

100. *Ibid* at 351.

101. 2020 FC 364 [*Alaloussi*].

102. Stacey, "Unified Model", *supra* note 98 at 351–52, citing *Alaloussi*, *ibid* at paras 50, 52.

103. 2003 SCC 63.

104. *Ibid* at para 130.

105. *Dunsmuir*, *supra* note 22 ("[r]easonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process") at para 47.

All *Vavilov* does is provide additional guidance as to how *Doré* decisions are to be reviewed: by focusing on the context and the reasons provided and to ensure that the proportionality balancing was justified, intelligible, and transparent.[106] This mirrors the language in section 1 that reasonable limits must be "demonstrably justified".[107] *Doré*'s conceptual basis post-*Vavilov* does not need to be couched in the language of deference. Rather, *Doré* sets out a process that decision-makers must follow in deciding section 1 issues. The role of a reviewing court is, in turn, to look at the decision in context and determine whether that process was adequately followed. It is a textbook application of the culture of justification.

Doré and *Vavilov* are cut from the same conceptual cloth. Despite the apparent inconsistency between the two, both are examples of the shift towards a culture of justification in Canadian administrative law. This is easily seen by post-*Vavilov* jurisprudence on the matter, embracing the use of both.[108] The remaining issue is not if the two can be reconciled, but *how*. How should the judicial review of discretionary *Charter*-impacting decisions be conducted?

IV. Two-Step Review - The Argument for Bifurcation

Although *Vavilov* applies correctness to most constitutional questions, it explicitly states that it is not reconsidering *Doré*.[109] In doing so it draws a distinction between two types of cases. The first are *Doré*-type cases, where "it is alleged that the effect of the *administrative decision being reviewed* is to unjustifiably limit rights under the [*Charter*]".[110] The second cases are challenges to statutes, i.e., "whether a provision of the decision-maker's *enabling statute*

106. *Vavilov*, *supra* note 1 at para 86.

107. *Charter*, *supra* note 5, s 1.

108. See *Commission Scolaire*, *supra* note 52.

109. *Vavilov*, *supra* note 1 at para 57.

110. *Ibid* at para 110 [emphasis added]. It is not clear in the jurisprudence whether Doré applies to the judicial review of regulations or only to individual exercises of administrative discretion. The Supreme Court of Canada did not address this issue in its recent decision on the standard of review of regulations. See *Auer v Auer*, 2024 SCC 36. The Federal Court of Appeal has held that Oakes is the applicable test in such cases, due to the similarities between regulations and ordinary statutes of general application. See *Power Workers' Union v Canada (Attorney General)*, 2024 FCA 182 at para 44. See also the application judge's decision, which has fuller reasons on this point. *Power Workers' Union v Canada (Attorney General)*, 2023 FC 793 at paras 42–55. This is still very much an open question in the law.

violates the *Charter*".[111] *Vavilov* is definitive on the latter being reviewed under correctness, and the Supreme Court of Canada has recently affirmed this.[112]

The implication of this statement is that the former is to be reviewed under reasonableness, as per *Doré*. It is not obvious on this framework that discretionary applications of the *Charter* ought not to fall under the constitutional correctness category—they are, after all, still constitutional questions. Given this, there has been much debate and inconsistency on the application of *Doré* post-*Vavilov*.

There are two distinct questions in *Doré* review. The first threshold question is whether a *Charter* right (or value) has been engaged. If it is, the reviewing court asks the second question: whether the balancing was proportionate.[113] Mancini has suggested that review of these questions could be bifurcated, such that the former is reviewed under correctness and the latter is reviewed under reasonableness.[114]

I adopt this idea. Reasonableness review is supported both by *Vavilov*'s reasons and first principles. Additionally, the idea has seen adoption in several courts. This section proceeds in reverse order of the questions. It first argues for retaining reasonableness for section 1 rights-balancing, and then for reviewing the threshold question under correctness.

A. No Correct Answers – Retaining Reasonableness Review for the Proportionality Analysis

Vavilov's goal was to simplify the standard of review framework "by providing only limited exceptions to reasonableness review".[115] Thus, caution should abound in introducing new correctness categories, for fear of undermining this intention. In the case of proportionality balancing, there is nothing to be gained with correctness review.

Vavilov's correctness categories hover around a few governing propositions, namely: (1) certain questions affect the legal system as a whole and thus require uniform and consistent answers; and (2) certain questions require predictability and finality.[116] This is a high bar to clear. Important issues

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111. *Ibid* [emphasis added].

112. *Ibid* ("[o]ur jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons" at para 57); see also *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at paras 92–94, Côté J, concurring.

113. *LSBC*, *supra* note 34 at para 58.

114. Mancini, "Conceptual Gap", *supra* note 7 at 824–29.

115. *Mason*, *supra* note 62 at para 53, citing *Vavilov*, *supra* note 1 at para 47.

116. *Vavilov*, *supra* note 1 at paras 56, 59, 64; see also *Mason*, *supra* note 62 at para 47.

or issues of "wider public concern" do not attract the rule of law exception, as an example.[117] This suggests that correctness categories are general questions, with a wide scope, that necessitate consistent answers across the legal system. These questions are intended to be "rare and exceptional";[118] and rule of law exceptions like that of constitutional questions are "justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system".[119] Proportionality review does not clear this high bar.

Proportionality balancing is a highly fact-specific activity. In these cases, *Charter* values compete against government objectives. This is key to *Doré*'s initial adoption of the reasonableness standard. Justice Abella stated that "the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*".[120] Fundamentally, these questions are a balance of different values in a particular circumstance, a far cry from a wide-ranging issue necessitating correctness like those contemplated in *Vavilov*.

