

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

**JOHN VABUOLAS, PAUL SIDHU, GRAND FORKS CONGREGATION OF
JEHOVAH'S WITNESSES, COLDSTREAM CONGREGATION OF JEHOVAH'S
WITNESSES, AND WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA**

Appellants

– and –

**INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA,
ATTORNEY GENERAL OF BRITISH COLUMBIA, GABRIEL-LIBERTY WALL AND
GREGORY WESTGARDE**

Respondents

– and –

**ATTORNEY GENERAL OF CANADA, BRITISH COLUMBIA CIVIL LIBERTIES
ASSOCIATION, BRITISH COLUMBIA HUMANIST ASSOCIATION, ASSOCIATION
FOR REFORMED POLITICAL ACTION, CHRISTIAN LEGAL FELLOWSHIP,
EVANGELICAL FELLOWSHIP OF CANADA AND CANADIAN CENTRE FOR
CHRISTIAN CHARITIES, DAVID ASPER CENTRE FOR CONSTITUTIONAL
RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION AND INFORMATION AND
PRIVACY COMMISSIONER OF ONTARIO**

Interveners

**FACTUM OF THE INTERVENER,
CANADIAN CIVIL LIBERTIES ASSOCIATION**
(Rule 42 of the Rules of the Supreme Court of Canada)

Trudel Johnston & Lespérance

750, Côte de la Place d'Armes, Suite 90
Montréal, QC, H2Y 2X8

Lex Gill

Tel: 514 871 8385 ext. 219
Fax: 514 871 8800
Email: lex@tjl.quebec

Adair Goldblatt Bieber LLP

401 Bay Street Suite 3200
Toronto, ON, M5H 2Y4

Ana Qarri

Tel: 416 499 9940
Fax: 647 689 2059
Email: aqarri@agblp.com

Counsel for the Intervener,
Canadian Civil Liberties Association

TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON, K1A 0J1
Email: registry-greffe@scc-csc.ca

COPIES TO:

W. Glen How & Associates LLP

13893 Highway 7, P.O. Box 40
Georgetown, ON, L7G 4T1

Jayden MacEwan
David M. Gnam
Anna Carolina Cantler
Tel.: 905 873 4545
Fax: 905 873 4522
jmacewan@wghow.ca

Counsel for the Appellants,
John Vabuolas, Paul Sidhu, Grand Forks
Congregation of Jehovah's Witnesses,
Coldstream Congregation of Jehovah's
Witnesses, and Watch Tower Bible and Tract
Society of Canada

Supreme Advocacy LLP

340 Gilmour Street, Suite 100
Ottawa, ON, K2P 0R3

Eugene Meehan, K.C.

Tel.: 613 695 8855, ext. 102
Fax: 613 695 8580
emeehan@supremeadvocacy.ca

Agent for the Appellants,
John Vabuolas, Paul Sidhu, Grand Forks
Congregation of Jehovah's Witnesses,
Coldstream Congregation of Jehovah's
Witnesses, and Watch Tower Bible and Tract
Society of Canada

DLA Piper

1133 Melville Street, Suite 2700
Victoria, BC, V6E 4E5

Taryn Urquhart

Alex Hudson

Tel.: 604 687 9444

taryn.urquhart@dlapiper.com

Counsel for the Respondent,
Information and Privacy Commissioner for
British Columbia

Attorney General of British Columbia

P.O. Box 9280 Stn Prov Govt
Victoria, BC, V8W 9J7

Robert Danay

Philip McLaughlin

Tel.: 250 952 0122

robert.danay@gov.bc.ca

Counsel for the Respondent,
Attorney General of British Columbia

Farris, Vaughan, Wills & Murphy LLP

2500-700 West Georgia Street
Vancouver, BC, V7Y 1B3

Kevin Smith

Megan Walwyn

Tel.: 604 661 9302

kwsmith@farris.com

Counsel for the Respondents,
Gabriel-Liberty Wall and Gregory Westgarde

Olthuis Van Ert

66 Lisgar Street
Ottawa, ON, K2P 0C1

Dahlia Shuhaibar

Tel.: 613 501 5350

dshuhaibar@ovcounsel.com

Agent for the Respondent,
Attorney General of British Columbia

Supreme Law Group

440 Laurier Ave. West, Suite 200
Ottawa, ON, K1R 7X6

Moira S. Dillon

Tel.: 613 691 1224

Fax: 613 691 1338

mdillon@supremelawgroup.ca

Agent for the Respondents,
Gabriel-Liberty Wall and Gregory Westgarde

Attorney General of Canada
Deputy Attorney General of Canada
50 O'Connor Street
Ottawa, ON, K1A 0H8

