There’s still value in values: Doré and French language education rights affirmed by the SCC

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In *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, the Supreme Court of Canada (SCC) affirmed the important role that non-rights holders play in fulfilling minority language education rights under section 23 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) while breathing new life into the oft-maligned framework articulated in *Doré v. Barreau du Québec*, 2012 SCC 12 (*Doré*). This decision makes clear that reasonableness review under *Doré* requires a meaningful consideration of how the decision will impact relevant *Charter* values, even when no *Charter* right is directly infringed.

Background

Under section 23 of the *Charter*, Canadian citizens whose first language or language of primary school instruction is English or French, but who live in a province or territory where that language is a linguistic minority, have the constitutional right to have their children receive primary and secondary school education in that language. In the Northwest Territories, French is a minority language, and parents who are rights holders under section 23 have a constitutional right to send their children to a French first language school.

In this case, several parents who had ties to the Francophone community in the Northwest Territories, but who were not rights holders because they did not meet the specific requirements of section 23 for various reasons (including that they were not Canadian citizens, or French was a second language), sought to have their children admitted to a French first language school.

The admission of children to French first language schools in the Northwest Territories was governed by a Ministerial Directive which set out three circumstances in which children of non-rights holder parents were eligible to be admitted: (1) if the child’s parent or grandparent would have been a rights holder but for a lack of opportunity to attend a French first language school; (2) if the parent would otherwise meet the criteria of section 23 if they were a Canadian citizen; and (3) if the parent is a new immigrant whose child does not speak English or French and is enrolling in a Canadian school for the first time.

The parents in this case did not meet the Directive's criteria. With support from the Northwest Territories French-Language School Board, the Commission scolaire francophone des Territoires du Nord-Ouest (CSFTNO), the parents requested that the Minister exercise her residual discretion, outside of the Directive, to admit the children to the French first language schools. The Minister refused. The parents and the CSFTNO applied for judicial review.

The Supreme Court of the Northwest Territories set aside the Minister's decisions, finding she had not proportionately accounted for the parents' protections under section 23 of the *Charter* (2020 NWTSC 28). The Court of Appeal overturned, with the majority finding that there was no legal or constitutional obligation to admit a child of a non-rights holder parent (2021 NWTCA 8).

Supreme Court of Canada

In a unanimous decision by Côté J., the SCC allowed the appeal, setting aside the Minister's decisions denying the children admission to the French first language school.

A. The *Doré* framework applies

The SCC found that this case was a straightforward application of the framework articulated in *Doré*, which governs the judicial review of administrative decisions that engage the *Charter* and sets out a reasonableness standard of review. Relying on its 2019 decision overhauling the standard of review framework in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 (*Vavilov*), the SCC held that there was no reason to depart from the reasonableness standard in this case.

In restating the *Doré* framework, the SCC also made reference to the principles of reasonableness review set out in *Vavilov*, including the need for decision-makers to justify their decision in light of the relevant laws and facts. Under the *Doré* approach, a reviewing court must first determine whether the administrative decision "engages the *Charter* by limiting *Charter* protections – both rights and values". If so, the reviewing court must assess whether the decision-maker proportionately balanced the underlying *Charter* right or value with the relevant statutory objectives. Following *Vavilov*, the focus of judicial review is on the decision-maker's reasoning process and outcome. Infusing these principles into the *Doré* framework, the SCC held that to be proportionate, the decision must reflect that the decision-maker considered the relevant *Charter* values and "meaningfully" addressed the impacts on the concerned group or individual.

B. Relevant *Charter* values must be balanced

The essence of the parties' disagreement was whether section 23 of the *Charter* could be engaged by the Minister's decisions, given that the parents whose children were denied admission to the French first language schools were not rights holders and there could therefore be no infringement of *Charter* rights.

In the ruling, the SCC reaffirmed its finding that the *Doré* framework applies not only where an administrative decision directly infringes *Charter* rights but also where it simply engages a *Charter* value. The SCC also clarified the relationship between *Charter* rights and values, explaining that *Charter* values are "inseparable from *Charter*

rights", as the values that underpin and give meaning to *Charter* rights. *Charter* values serve different functions in different contexts, including in the development of common law rules and statutory interpretation. In the administrative law context, decision-makers have a general obligation to consider the values relevant to the exercise of their discretion, which are constitutional constraints on the powers delegated to the decision-maker. The SCC tied this back to the reasonableness analysis in *Vavilov*, which requires that the decision be justified in relation to the relevant facts and law.

The SCC set out a number of circumstances where it will be evident that a *Charter* value is relevant and must be considered by an administrative decision, namely: (1) because on the nature of the governing statutory scheme; (2) because the parties raised the *Charter* value before the administrative decision-maker; or (3) because of the link between the *Charter* value and the matter under consideration.