Such a balancing does not have a definite right-or-wrong answer. The answer will depend on the circumstances. As Daly notes, "a proportionate restraint on freedom of expression in the workplace may not be proportionate in a municipal election campaign".[121] The context of a regime determines what is and is not proportionate. Contextual constraints are already accounted for in reasonableness review. *Vavilov* explicitly notes that the "potential impact of the decision on the individual to whom [the administrative decision] applies", as a constraint on the decision-maker's reasoning, along with other contextual elements, such as the statutory scheme.[122]

Further, the lack of a definite right-or-wrong answer has historically attracted reasonableness review. Under *Dunsmuir*, reasonableness is concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[123] Though this is no longer the only consideration for reasonableness review, *Vavilov* explicitly retained this important consideration.[124]

This idea is supported by section 1 jurisprudence more broadly. In *R v Keegstra* (*Keegstra*), Dickson CJC notes that "s. 1 should not operate in every instance so as to force the government to rely upon only the mode

117. *Mason*, *supra* note 62 at para 47.

118. *SOCAN*, *supra* note 62 at para 27, citing *Vavilov*, *supra* note 1 at paras 23, 70.

119. *Vavilov*, *supra* note 1 at para 70.

120. *Doré*, *supra* note 4 at para 54 [emphasis in original].

121. Daly, "Unresolved Issues", *supra* note 85 at 107.

122. *Vavilov*, *supra* note 1 at paras 105–06.

123. *Dunsmuir*, *supra* note 22 at para 47.

124. *Vavilov*, *supra* note 1 at para 86.

of intervention *least intrusive of a Charter right or freedom*".[125] Under this judgment, the government can employ a measure that is more restrictive of *Charter* rights, provided it furthers the statutory objective in a way other (less restrictive) measures could not.[126] This fits perfectly with the idea that decisions reviewable under reasonableness have a range of acceptable outcomes. *Keegstra*, along with *Doré*, suggest that section 1 is alive to the possibility that proportionate balancing can lead to several acceptable results, rather than a single correct answer.[127] As well, *Vavilov*'s contextual restraints accords with *Oakes*' statement of proportionality requiring that more severe restraints on rights to have a more important objective to counterbalance them.[128]

What matters here is not that the "right" answer be reached, but that there be a proportionate balancing. This is explicit in *Doré*, where Abella J stated, "[o]n judicial review, the question becomes, 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".[129] In short, the decision must be justified.

The culture of justification is clear in these reasons and *Vavilov* does not replace them. The kind of question answered under proportionality has no bright-line answer. Rather, it has a process that must be followed properly so that a justified conclusion can be reached. The goal of section 1 is to "balance the interests of society with those of individuals and groups".[130] The key is not what decision the decision-maker made, but whether that decision was made by a proportionate balancing.

Correctness is an inappropriate standard for proportionality analysis because ultimately it does not prescribe anything different from first instance decision-making. The only difference between correctness and reasonableness is who is undertaking the balancing; the court, or the decision-maker.[131] The decision-maker at first instance is clearly better positioned to do so given their proximity to first-instance arguments and expertise over both their enabling statutes and the facts.[132] Given

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125. *R v Keegstra*, 1990 CanLII 24 (SCC) at 784 [emphasis added] [*Keegstra*].

126. *Ibid*.

127. It should be noted that *Keegstra* is a challenge to legislation, which is reviewable under correctness in administrative law. See *Vavilov*, *supra* note 1 at para 57. I cite *Keegstra* only for the conceptual link between the minimal impairment analysis and reasonableness review, not to say that it prescribes the standard of review in administrative law.

128. *Vavilov*, *supra* note 1 at para 89; *Oakes*, *supra* note 9 at para 71.

129. *Doré*, *supra* note 4 at para 57 [emphasis added].

130. *Oakes*, *supra* note 9 at para 70.

131. Stacey, "Public Law's Cerberus", *supra* note 31 at 28.

132. Mancini, "Conceptual Gap", *supra* note 7 at 824.

this, there is little reason to effectively decide the issue over again, when the only real issue is whether the balancing was done appropriately.

Before concluding, I will briefly address Stacey's argument against bifurcation. This critique is not relevant here. Stacey's conception of bifurcation is one that splits *Doré* not into the threshold question and proportionality question, but one that separates *Charter* rights and *Charter* values such that they attract different standards.[133] This is a different conception than Mancini and I's, and one that appears to have been rejected by the Supreme Court of Canada.[134]

To conclude, there is no need to disrupt *Vavilov*'s presumption of reasonableness. Proportionality analysis is fundamentally about a procedure of proportionate balancing. It is about justification. Justification has been engrained in administrative law for decades and resoundingly affirmed in *Vavilov*. Proportionality balancing does not require correctness review; there is nothing to be gained from it. Despite being a constitutional question, proportionality balancing is not better served by correctness review.

B. The Threshold Question and the Need for Definite Answers

Unlike the proportionality analysis, the question of whether a *Charter* right or value applies has a bright-line answer—it does or it does not. The question determines whether a decision-maker needs to consider that right or value at all.[135] Judicial review of the threshold question fits neatly into *Vavilov*'s constitutional correctness category.

Whether a *Charter* right applies to a given person, group, or context is a matter of fundamental importance to the legal system as a whole.[136] Either a right applies to a type of claimant, or it does not. Once a decision is made on this issue, it is difficult to overturn in future case law absent new legal issues or a change in circumstances.[137] A decision will have profound implications for anyone in the claimants' situation, which marshals in favour of *Vavilov*'s constitutional and rule of law exceptions.