Zoe Oxaal
Tel.: 613 295 0765

SCCAgentCorrespondentCSC@justice.gc.ca

Agent for the Intervener,
Attorney General of Canada

Circle Barristers

180 John Street
Toronto, ON, M5T 1X5

Sujit Choudhry
Mani Kakkar
Erica McLachlan
Tel.: 416 436 3679

sujit.choudhry@circlebarristers.com

Counsel for the Intervener,
British Columbia Civil Liberties Association

Allen/McMillan Litigation Counsel

1625 - 1185 West Georgia Street
Vancouver, BC, V6E 4E6

John Trueman
Vivian Li

Tel.: 604 569 2652
Fax: 604 628 3832

john@amlc.ca

Counsel for the Intervener,
British Columbia Humanist Association

**Association for Reformed Political Action
(ARPA) Canada**

130 Albert Street, Suite 1705
Ottawa, ON, K1P 4G4

John Sikkema
Joel Persaud

Tel.: 289 228 8775
Fax: 613 249 3238

john@arpacanada.ca

Counsel for the Intervener,
Association for Reformed Political Action

Christian Legal Fellowship

285 King Street, Suite 202
London, ON, N6B 3M6

Derek B.M. Ross
André M. Schutten

Tel.: 519 601 4099
Fax: 519 601 4098

execdir@christianlegalfellowship.org

Counsel for the Intervener,
Christian Legal Fellowship

Lionheart Law

2210 Bank Street, Suite 10145
Ottawa, ON, K1V 1J6

Garifalia C. Milousis
Deina Warren

Tel.: 647 557 6374 ext. 1010

lia@lionheartlaw.ca

Counsel for the Intervener,
Evangelical Fellowship of Canada and
Canadian Centre for Christian Charities

Supreme Advocacy LLP

340 Gilmour Street, Suite 100
Ottawa, ON, K2P 0R3

Marie-France Major

Tel.: 519 601 4099
Fax: 519 601 4098

mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Christian Legal Fellowship

Stockwoods LLP

TD North Tower, Suite 4130
77 King Street West, P.O. Box 140
Toronto, ON, M5K 1H1

Justin Safayeni
Olivia Eng

Tel.: 416 593 3494
Fax: 416 593 9345

justins@stockwoods.ca

Counsel for the Intervener,
David Asper Centre for Constitutional Rights

**Information and Privacy Commissioner of
Ontario**

2 Bloor Street East, Suite 1400
Toronto, ON, M4W 1A8

Linda Hsiao-Chia Chen
Brendan Gray

Tel.: 437 770 8216

linda.chen@ipc.on.ca

Counsel for the Intervener,
Information and Privacy Commissioner of
Ontario

Conway Baxter Wilson LLP

411 Roosevelt Avenue, Suite 400

Ottawa, ON, K2A 3X9

David P. Taylor

Tel.: 613 288 0149
Fax: 613 688 0271

dtaylor@conwaylitigation.ca

Agent for the Intervener,
David Asper Centre for Constitutional Rights

TABLE OF CONTENTS

PART I: OVERVIEW..... 1

PART II: QUESTIONS IN ISSUE..... 1

PART III: STATEMENT OF ARGUMENT..... 1

PART IV: COSTS.....10

PART VI: SUBMISSIONS ON CASE SENSITIVITY.....10

PART VII: TABLE OF AUTHORITIES.....12

PART I: OVERVIEW

1. This appeal offers the Court an opportunity to resolve a series of problems that arise when parties disagree as to whether discretionary administrative action, as opposed to the statutory scheme purporting to authorize that action, is the proper subject of a *Charter* challenge. The manner in which a violation is characterized has become a proxy war over forum, remedy, standard of review, and ultimately the degree of constitutional protection afforded to claimants. The CCLA submits that the distinction cannot ground a workable standard of review framework, and that a bifurcated test risks reproducing the same *vires* debates that divided the Court before *Vavilov*. It also asks the Court to provide clear guidance ensuring claimants receive equal constitutional protection regardless of the context in which their rights were violated. Additionally, the appeal raises substantive questions about “competing” rights and interests in the context of privacy and access to information legislation. In this context, the law requires decision-makers and courts to reconcile countervailing interests, including finding a balance between the rights of privacy and access, or between those rights and other constitutional interests.