C. The values underlying section 23 of the *Charter* were relevant

The SCC held that the values underlying section 23 of the *Charter* were engaged by the Minister's decision in this case. This was because her decisions were likely to have an impact on the minority language educational environment in the Northwest Territories.

In identifying the specific *Charter* values that governed the Minister's discretion, the SCC noted that section 23 of the *Charter* has a preventive, remedial and unifying purpose. Preserving and developing minority language communities are among the values underlying section 23. Education is an essential means of carrying out these objectives, because schools are a setting for socialization for students to develop their potential in their own language and familiarize themselves with their culture.

The SCC held that the values underlying section 23 are always relevant to discretionary decisions about admitting children of non-rights holders to minority language schools. Allowing the presence of children from the majority language community could swamp children in the minority language community. But conversely, population growth in the minority language community reduces the likelihood of assimilation and contributes to fulfilling section 23's promise of equal partnership of Canada's two official languages in education. In either event, these values are relevant and must be considered.

D. The values underlying section 23 of the *Charter* were limited by the decision

After finding that the values underlying section 23 of the *Charter* were **engaged** by the decision, the SCC went on to find that they were also **limited** by the decision.

The SCC conducted a contextual analysis based on the unique language dynamics of the Francophone community in question. Based on the evidence, the SCC concluded that the admission of a certain number of children of non-rights holders into French first language schools actually contributed to the growth and development of the Francophone community in the Northwest Territories, and reduced the likelihood of assimilation and cultural erosion. Although this would not be the result in all cases—in other factual circumstances, the admission of children of non-rights holders could have a negative impact on the minority language community (if they become, for example, centres of assimilation) and militate against admission—based on regional factors and

the individual characteristics of each applicant, admission was shown to have a positive impact.

As a result, the values of preservation and development of minority language communities underlying section 23 were limited by the decision to refuse their admission, and the Minister was required to proportionately balance these values against the government's interests.

E. The Minister failed to proportionately balance *Charter* values

The SCC found that the Minister had failed to proportionately balance *Charter* values in her decisions by meaningfully addressing the constitutional values of preservation and development of official language minority communities.

With respect to one of the applicants, the Minister failed to consider the relevant *Charter* values at all. The SCC found that this necessarily led to a disproportionate balancing.

For the other decisions, the Minister did refer to section 23 but the SCC found that her reasons did not reflect the significant impact her decisions might have on the Francophone community of the Northwest Territories. The Minister therefore did not give proper weight to the relevant values. The Minister had focused on whether the students' admission was "required" to protect the Francophone community, and did not consider whether their admission would promote the development of the Francophone community.

Because these significant benefits for the preservation and development of the language and culture of the minority language community were lost, the SCC found that the Minister's decision had a significant impact on values under section 23 of the *Charter*. The SCC also found that the Minister placed too much importance on her duty to make consistent decisions and placed disproportionate weight on the cost of admitting students into French schools. All of this rendered her decisions unreasonable.

Key takeaways

- The SCC's decision in *Commission scolaire francophone des Territoires du Nord-Ouest* affirms the continued application of the *Doré* framework, including in cases where the decision implicates *Charter* values but does not directly infringe a *Charter* right. The application of reasonableness review to administrative law decisions that engage the *Charter* has been subject to academic and judicial criticism, including from Côté J. herself in her joint dissenting reasons with Brown J. in *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32. Commentators and the judiciary have questioned the future of the *Doré* framework following the SCC's decision in *Vavilov*, based on the SCC's commentary in that case about constitutional questions being subject to correctness review. However, this new precedent from a unanimous panel of the SCC endorsed the *Doré* framework for limits on *Charter* values, now bolstered by the strengthened focus on reasons and justification in *Vavilov*.
- The decision elaborates on the requirement for administrative decision-makers to consider *Charter* values in every decision in which they are engaged, regardless of whether they are raised by the parties or not, and sets out a new test for

determining whether *Charter* values are engaged. To identify whether *Charter* values must be considered in a given decision, an administrative decision-maker should consider whether: (1) the nature of the governing statutory scheme implicates *Charter* values; (2) *Charter* values were raised before the administrative decision-maker; or (3) there is a link between the *Charter* value and the matter under consideration.

- The decision treats the question of whether *Charter* values are **engaged** separately from the decision of whether *Charter* values are **limited**. Where *Charter* values are engaged, they must be considered by the decision-maker for the decision to be reasonable. Where *Charter* values are limited, those limits must further be proportionately balanced against the government's objectives.
- The SCC's decision also provides an important boost to minority language communities and minority language education rights by recognizing the important role that non-rights holders can play in contributing to the preservation and development of minority language communities. Rather than taking a narrow view of section 23 based on negative impacts on individual rights holders, the SCC affirmed the positive and collective aspects of section 23 rights, and adopted a contextual approach for understanding how those who show a genuine commitment to integrating into the minority language and culture can improve the continued vitality of these communities.

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