Further, as Mancini notes, bifurcation is already standard in another context—the duty to consult with Indigenous peoples.[138] In such cases, the duty or extent of the duty to consult are reviewable under correctness, while findings of fact made in support of this analysis are reviewable under reasonableness.[139]

135. Mancini, "Conceptual Gap", *supra* note 7 at 824.

136. *Ibid* at 825, citing *Ferrier*, *supra* note 53 at para 36.

137. See *Carter v Canada*, 2015 SCC 5 at para 44 [*Carter*].

138. Mancini, "Conceptual Gap", *supra* note 7 at 826.

139. *Ibid* at 826–27 citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 and *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43.

This further supports the use of the constitutional exception, especially since these issues are a form of constitutional question.

However, Mancini argues that bifurcation fails to accord with *Doré*'s stance on a unified public law. In short, that *Doré* stands for the proposition that administrative decision-makers are able to contribute to the meaning of the Constitution.[140] This is an accurate reading of *Doré*, but correctness review does not oust this interpretation. Rather, it acknowledges the reality that certain constitutional issues are of fundamental importance, and that it is the court's proper role as "guardians of the Constitution"[141] to ensure that the Constitution consistently dictates the limits of state action.[142]

Doctrinally, there is no issue with this reconciliation. In setting out the constitutional exception, *Vavilov* explicitly carves out the proportionality question as not being considered, but is silent on the threshold question.[143] Thus, bifurcation is not inconsistent with *Vavilov* as a matter of doctrine.

There is one further potential challenge to applying correctness review for the threshold question. Certain rights have their own internal balancing enumerated in the *Charter*. For example, section 7 internally balances infringements of life, liberty, and security of the person with the "principles of fundamental justice".[144] This may militate against correctness review for section 7. This issue requires further consideration in the case law and I do not purport to answer it here. I will, however, note that the central issue of section 7 is not that there be a proportionate balancing (as in section 1), but that state conduct does not offend certain principles before a breach is even considered.[145]

In short, the threshold question ought to be reviewed for correctness. It is a substantive question about the extent of state authority, not a procedural question of an appropriate balancing of certain considerations. The issues are wide-reaching and have a bright line, yes-or-no answer. There are competing considerations for the threshold question and proportionality analysis, which ought to attract different standards of review. I now turn to the treatment of bifurcation in the courts.

140. Mancini, "Conceptual Gap", *supra* note 7 at 827–28.

141. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 60.

142. *Vavilov*, *supra* note 1 at para 56.

143. *Ibid* at para 57.

144. *Charter*, *supra* note 5, s 7; see also *Carter*, *supra* note 137 at para 70.

145. See *Carter*, *supra* note 137 at para 79 ("[i]n determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, *courts are not concerned with competing social interests or public benefits conferred by the impugned law*. These *competing moral claims and broad societal benefits* are more appropriately considered at the stage of justification under s. 1 of the *Charter*" [emphasis added]).

V. Bifurcation in Action

Bifurcation has seen considerable adoption and discussion in Canada's courts since Mancini's initial review in 2020. This section first surveys the use of bifurcation on judicial review in courts other than the Supreme Court of Canada. It then considers the implication of recent Supreme Court of Canada decisions on bifurcation.

A. Lower Court Disagreement on Bifurcation

Bifurcation has seen some adoption in post-*Vavilov* cases. It was initially used by the Ontario Court of Appeal in *Ferrier*.[146] This case concerned a Thunder Bay Police Services Board hearing of an officer involved in the death of an Indigenous man. The decision-maker, pursuant to the enabling statute, ordered the hearing to be closed. The complainants argued that inadequate attention was paid to their section 2(b) rights by this failure.[147] They argued that the decision-maker should have applied the *Dagenais-Mentuck* test in deciding to close the hearing.[148]

Justice of Appeal Sharpe, writing with draft reasons of *Vavilov* at his disposal, found that a bifurcated standard of review was appropriate. The decision that *Dagenais-Mentuck* did not apply was to be reviewed on the correctness standard.[149] His justification was that this was not a review of how the decision-maker considered the right at issue, but the "the refusal or failure to consider an applicable *Charter* right".[150] Section 2(b)'s application was found to be both a constitutional issue and a matter of central importance to the legal system as a whole; whether the *Charter* applied to the facts of the case.[151] The test was never part of the discretionary balancing contemplated by *Doré*, as the decision-maker decided it did not apply.

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146. *Ferrier*, *supra* note 53. A similar line of reasoning was also used by the Alberta Court of Appeal in *UAlberta Pro-Life v Governors of the University of Alberta* , 2020 ABCA 1. This paper focuses on *Ferrier* as the prototype.

147. *Ferrier*, *supra* note 53 at para 4.

148. The *Dagenais-Mentuck* test is a test for restrictions of the open court principle and freedom of the press. See *ibid* at para 15. Its specifics need not concern us here.

149. *Ibid* at para 33.

150. *Ibid* at para 35.

151. *Ibid* at paras 36–37. Reasonableness would also be inappropriate under Sharpe JA's reasoning, as the test either applied or it did not; there was no range of acceptable options.

Ferrier is a clear and compelling application of bifurcation. It clearly sets out the threshold question as whether a right applies (i.e., whether a decision-maker was correct in disregarding or considering a right), reviewable on correctness as a constitutional question or question of fundamental importance. The subsequent proportionality analysis is still done under *Doré*. However, its approach has received mixed reception among the courts.