PART II: QUESTIONS IN ISSUE

2. The CCLA intervenes on the law/application divide raised by the present appeal, the appropriate standard of review on *Charter* questions, and the manner in which courts should balance competing constitutional rights in the context of access to information and privacy law.

PART III: STATEMENT OF ARGUMENT

A. The law/application divide is the source of persistent conflict in the *Charter* context

3. The conceptual distinction between (a) legislation that infringes the *Charter* directly and (b) the unconstitutional exercise of otherwise lawful administrative discretion has been a feature of the Canadian constitutional jurisprudence since at least *Slaight Communications*¹, though its implications have varied widely over the years.

4. In *Slaight*, Justice Lamer drew a line between cases in which “the disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right” (in which case the legislation itself is the subject of constitutional

¹ *Slaight Communications Inc. v. Davidson*, [1989] 1 RCS 1038 [“*Slaight Communications*”].

scrutiny) and cases where “the legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*” (in which case the order is the proper subject). In either case, the state faced the same degree of scrutiny under section 1 of the *Charter*, and courts were asked to determine whether an infringement constituted a reasonable limit that was demonstrably justified in a free and democratic society.²

5. Since *Slaight*, the dividing line between unconstitutional legislation and unconstitutional state action has not always been easy to identify in practice.³ In some cases (like this appeal⁴) different levels of court will disagree about the proper subject of a party’s challenge. Even appellate courts may split on the question.⁵ Experienced public law litigators know that the manner in which a *Charter* issue is framed has far-reaching procedural, evidentiary and remedial consequences, and that a dispute in this regard can significantly increase the cost and complexity of a file.

6. For example, where a claimant directly challenges the constitutionality of a statutory provision under subsection 52(1) of the *Constitution Act, 1982*, state defendants routinely argue that the provision itself is constitutional, while conceding that the authority it confers may, on occasion, be exercised in a manner that infringes the *Charter*.⁶ On this view, the “true source”⁷ of the claimant’s grievance lies in discretionary administrative action, and not the legislation itself. A direct constitutional challenge, they argue, is thus misdirected, and individualized recourse — whether by way of judicial review or under subsection 24(1) of the *Charter* — is said to offer the more appropriate avenue for resolving the alleged *Charter* violation.

² *Ibid.*, p. 1080.

³ *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023 SCC 17](#), para. [159](#) [“*CCR*”]; Latimer and Berger, “A Plumber with Words: Seeking Constitutional Responsibility and an End to the *Little Sisters* Problem” (2022), [104 S.C.L.R. \(2d\) 143](#), pp. 145-46.

⁴ *Vabuolas v. British Columbia (Information and Privacy Commissioner)*, [2025 BCCA 83](#), see paras. [39-49](#), [60-67](#), [78-96](#) [“*Vabuolas BCCA*”].

⁵ See e.g., *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000 SCC 69](#) [“*Little Sisters*”].

⁶ See, e.g. the tensions in *CCR*, supra 3, paras. [61-63](#), [159](#), [164](#); *Little Sisters*, supra 5, paras. [133-135](#); *R. v. Khawaja*, [2012 SCC 69](#), para. [83](#); *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, [2015 SCC 46](#), paras. [52-53](#); *Procureur général du Québec c. Luamba*, [2024 QCCA 1387](#), paras. [74-76](#) (SCC File No. 41605, judgment reserved).

⁷ *Vabuolas BCCA*, supra 4, paras. [105-106](#).

7. Yet where claimants *do* seek an individual remedy for the violation of their rights, they are often met with the opposite defence: namely, that the “true source” of the violation lies not in the impugned state conduct, but in the (presumptively valid) statutory scheme that authorized it in the first place. A claimant seeking damages under subsection 24(1) of the *Charter* in these cases often provokes a defence of “good governance” and a limited immunity, heightening a claimant’s burden.⁸ In other cases, whether the true source of the violation is found to be the law itself (as opposed to its [mis]application) will directly affect the relevance and admissibility of evidence, the remedies available to a claimant, the applicable analytical framework, and even the proper forum in which the debate may be heard.

8. The question of how to characterize the “source” of a given *Charter* violation has given rise to persistent conflict in Canadian constitutional law, conflict which obscures the reality that both the law *and* its application will often be unconstitutional to varying degrees and for different reasons.⁹ While it is sometimes possible to draw a principled distinction on this basis, the case law favours procedural games that center this line-drawing exercise at the expense of the merits, particularly in areas where administrative decision-makers exercise broad, low-visibility forms of discretion and where the stakes for individual liberties are highest — as is the case at the border, in immigration and refugee law, and within prisons. In these cases, *Charter* claimants never seem to be asking for the right thing, in the right place, in the right way, at the right time.

9. If a claimant has the misfortune of experiencing a *Charter* violation in a manner that involved some administrative decision-maker or statutory delegate, the situation becomes all the more complex. Should they attempt to bypass the problem altogether and seek direct redress before the superior courts, the matter may raise issues of collateral attack or require the claimant to first exhaust all available administrative remedies.¹⁰ But even in a purely administrative context, the same dichotomy resurfaces — this time as a debate over the standard of review.

⁸ See e.g., *Canada (Attorney General) v. Power*, [2024 SCC 26](#).

⁹ See e.g., *Canadian Civil Liberties Association v. Canada*, [2019 ONCA 243](#), paras. [116-119](#) and *Brazeau v. Canada (Attorney General)*, [2020 ONCA 184](#), paras. [1-11](#), [39](#).

¹⁰ See, by analogy cases like *Canada (Public Safety and Emergency Preparedness) v. Chhina*, [2019 SCC 29](#), para. [71](#) (majority), para. [89](#) (dissent); *Okwuobi v. Lester B. Pearson School Board*; *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, [2005 SCC 16](#); *Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, [2005 SCC 16](#), paras.

10. At the outset, claimants are told that when “the issue on review is whether a provision of the decision maker’s enabling statute violates the *Charter*”¹¹ the standard of review is correctness, following both *Vavilov* and *Martin*. As the majority in *Vavilov* explains, questions that implicate “the constitutional authority to act must have determinate, defined and consistent limits” and require a final answer from the courts.¹² An administrative decision-maker's interpretation as to the constitutionality of its own governing legislation, in other words, is not entitled to deference at all.

11. However, where the violation of a *Charter* right is instead framed as arising from the improper or disproportionate exercise of otherwise valid statutory discretion, a different standard applies. To the extent that a court finds “that the effect of the administrative decision being reviewed is to unjustifiably limit rights,” the majority reasons in *Vavilov* refer to *Doré*, which held that such decisions are to be reviewed on the reasonableness standard.¹³ In its 2023 *CSFTNO* decision, this Court goes somewhat further, prescribing *Doré* as the framework for the review of all “discretionary administrative decisions that limit *Charter* protections”¹⁴ as well all cases where a decision “simply engages a value underlying one or more *Charter* rights, without limiting these rights”.¹⁵ *Doré* thus appears to stand for two propositions at once: that *Charter*-infringing state action should be reviewed on a reasonableness standard, and that *Charter* values operate as a freestanding interpretive constraint on decision-makers — even without a *Charter* breach.

12. While reiterating the claim from *Doré*, *Loyola* and *Trinity Western* to the effect that reasonableness review for *Charter* compliance works the same “justificatory muscles” as the test set out in *Oakes*,¹⁶ the *CSFTNO* decision also retains a series of methodological artifacts from the majority reasons in *Trinity Western* which have otherwise been abandoned in the post-*Vavilov* era

[45-46](#), [52-53](#); *Strickland v. Canada (Attorney General)*, [2015 SCC 37](#), paras. [20-31](#); *R. v. Bird*, [2019 SCC 7](#), paras. [25-32](#).

¹¹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), para. [57](#) [“*Vavilov*”] *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003 SCC 54](#), para. [65](#) [“*Martin*”].

¹² *Vavilov*, supra 11, paras. [55-56](#).

¹³ *Ibid.*, para. [57](#), citing *Doré v. Barreau du Québec*, [2012 SCC 12](#) [“*Doré*”].

¹⁴ *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, [2023 SCC 31](#), para. [60](#) [“*CSFTNO*”].

¹⁵ *Ibid.*, para. [64](#).

¹⁶ *CSFTNO*, supra 14, para. [70](#); *Doré*, supra 13, para. [5](#); *Loyola High School v. Quebec (Attorney General)*, [2015 SCC 12](#), para. [40](#); *Law Society of British Columbia v. Trinity Western University*, [2018 SCC 32](#), paras. [79-82](#) [“*Trinity Western*”].