Let us first consider the favourable applications of *Ferrier*. The Supreme Court of British Columbia found, in a case also dealing with the *Dagenais-Mentuck* test, that *Ferrier*'s approach applied.[152] Strictly speaking this is *obiter dicta*, as this case was ultimately a discretionary exercise issue, but nevertheless the court adopts the *Ferrier* framework for "threshold" decisions.[153] A similar distinguishment was made in the Federal Court in *Corus Entertainment Inc v Canada (Attorney General)* (*Corus*), another *Dagenais-Mentuck* case, where the facts did not lend themselves to a *Ferrier*-type threshold question.[154] Nevertheless, the *Corus* court appears to treat Ferrier favourably.[155] A clearer favourable treatment of *Ferrier* is found in the Federal Court case of *Fraser v Canada* (*Minister of Public Safety and Emergency Preparedness)* (*Fraser*), where a threshold question was actually at issue and *Ferrier* was applied.[156]

Turning briefly to the unclear interpretations, the recent Saskatchewan Court of Appeal case *Clarke v Canada (Attorney General)* refused to discuss the issue of *Doré* as it was not raised by the parties.[157] Two recent *Doré*-type cases in the Ontario courts did not discuss *Ferrier* at all, but these cases did not have a *Ferrier*-type issue.[158] These suggest at least that *Ferrier* has not been adopted as an addition to the *Doré* test, where the threshold question can simply be checked off if rights were considered.

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152. *British Columbia (Environmental Management Act, Director) v Canadian National Railway Co*, 2022 BCSC 135 at para 83.

153. *Ibid* at paras 71, 83.

154. 2020 FC 1064 at para 35 [*Corus*].

155. *Ibid* at paras 32–35.

156. F*raser v Canada (Minister of Public Safety and Emergency Preparedness)*, 2021 FC 821 at para 52 [*Fraser*]. On appeal the application of *Ferrier* was not denounced in-general, but the Federal Court of Appeal found that appellate standards applied to the particular facts. See *Fraser v Canada (Minister of Public Safety and Emergency Preparedness)*, 2023 FCA 167.

157. 2023 SKCA 84; I note in passing that the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, uses a type of bifurcated analysis. It analyzes the constitutionality of the relevant statute under correctness, but the application on the facts under reasonableness. However, this is a pre-*Vavilov* decision and ultimately falls squarely within *Vavilov*'s reasoning at para 57.

158. See *Lauzon v Ontario (Justices of the Peace Review Council)*, 2023 ONCA 425; *Peterson v College of Psychologists of Ontario*, 2023 ONSC 4685.

Ferrier's reception in the Federal Courts has been mixed to negative, with an extensive discussion on the case's approach. Prior to *Fraser*, the Federal Court adopted *Ferrier*'s approach in *Robinson v Canada (Attorney General)* (*Robinson* FC). Unlike the other cases discussed this was not a section 2(b) case, but a section 15(1) case. Mr. Robinson was a fisherman who became disabled and could no longer stand for long periods of time, and as such could not operate his boat himself.[159] As licenses required the holder to personally fish, he had to receive authorization to use a Medical Substitute Officer (MSO), which he did. This MSO authorization lasted until July 31, 2016, and could not be renewed due to a five-year maximum policy.[160] He appealed to the Atlantic Fisheries License Appeal Board, seeking to have continued use of the MSO without an end date, invoking among other things section 15(1)'s disability protections.[161] His appeal was denied, with the reasons making no reference to his section 15 arguments.[162]

Robinson relied on *Ferrier* in his argument, claiming that the decision-maker failed or declined to take into account his section 15(1) rights.[163] The Court accepted this reasoning, applying correctness to the question of whether his section 15(1) rights were violated as per *Ferrier*, though they note that a decision with an unexplained refusal or failure to consider an applicable *Charter* right would likely be considered unreasonable.[164] This ultimately led to a three-part examination which proceeds as follows.

First, the court asks whether the *Charter* is engaged by limiting *Charter* protections.[165] The standard for this step is correctness, per *Ferrier*. Second, the court asks whether the decision-maker failed or refused to consider Robinson's *Charter* rights.[166] As per *Ferrier*, this is also under the correctness standard. The case was decided at this stage, with the decision-maker having failed to consider Robinson's rights.[167] Had it not been, the third stage would have been application of *Doré*'s proportionality balancing, under the reasonableness review. This decision explicitly makes the *LSBC* first step into correctness review, and adds the *Ferrier* threshold question into the mix, effectively *tri*furcating *Doré*.

159. *Robinson* FC, *supra* note 35.

160. *Ibid* at para 10.

161. *Ibid* at para 13.

162. *Ibid* at para 14.

163. *Ibid* at para 41.

164. *Ibid* at paras 42, 60.

165. *Ibid* at paras 46–48, citing *LSBC*, *supra* note 34.

166. *Robinson* FC, *supra* note 35 at para 58.

167. *Ibid* at para 71.

Hearing the appeal of *Robinson* FC, the Federal Court of Appeal refused to comment on the *Ferrier* issue. Instead, Rennie JA's brief reasons note that the "unexplained failure to address whether the *Charter* was engaged cannot survive reasonableness review".[168] This decision is couched entirely in *Vavilov*'s reasonableness review language, where the failure to respond to the issue was neither justified nor transparent, and so the reasons did not justify the decision.[169] Justice of Appeal Rennie makes no comment as to the *Doré* test, nor on *Ferrier*, stating that it ought to be "decided when it must and with the benefit of a full argument".[170]

It is difficult to read *Canada (Attorney General) v Robinson* (*Robinson* FCA) as more than a refusal to rock the boat. Robinson, by the evidence in *Robinson* FC, made a full argument in favour of *Ferrier*, and the Attorney General on appeal argued against its imposition. Given that both the Federal Court and Federal Court of Appeal held that a failure to consider the *Charter* is either likely to be or necessarily unreasonable, it is unclear when *Ferrier*'s bifurcation "must" be decided. Either Rennie JA's reasons suggest that *Ferrier* is necessarily moot, as there can be no reasonable-but-incorrect failure to account for *Charter* rights, or they fail to address the issue at hand.

I pause to clarify the version of bifurcation I endorse. The "threshold" question admits of two issues. The first is whether the decision-maker failed to even consider whether a *Charter* right or value applied (as was the case in *Ferrier*). Even where the decision-maker does consider a *Charter* right or value, the determination of whether it does or does not apply is part of that threshold. For example, this includes the section 15(1) rights analysis in *Robinson* FC. Although the two are conceptually distinct, they each form part of the threshold question in a bifurcated analysis.

Following this case, the Federal Court of Appeal applied *Ferrier* anyway in another *Dagenais-Mentuck* case, *Canada Broadcasting Corp v Canada (Parole Board)* (*CBC*).[171] The Federal Court of Appeal makes no reference to the refusal to adopt *Ferrier* in *Robinson* FCA—Pelletier JA's reasons make no citation to *Robinson* FCA at all.[172] It is furthermore unclear what differentiates this case from the *Robinson* cases. Granted the fact scenario is like *Ferrier* in terms of the test applied, but *Ferrier* is clear on being a generally applicable principle, not just applying to considerations of the *Dagenais-Mentuck* test. In either case the

168. 2022 FCA 59 at para 28 [*Robinson* FCA].

169. *Ibid*. This reflects a larger trend in Canadian administrative law jurisprudence towards reasons needing to be responsive to the facts and arguments raised by the parties. See Paul Daly, "Responsive Reasons in Administrative Law: Canada and Ireland" (2024) Administrative Law Matters, online (blog): <administrativelawmatters.com> [perma.cc/M6J9-NHY5].

170. *Robinson* FCA, *supra* note 168 at para 29.

171. 2023 FCA 166 at para 32 [*CBC*].

172. *Ibid* at paras 32–33.

answer was either a yes (the right applied) or a no (the right did not apply).[173] It is possible that this is a difference of opinion among the justices, as no justice on *Robinson* FCA sat on *CBC*.

The Federal Court in the later case of *Toth v Canada (Minister of Health)* (*Toth*)[174] followed *Robinson* FCA's precedent and departed from *CBC*'s precedent, refusing to "carve out a freestanding question" from *Doré*, that being the threshold question.[175] Instead, it defaulted to reasonableness review under *Doré*. *Toth* makes no reference to *CBC*.

In sum, treatment of *Ferrier* has been mixed to negative since its release. With the federal courts having considered it most extensively, it is unclear whether, if at all, *Ferrier* applies in federal cases. There is no settled precedent, leaving *Ferrier*'s ultimate application an open question. For what it is worth, the Supreme Court of Canada refused leave to appeal *Ferrier*, suggesting tacit approval of its approach—or at least, further unwillingness to reconsider *Doré*.

B. To Defer or Not to Defer is Still the Question: Recent Supreme Court of Canada Jurisprudence

The Supreme Court of Canada has issued two decisions on the judicial review of *Charter*-impacting discretionary decisions. Neither of these cases offer a satisfying answer and are in some ways mutually inconsistent. I begin with *Commission Scolaire*, which tackled the question of *Doré*'s applicability head on, along with the issue of *Charter* values. I then address *York Region*, which suggests that bifurcated analysis lives on, through its application of correctness to a question of the *Charter*'s scope.

i) *Commission Scolaire*

The Supreme Court of Canada in *Commission Scolaire* recently considered *Doré*, offering a strong reaffirmation that it continues to apply under *Vavilov*. This case considered section 23 of the *Charter*, which provides the right for certain Canadian citizens to have their children receive education in a minority official language.[176] In this case, all the parents were not rights

173. *Ibid* at para 33; *Ferrier*, *supra* note 53 at paras 36–37.

174. 2023 FC 1283 [*Toth*].

175. *Ibid* at para 95.

176. *Commission Scolaire*, *supra* note 52 at para 1.

holders and their applications to have their children admitted into francophone schools were denied.[177] This case offers guidance on *Charter* values, and on the application of *Doré* post-*Vavilov*.

In contrast to Bennett and Davis's claim that *Doré* cases only consider rights, the parties in this case agreed that no rights infringement was at issue.[178] This case was purely about whether the underlying *values* of section 23 were relevant to the Minister's inquiry. Justice Côté, writing for a unanimous court, justifies this both with *Doré*, and with *Vavilov*'s discussion that unwritten constitutional principles "dictate the limits of state action".[179] The operative question is whether the *Charter* values were relevant (i.e., did the Minister need to consider them)—mirroring the threshold question of *Ferrier* and *Robinson* FC.[180] Justice Côté notes that relevance can be determined through the statutory scheme, raised by the parties, or found by a link between the value and matter being considered.[181]

On the *Charter* values question, *Commission Scolaire* adds some clarity. It affirms the role of values as things to be protected in themselves, rejecting the minority opinions in *LSBC*. However, it anchors those values to a degree of relevance. This relevance comes from *Vavilov*'s discussion of reasonableness constraints, where reasonable outcomes are determined by the legal context.[182] One can answer the question "what is a *Charter* value's role" with "it is a legal constraint on administrative decision-makers". This does not fully resolve the vagueness problem but is a more robust view than that given in *Doré* or *RWDSU*.

The case offers confused guidance on the standard of review, likely stemming from the parties' mutual agreement on reasonableness. Justice Côté's elucidation of *Charter* values and their relevance stems from two distinct discussions in *Vavilov*. The discussion of the "limits of state action" comes from *Vavilov*'s constitutional correctness category, as a reason for reviewing such questions on a correctness standard. The "constraints" language on the other hand comes from *Vavilov*'s guidance on conducting reasonableness review. While Côté J unambiguously lays out relevance as a separate threshold question, like the rights infringement in *Robinson* FC, her judgment is unclear as to the relevant standard of review.