— for instance, by asking “whether the decision falls within a range of reasonable outcomes” rather than by applying *Vavilov*’s distinct framework for reasonableness review.¹⁷ The decision (perhaps simply because it does not involve a live *Charter* violation) also fails to respond to the persistent criticism that *Doré* effectively reverses the burden of proof for *Charter* claimants in the administrative law context, by starting from a presumption that state decision-makers have acted reasonably, and therefore constitutionally, in the exercise of their authority.¹⁸

13. In the 2024 decision *York Region*, the Court’s guidance shifted again. There, the majority held that whether the *Charter* applies at all is a constitutional question requiring a final and determinate answer from the courts, attracting correctness review.¹⁹ It also concluded that the constitutionality of an arbitrator’s decision as to “whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis” requires correctness review as well, on the basis that these issues fall within the scope of the “other constitutional matters” contemplated in *Vavilov*.²⁰ The reasons stressed that the correctness category of constitutional questions “should not be unduly narrowed”,²¹ leaving the door open to a number of future exceptions.

B. The Court should resist a bifurcated test and avoid reproducing the debate over *vires*

14. As the decisions from the courts below attest, the standard of review, the method for determining it and the manner in which it is to be applied are currently unclear for a range of *Charter* questions. These challenges mirror the conceptual difficulties surrounding how to determine the appropriate subject of constitutional review in other contexts and create litigation incentives that distract from the merits of a *Charter* dispute. The resulting uncertainty poses problems both for access to justice and the rule of law. What, then, to do?

15. One way to reconcile *York Region* with *Doré* is, as the Court of Appeal suggests, to endorse a bifurcated standard: correctness for the threshold question of whether the *Charter* applies,

¹⁷ *CSFTNO*, supra 14, para. [72](#), citing *Trinity Western*, supra 17, para. [81](#). See also *Vavilov*, supra 11, para. [83](#).

¹⁸ See e.g., Audrey Macklin, “Charter Right or Charter-Lite?: Administrative Discretion and the Charter” (2014) 67 *Supreme Court Law Review* [561](#) (2014 CanLII Docs 33333).

¹⁹ *York Region District School Board v. Elementary Teachers’ Federation of Ontario*, [2024 SCC 22](#), para. [62](#) [*“York Region”*].

²⁰ *Ibid.*, paras. [63](#), [65](#).

²¹ *Ibid.*, para. [65](#).

reasonableness for the proportionate balancing that follows once it does.²² However, this solution simply relocates the source of instability rather than resolves it, since the extent to which a decision maker’s proportionality analysis effectively alters “the scope of the *Charter* protection” or “the appropriate framework of analysis” (which would both attract correctness review under *York Region*) is its own moving target. Indeed, this framework would render the ability to draw a clear line particularly difficult for rights with “internal limits,” such as those guaranteed by sections 8 and 9, or for rights like those protected by section 7, where the real justificatory work is done not through section 1 or the *Doré* framework, but elsewhere.

16. The same law/application dichotomy described above also renders a bifurcated approach conceptually vulnerable to gamesmanship and redefinition over time. In this sense, the problem before the Court today is nearly identical to the debates that formerly defined “true” questions of jurisdiction or *vires*, an issue which plagued the case law prior to *Vavilov*.²³ Under *Dunsmuir* and its predecessors, the primary concern driving the maintenance of jurisdictional questions as a correctness category was the principled position that “a delegated decision maker should not be free to determine the scope of its own authority.”²⁴ These questions, which attracted correctness review on an ostensibly “exceptional” basis, were in theory “confined to instances where the decision maker must determine whether it has the authority to enter into the inquiry before it.”²⁵ In practice however, they were inherently “slippery”²⁶: effective guidance for how to identify a “true” question of jurisdiction in the wild was highly illusive, and the issue regularly divided the Court.²⁷

17. The ultimate problem, the Court in *Vavilov* observed, was that “in theory, any challenge to an administrative decision can be characterized as “jurisdictional” in the sense that it calls into

²² *Vabuolas BCCA*, supra 4, para. [96](#).

²³ *Vavilov*, supra 11, paras. [65-68](#).

²⁴ *Vavilov*, supra 11, para. [67](#).

²⁵ *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018 SCC 31](#), par. [31](#) [“*CHRC*”].

²⁶ *CHRC*, supra 26, para. [38](#).