Her reasons for deciding whether the values were relevant or not are not clear either. She spends significant time discussing the functions of *Charter* values, which values are at play, and how they are relevant due to the likelihood

177. *Ibid* at para 6.

178. *Ibid* at paras 63–64.

179. *Ibid* at para 65, citing *Vavilov*, *supra* note 1 at para 56.

180. *Commission Scolaire*, *supra* note 52 at para 66.

181. *Ibid* citing Daly, "Doré Duty", *supra* note 37.

182. *Commission Scolaire*, *supra* note 52 at para 66, citing *Vavilov*, *supra* note 1 at para 105.

to have an impact on the minority language educational environment.[183] This is not a "reasons-first approach", despite her affirmation of reasonableness principles.[184] A reasons-first approach arguably would have found the Minister's admittance in her reasons that section 23's purpose needed to be considered dispositive.[185] Yet, Côté J proceeds to relitigate the issue. It may be the case that this was raised by the parties, but the manner in which she reasons on this issue is indicative of a *de novo* correctness review, rather than the process-check of reasonableness.

Justice Côté's review on the threshold question is closer to the review applied in *LSBC*, where the court decided effectively *de novo* that the issue of whether section 2(a) was infringed, implying correctness. This may be a similar case of disguised correctness review—despite Côté J's statements to the contrary. Thus, although this case does not affirm the *Ferrier*-type bifurcation, it does not effectively kill it and seems instead to apply it. It should be noted that none of the *Ferrier* line of cases were considered in *Commission Scolaire*. Given that the parties agreed on the standard of review, this issue likely will not be settled until the Supreme Court of Canada hears a case where the standard is contested.

ii) *York Region*

Commission Scolaire is not the end of it. The Supreme Court of Canada recently released the case of *York Region District School Board v Elementary Teachers' Federation of Ontario (York Region)*,[186] which further muddies the waters on the question of *Doré* review and bifurcation. This case has two opinions, each of which applies a different standard of review. Unlike *Commission Scolaire*, Y*ork Region* addresses the *Ferrier* line of cases.

York Region is a search and seizure case in the labour context. It concerned two teachers who maintained a private log of objectionable behaviour at the school they worked for. The log was found by the school principal when one of the teachers' computers was left open. The principal issued written reprimands to the teachers, who grieved them.[187] The labour arbitrator was not asked to consider section 8 of the *Charter*, but did consider section 8 jurisprudence.

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183. *Commission Scolaire*, *supra* note 52 at para 78.

184. *Ibid* at para 71.

185. *Ibid* at para 78.

186. 2024 SCC 22 [*York Region*].

187. *Ibid* at paras 11–15.

The key issues for our purposes are twofold. Firstly, the question of whether the *Charter* applies to public school boards, and secondly, the appropriate standard of review for this kind of question. This first issue involves both a question of whether a given right or value (in this case, section 8 of the *Charter*), applies to the claimant, and a broader question of whether public school boards are sufficiently governmental such that the *Charter* applies under section 32.[188] These are questions about the scope of the *Charter*.

There are two opinions in *York Region*. The majority was penned by Rowe J, with Wagner CJ and Côté, Kasirer, and Jamal JJ concurring, while the concurrence was written by Karakatsanis and Martin JJ. Both opinions agreed that whether the school board was sufficiently governmental was reviewable under a correctness standard under *Vavilov*'s constitutional exception.[189] More interesting is the disagreement on how to review the arbitrator's decision.

Justice Rowe's majority opinion focuses on the fact that "the arbitrator erred in failing to appreciate that a *Charter* right arose from the facts before her".[190] Effectively, despite the parties not making a section 8 argument at first-instance, it was incumbent on the arbitrator to consider section 8 and her failure to do so attracted correctness review for the reasons of the Court's need to delineate the scope of constitutional rights.[191] This reasoning is exactly what occurred in *Ferrier* and *CBC*. Justice Rowe explicitly refers to and adopts these decisions, as well as referencing Mancini's discussion of bifurcation in the "Conceptual Gap" article.[192] In doing so, Rowe J endorses part of the bifurcation analysis. The Supreme Court of Canada has endorsed reviewing a failure to consider *Charter* rights under correctness.

The minority opinion disagrees and applies reasonableness review instead. However, their disagreement is based on the conclusion that the arbitrator did, in fact, consider the appropriate *Charter* right.[193] This is because she considered section 8 jurisprudence and its underlying principles, "the arbitrator's reasons clearly demonstrate she appreciated that the s. 8 privacy framework applied and constrained her decision".[194]

Curiously, this is the extent of the disagreement. It is notable that the minority Justices agree that "whether or not teachers have a privacy right in their workplace is an issue that deserves to be correctly determined for all".[195]

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188. *Ibid* at paras 62, 79; on the framework of analysis for the *Charter*'s applicability under s 32, see *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC).

189. *York Region, supra* note 186 at paras 62, 108.

190. *Ibid* at para 63.

191. *Ibid* at para 64.

192. *Ibid* at para 66.

193. *Ibid* at paras 108–09, Karakatsanis and Martin JJ, concurring.

194. *Ibid* at para 109, Karakatsanis and Martin JJ, concurring.

195. *Ibid* at para 111, Karakatsanis and Martin JJ, concurring.

Yet, they characterize the issue as whether the specific greivors' rights were breached, stating that this determination "heavily depended on the specific factual and statutory context" and, as a result, "the presumption of reasonableness review applies".[196] This reasoning is the same underlying the argument for bifurcation; that a fact-specific analysis involving a specific context does not attract correctness review.[197]

For the minority, the question of whether a right is infringed is reviewable under reasonableness due to its highly fact-specific nature.[198] They reject the notion that *Ferrier* and its subsequent cases stand for the proposition that correctness review applies to these cases.[199] Instead, *Charter*-rights considerations are entirely separate from "scope" considerations (such as whether the public school board is sufficiently governmental), and are instead questions about *Charter* "application", with a final conclusion that

> questions about the engagement and scope of a *Charter* right will only sometimes require a final and determinate answer. . . . [T]he arbitrator's decision . . . [was] highly fact-specific, depended on a particular statutory context, and concerned the application of legal principles to the particular grievance presented.[200]

It is difficult to see what the difference is between scope and application. Paul Daly uses the term scope in a slightly different way, referring to whether a *Charter* right is infringed under a particular set of facts (what the minority in *York Region* calls "application").[201] As Daly notes, "in respect of s. 8, because the scope of the right is determined in large part by the context-sensitive concept of a 'reasonable expectation of privacy', meaning that scope and application bleed one into the other".[202] The idea of scope is at best nebulous; the term can conceptually apply to multiple stages of rights analysis. Whether a right does or

196. *Ibid* at para 112, Karakatsanis and Martin JJ, concurring.

197. *Ibid* at paras 123–26, Karakatsanis and Martin JJ, concurring.

198. *Ibid* at para 123, Karakatsanis and Martin JJ, concurring.

199. *Ibid* at para 126, Karakatsanis and Martin JJ, concurring.

200. *Ibid* at para 127, Karakatsanis and Martin JJ, concurring.

201. Paul Daly, "Constraints, Correctness and the Charter: York Region District School Board v. Elementary Teachers' Federation of Ontario, 2024 SCC 22" in *Administrative Law Matters* (10 July 2024), online (blog): <administrativelawmatters.com> [perma.cc/XF6V-S9BY] [Daly, "Constraints"].

202. *Ibid*.

does not "apply" on a given set of facts nevertheless delineates who that *Charter* right protects and who it does not. The distinction drawn by *York Region*'s minority is conceptually murky.[203]

The minority also incorrectly assesses *Ferrier* and *CBC*. They state that these cases do not qualify as a "line of developing authority that requires correctness review for whether a *Charter* right arises on the facts or for questions about the scope of a *Charter* right".[204] Yet, whether a decision-maker failed to consider an applicable *Charter* right is a question of whether a *Charter* right arises. The minority Justices' statement is a misreading of *Ferrier* and *CBC*. Notably in *Ferrier*, the Court states that "[t]he issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the section 2(b) *Charter* right impacted or affected the discretionary decision he had to make".[205] Justice Rowe's reading is accurate while the concurring Justices' is not.

Neither opinion mentions *Commission Scolaire*, despite it ostensibly answering the question already. Though the case is primarily about *Charter* values, *Charter* rights also fall under its framework. The first step involves the reviewing court determining "whether the administrative decision at issue 'engages the *Charter* by limiting *Charter* protections—*both rights* and values".[206] The majority does not address this apparent inconsistency. The minority does not address *Commission Scolaire* either, but their reasons prescribe the same standard of review.

Paul Daly has argued that the two cases can be differentiated by a focus on values rather than rights; rights and values serve different functions and *Commission Scolaire* is focused on values, not rights.[207] This is true only to a point. *Commission Scolaire* has two primary purposes: settling *Doré* review and clarifying *Charter* values. The decision explicitly includes *Charter* rights in its prescribed analysis but only analyzes *Charter* values as that was the issue on appeal.[208] Daly's argument on the roles of *Charter* values is important but does

203. On this point, see Mancini, "Conceptual Gap", *supra* note 7 at 829; Daly, "Unresolved Issues", *supra* note 85 at 107–08 (accepting that scope questions may require correctness review and that the distinction is not particularly robust).

204. *York Region*, *supra* note 186 at para 127, Karakatsanis and Martin JJ, concurring.

205. *Ferrier*, *supra* note 53 at para 37 [emphasis original].

206. *Commission Scolaire*, *supra* note 52 at para 50 [emphasis added], citing *LSBC*, *supra* note 34 at para 61.

207. Daly, "Constraints", *supra* note 201.

208. *Commission Scolaire*, *supra* note 52 at para 62.

not answer the inconsistency. It is all well and good that *York Region* focuses on rights, and how the operate as constraints on decision-makers, but *Commission Scolaire* does not confine itself only to values cases. Thus, an inconsistency remains.

What, then, is to be made of *York Region* in relation to the bifurcation argument? Firstly, it still does not fully settle the question of bifurcation. Justice Rowe only addresses half of the issue. The question of rights-infringement was not at issue, although Rowe J does suggest that the arbitrator should have applied the standard common law test for a reasonable expectation of privacy in *obiter*.[209] Cases which consider correctness review for a rights infringement test, such as *Robinson* FC, were not considered.

From this, we can conclude at least that a failure to consider *Charter* rights is reviewable under correctness, as in *Ferrier*. This then prompts a full *de novo* review.[210] If the decision-maker properly considered relevant *Charter* values however, the answer is somewhat unclear as to whether and where deference is owed. *York Region*'s majority does not, even in *obiter*, explain what comes next.

Bifurcation is neither killed by these reasons, nor is it adopted. Justice Rowe's reasons only apply to one kind of *Charter* issue—the failure of a decision-maker to consider an applicable right. This is a matter of the "scope" of the *Charter* and thus must be reviewed on correctness.