²⁷ See e.g., *West Fraser Mills Ltd. v. British Columbia (Workers’ Compensation Appeal Tribunal)*, [2018 SCC 22](#) para. [23](#) (McLachlin C.J.) vs. para. [63](#) (Côté J.), vs. paras. [114-120](#) (Brown J.); *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, [2011 CSC 61](#), paras. [33-43](#) (Rothstein J.) vs. paras. [78-89](#) (Binnie J.) vs. para. [102](#) (Cromwell J.) [“*Alberta Teachers*”]; *Québec (Attorney General) v. Guérin*, [2017 SCC 42](#), para. [36](#).

question whether the decision maker had the authority to act as it did.”²⁸ There were no “clear markers” to distinguish between real jurisdictional issues and ordinary problems of statutory interpretation, which encouraged tactical fights over the standard, a high degree of indeterminacy and real cost to litigants.²⁹ The exact same issue arises here, because *every* exercise of administrative power that limits a *Charter* right is also, at least implicitly, an interpretation of the scope of that decision maker’s constitutional authority to act. Indeed, it is precisely this kind of jurisdictional thinking that Justice Lamer had in mind in *Slaight* when writing that “an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he *exceeds his jurisdiction if he does so*.”³⁰

18. In *Vavilov*, the solution was to eliminate the correctness category for jurisdictional questions entirely while adopting a more robust approach to reasonableness review. At an analytical level, this allowed courts to take statutory limits on administrative power seriously while avoiding a preliminary debate regarding the nature of the question.³¹ If reasonableness review is maintained for some subcategory of constitutional issues, the CCLA takes the view that it must, at minimum, explicitly adopt the more searching methodological approach outlined in *Vavilov*.³² That said, the maintenance of reasonableness review for any form of *Charter* issue is nearly impossible to reconcile with the present state of the jurisprudence,³³ and creates real challenges in practice.

19. First, if the Court accepts that the line between the constitutionality of a law and its mere application is frequently indeterminate, it must err on the side that correctness review should govern all decisions that apply the law in a *Charter*-infringing manner. The Court has been clear that unlike ordinary issues of statutory interpretation, the “constitutional authority to act must have determinate, defined and consistent limits” and that legislatures cannot be permitted to exceed their own constitutional power by way of administrative delegation.³⁴ The rule of law considerations

²⁸ *Vavilov*, supra 11, para. [66](#) citing *CHRC*, supra 26, para. [38](#); *Alberta Teachers*, supra 28, para. [34](#).

²⁹ *Vavilov*, supra 11, paras. [66-67](#).

³⁰ *Slaight Communications*, supra 1, p. 1078, emphasis ours.

³¹ *Vavilov*, supra 11, paras. [67-68](#), [108-110](#).

³² *Vavilov*, supra 11, paras. [73-138](#). See also: *Mason v. Canada (Citizenship and Immigration)*, [2023 SCC 21](#), paras. [56-77](#).

³³ Or its precedent prior to *Doré* going back as far as, for example, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [\[1991\] 2 S.C.R. 5](#), p. 17; *Martin*, supra 11, para. [31](#).

³⁴ *Vavilov*, supra 11, para. [56](#).

around abusive exercise of state authority, administrative overreach and “fox-in-the-henhouse” type problems³⁵ are also simply more acute where individual rights and liberties are at stake.

20. Reasonableness review on *Charter* questions is also difficult to square with this Court’s 2022 analysis in *SOCAN*, which confirmed correctness as the standard of review where courts and administrative bodies have concurrent first instance jurisdiction over a legal issue in a statute.³⁶ There, the Court highlighted the problem of subjecting “the same legal issue to different standards of review depending solely on whether the issue arises before the Board or the courts” and the risk of inconsistent or contradictory interpretations across a diversity of decision-making bodies.³⁷

21. If this is true for the *Copyright Act*, it must be true for the *Charter*. For decades, the jurisprudence has encouraged constitutional adjudication wherever it naturally arises, affirming that “claimants should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available,”³⁸ that “there cannot be a Constitution for arbitrators and another for the courts,”³⁹ and that the *Charter* “is not some holy grail which only judicial initiatives of the superior courts may touch” — rather, it “belongs to the people.”⁴⁰ There is nothing inherent to the correctness standard that prevents a reviewing court from benefiting from the “rich source of thought and experience about law and government”⁴¹ offered by administrative actors in these contexts while addressing the rule of law concerns specific to constitutional issues.

22. In this light, correctness review allows for a greater uniformity across highly diverse contexts and protects against the perception, founded or not, that administrative deference favours a form of “second-rate” justice. As Chief Justice McLachlin explained in *Trinity Western*, claimants “should not have to fear that their rights will be given different levels of protection depending on how the state has chosen to delegate and wield its power.”⁴² In this spirit, the Court

³⁵ *Vavilov*, supra 11, paras. [53](#), [55-56](#), [68](#).