The question is then whether bifurcation is dead. The answer is a qualified no. There is a desire in these reasons to have wide-ranging questions of *Charter* rights application answered on correctness. This is evident both through the agreement on the at-large *Charter* scope question; in Rowe J's use of *Ferrier* and in the minority's statement that "whether or not teachers have a privacy right in their workplace is an issue that deserves to be correctly determined for all".[211] Yet, there is no satisfying answer to the minority's contention that reasonableness applies to the question of rights infringement in a specific context by the majority.

The Federal Court recently released its redetermination in the *Robinson* line of cases, following *Robinson* FCA's remittance.[212] This case surveyed the jurisprudence at the federal courts and Supreme Court of Canada on the question, including the cases discuss in this paper.[213] The respondent argued that *York Region*'s correctness review "applies

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209. *York Region*, *supra* note 186 at paras 96, 101–03.

210. It should be noted that Rowe J nevertheless spends the reasons analyzing the arbitrator's judgment in what Daly has called "disguised reasonableness review". See Daly, "Constraints", *supra* note 201.

211. *York Region*, *supra* note 186 at para 111.

212. *Robinson v Canada (Attorney General)*, 2024 FC 2092 [*Robinson No 2*].

213. *Ibid* at paras 25–59.

only in circumstances where a decision-maker has failed to turn its mind to whether a *Charter* right is engaged".[214] Justice Southcott disagreed, having the following to say about *York Region*'s analysis:

> In concluding that the arbitrator erred in law by failing to apply the section 8 *Charter* right as she was required to do, the majority observed not only that the arbitrator's reasons *failed to indicate that she was considering* that right but also that *she failed to appreciate that the Charter right was at stake* (at para 94). To accept the Respondent's submission would be to conclude that, *if the arbitrator had thought about the Charter right but concluded that it did not apply, the majority in York Region would have examined that conclusion through the standard of reasonableness*. I do not read the majority's analysis as capable of supporting that interpretation.[215]

Robinson No 2 interprets *York Region*, and the Federal Court cases more generally, as supporting review of the scope of a *Charter* right (i.e., the threshold question) under correctness.[216] He further finds that, as I have argued, bifurcation does not break with *Doré*, because *Doré* is focused on proportionality analysis, "not whether the particular *Charter* value is engaged".[217] Justice Southcott ultimately applies a bifurcated analysis.[218]

York Region, then, has not totally disposed of bifurcation. *Robinson No 2* is a strong case that bifurcation lives, bolstered by the *York Region* decision. Of course, this is only one case in one court. Further decisions, especially at the appellate level, will be needed to fully settle the jurisprudence.

Conclusion

Doré and *Vavilov* are conceptually intertwined through the culture of justification. I have argued that *Charter* review ought to be bifurcated, such that the threshold question of a *Charter* right (or value)'s applicability is reviewable under correctness (as is the failure of a decision-maker to consider a right or value), due to its bright-line answers and wide-ranging applicability.

214. *Ibid* at para 61.

215. *Ibid* at para 62 [emphasis added].

216. *Ibid* at para 64 (while Justice Southcott acknowledges that *Robinson* FCA declined to adopt the *Ferrier* approach, that the Federal Court of Appeal applied that approach in *CBC*).

217. *Ibid* at para 67; see also *ibid* para 65 (finding the same for *Commission Scolaire*).

218. *Ibid* at para 71.

The proportionality balancing under section 1 of the *Charter* ought to remain under reasonableness review, as a highly fact-specific analysis.

Recent jurisprudence is mixed on the idea of bifurcation. As it stands, the review of these decisions appears to proceed in the following steps:

i. Determine whether the decision-maker failed to consider an applicable *Charter* right or appreciate that an applicable right was at stake. This attracts correctness review.[219]

ii. Determine whether the decision infringes an applicable *Charter* right or engages an applicable *Charter* value? This question appears to attract reasonableness review, at least for *Charter* values.[220]

iii. Is the decision a proportionate balancing under section 1 of the *Charter*? This decision attracts reasonableness review.[221]

This is, in effect, a "weak-form bifurcation". *York Region* has confirmed *Ferrier*'s statement that the failure to appreciate an applicable *Charter* right is reviewable on a correctness standard. A "strong-form bifurcation", where the infringement of a *Charter* right or engagement of a *Charter* value is reviewable under correctness, is unclear.

Going forward, there are two issues to be resolved. First, what is the appropriate standard review of a decision-maker's analysis of whether a *Charter* right was infringed and the decision-maker correctly identified that a right applied? Since the majority's analysis in *York Region* ends at the identification step, the standard of review at this stage is unclear, though *Robinson No 2* suggests the standard is correctness. *Commission Scolaire* and the minority in *York Region* suggest the standard is reasonableness.

Second, does the review of decisions impacting *Charter*-values attract the same standard of review as decisions impacting *Charter*-rights? Further, it is unclear where to put the engagement of *Charter* values on the above chart—it could reasonably fit into steps (1) or (2). Until these questions are fully answered, bifurcation as I argue for it is neither dead nor alive. Instead, it exists in waiting.

Modern *Doré* review is unsatisfyingly ambiguous. The general framework is clear enough thanks to *Commission Scolaire*, but the finer points of standard of review are not yet settled. The concerns with *Charter* values, rather than being fully addressed, have been reaffirmed and continue to be baked into the system. Only time will tell if these attempted clarifications are sufficient to dispel the common criticisms. *Doré* remains a strange corner of administrative law and constitutional law, a blurry exception in the margins of *Vavilov*'s clear and otherwise expansive framework for judicial review.

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219. *York Region*, *supra* note 186 at para 66; *Robinson No 2*, *supra* note 212 at para 71.

210. *Commission Scolaire*, *supra* note 52 at para 73.

211. *Ibid*.