³⁶ *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, [2022 SCC 30](#), para. [28](#).

³⁷ *Ibid.*, paras. [34](#), [38](#), citing *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 35](#), para. [14](#).

³⁸ *Martin*, supra 11, para. [39](#). See also *R. v. Conway*, [2010 SCC 22](#), paras. [78-82](#).

³⁹ *Douglas College v. Douglas/Kwantlen Faculty Assn.*, [\[1990\] 3 SCR 570](#), p. 597.

⁴⁰ *Cooper v. Canada (Human Rights Commission)*, [\[1996\] 3 RCS 854](#), para. [70](#).

⁴¹ *Doré*, supra 13, para. [27](#).

⁴² *Trinity Western*, supra 17, para. [116](#).

must be explicit that the degree of constitutional protection afforded to individuals under the *Charter* will be identical *regardless* of whether their rights have been violated by an administrative actor or another agent of the state, such as a police officer.

23. Finally, the Court should provide clear guidance to courts and administrative decision makers that keeps constitutional litigation focused on the rights and interests of claimants, rather than on esoteric debates around the proper target of a claim or the standard of review.⁴³ To that end, the Court should expressly acknowledge the highly fact-dependent nature of how the “source” of a given *Charter* violation is characterized, caution against the bifurcation of proceedings in these cases, and expressly discourage the treatment of the law/application distinction as a “preliminary” question that can be decided in the abstract.

C. “Competing” Rights and Interests in the Context of Privacy Legislation

24. Regardless of how this Court resolves the methodological standard of review question, any recognition of absolute and categorical exemptions from the rights to access and privacy in this context must reflect a careful constitutional balance.

25. This Court should give proper attention to the statutory context of this appeal, which concerns the interpretation of a privacy law, and specifically, an access to information provision. In the context of privacy and access to information laws, “competing” rights claims (involving not only religious freedom, but also the rights to privacy, freedom of the press, solicitor-client privilege, and other fundamental interests) are common and structurally expected.⁴⁴ The rights advanced by these laws, such as individual privacy and access to information, can never be advanced or applied in an absolute manner; the interpretation and application of privacy and access to information laws requires careful balancing of competing interests and values.⁴⁵

⁴³ *Dunsmuir v. New Brunswick*, [2008 SCC 9](#), para. [133](#).

⁴⁴ See, e.g., *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2024 SCC 4](#); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016 SCC 53](#); *Dagg v. Canada (Minister of Finance)*, [\[1997\] 2 S.C.R. 403](#) [“*Dagg*”].

⁴⁵ See, e.g., *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006 SCC 13](#), para. [30](#); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012 SCC 3](#), para. [4](#).

26. Careful balancing of rights and interests in the application of privacy and access to information laws is required due to their special nature as quasi-constitutional statutes.⁴⁶ The right to individual privacy is recognized by this Court as quasi-constitutional in character.⁴⁷ Individual control over personal information is “intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values.”⁴⁸ Additionally, access to information is “a derivative right” and may arise as “a necessary precondition of meaningful expression.”⁴⁹

27. This Court has repeatedly recognized the preference for proper balancing of interests, rather than categorical approaches, in this context. In the course of interpreting access to information laws, this Court has endorsed “the view that access to information legislation creates and safeguards certain values — transparency, accountability and governance — that are essential to making democracy workable”, while “accepting that rights of access and the values they safeguard must be balanced” against other, competing interests, including individual privacy, solicitor-client privilege, and confidentiality of third-party information.⁵⁰ Similarly, in the course of interpreting privacy and access to information legislation in conjunction, this Court recognizes that this analysis “involve[s] a balancing of competing values [of access and privacy]. Such a balancing process, where mandated by legislation, cannot be avoided simply because it might be easier to apply a clear, bright-line rule that favours one interest over another.”⁵¹

PART IV: COSTS

28. The CCLA does not seek costs and asks that no costs be ordered against it.

PART V: ORDER SOUGHT

29. The CCLA takes no position on the disposition of this appeal.

⁴⁶ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011 SCC 25](#), para. [24](#) [“*National Defence*”].

⁴⁷ *Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, [2018 FCA 10](#), para. [20](#); *National Defence*, supra 46, para. [40](#).

⁴⁸ *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013 SCC 62](#), para. [24](#).

⁴⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, [2010 SCC 23](#), para. [30](#).

⁵⁰ *National Defence*, supra 47, paras. [80-82](#).

⁵¹ *Dagg v. Canada (Minister of Finance)*, [\[1997\] 2 S.C.R. 403](#), para. [56](#) [emphasis added].

ALL OF WHICH is respectfully submitted this 23rd day of June, 2026.



Lex Gill

Trudel Johnston & Lespérance

Counsel for the Intervener,
Canadian Civil Liberties Association



Ana Qarri

Adair Goldblatt Bieber LLP

Counsel for the Intervener,
Canadian Civil Liberties Association

PART VII: TABLE OF AUTHORITIES

Case Law	Paragraph(s)
<i>Alberta (Information and Privacy Commissioner) v. University of Calgary</i> , 2016 SCC 53	25
<i>Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401</i> , 2013 SCC 62	26
<i>Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association</i> , 2011 CSC 61	16
<i>Brazeau v. Canada (Attorney General)</i> , 2020 ONCA 184	8
<i>Canada (Attorney General) v. Power</i> , 2024 SCC 26	7
<i>Canada (Canadian Human Rights Commission) v. Canada (Attorney General)</i> , 2018 SCC 31	16
<i>Canada (Information Commissioner) v. Canada (Minister of National Defence)</i> , 2011 SCC 25	26
<i>Canada (Minister of Citizenship and Immigration) v. Vavilov</i> , 2019 SCC 65	10, 12, 16, 17, 18, 19, 20
<i>Canada (Public Safety and Emergency Preparedness) v. Chhina</i> , 2019 SCC 29	9
<i>Canadian Civil Liberties Association v. Canada</i> , 2019 ONCA 243	8
<i>Canadian Council for Refugees v. Canada (Citizenship and Immigration)</i> , 2023 SCC 17	7
<i>Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)</i> , 2023 SCC 31	11, 12
<i>Cooper v. Canada (Human Rights Commission)</i> , [1996] 3 RCS 854	23
<i>Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)</i> , [1991] 2 S.C.R. 5	18
<i>Dagg v. Canada (Minister of Finance)</i> , [1997] 2 S.C.R. 403	25, 27
<i>Doré v. Barreau du Québec</i> , 2012 SCC 12	11
<i>Douglas College v. Douglas/Kwantlen Faculty Assn.</i> , [1990] 3 SCR 570	21
<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9	23
<i>Goodwin v British Columbia (Superintendent of Motor Vehicles)</i> , 2015 SCC 46	6
<i>H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)</i> , 2006 SCC 13	25
<i>Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board</i> , 2018 FCA 10	26
<i>Law Society of British Columbia v. Trinity Western University</i> , 2018 SCC 32	12

Factum of the Canadian Civil Liberties Association

<i>Little Sisters Book and Art Emporium v. Canada (Minister of Justice)</i> , 2000 SCC 69	5, 6
<i>Loyola High School v. Quebec (Attorney General)</i> , 2015 SCC 12	12
<i>Mason v. Canada (Citizenship and Immigration)</i> , 2023 SCC 21	18
<i>Merck Frosst Canada Ltd. v. Canada (Health)</i> , 2012 SCC 3	25
<i>Nova Scotia (Workers' Compensation Board) v. Martin</i> , 2003 SCC 54	10, 18, 21
<i>Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)</i> , 2005 SCC 16, [2005] 1 RCS 257	9
<i>Ontario (Public Safety and Security) v. Criminal Lawyers' Association</i> , 2010 SCC 23	26
<i>Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)</i> , 2024 SCC 4	25
<i>Procureur général du Québec c. Luamba</i> , 2024 QCCA 1387	6
<i>Québec (Attorney General) v. Guérin</i> , 2017 SCC 42	16
<i>R. v. Bird</i> , 2019 SCC 7	9
<i>R. v. Conway</i> , 2010 SCC 22	21
<i>R. v. Khawaja</i> , 2012 SCC 69	6
<i>Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada</i> , 2012 SCC 35	20
<i>Slaight Communications Inc. v. Davidson</i> , [1989] 1 RCS 1038	3, 4, 5, 17
<i>Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association</i> , 2022 SCC 30	20
<i>Strickland v. Canada (Attorney General)</i> , 2015 SCC 37	9
<i>Vabuolas v. British Columbia (Information and Privacy Commissioner)</i> , 2025 BCCA 83	5
<i>York Region District School Board v. Elementary Teachers' Federation of Ontario</i> , 2024 SCC 22	13
<i>West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)</i> , 2018 SCC 22	16
Secondary Sources	Paragraph(s)
Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 <i>Supreme Court Law Review</i> 561 (2014 CanLIIDocs 33333)	12