



SUPREME COURT OF CANADA

CITATION: York Region District
School Board v. Elementary
Teachers' Federation of Ontario,
2024 SCC 22

APPEAL HEARD: October 18, 2023
JUDGMENT RENDERED: June 21,
2024
DOCKET: 40360

BETWEEN:

York Region District School Board
Appellant

and

Elementary Teachers' Federation of Ontario
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General
of Quebec, British Columbia Civil Liberties Association, British Columbia
Teachers' Federation, Centre for Free Expression, Ontario College of
Teachers, Power Workers' Union, Society of United Professionals, National
Police Federation, Ontario Principals' Council, Canadian Association of
Counsel to Employers, Egale Canada, David Asper Centre for Constitutional
Rights, Canadian Civil Liberties Association, Centrale des syndicats du
Québec and Queen's Prison Law Clinic**
Intervenors

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:** Rowe J. (Wagner C.J. and Côté, Kasirer and Jamal JJ.
(paras. 1 to 107) concurring)

**JOINT
CONCURRING
REASONS:** Karakatsanis and Martin JJ.
(paras. 108 to 143)

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York Region District School Board

Appellant

v.

Elementary Teachers' Federation of Ontario

Respondent

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**Attorney General of Canada,
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National Police Federation, Ontario Principals' Council,
Canadian Association of Counsel to Employers, Egale Canada,
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Interveners

**Indexed as: York Region District School Board v. Elementary Teachers'
Federation of Ontario**

2024 SCC 22

File No.: 40360.

2023: October 18; 2024: June 21.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Application — Search and seizure — Teachers' right to privacy at work — Ontario public school board principal taking screenshots of teachers' private communications on school laptop — Communications forming basis for written reprimands grieved by teachers' union on ground that teachers' right to privacy violated — Arbitrator dismissing grievance — Whether Charter applies to public school boards in Ontario — If so, whether arbitrator's decision should be set aside — Canadian Charter of Rights and Freedoms, ss. 8, 32.

Administrative law — Judicial review — Standard of review — Constitutional questions — Teachers grieving reprimand arising from screenshots taken by principal of their private communications on school laptop — Arbitrator dismissing grievance — Standard of review applicable to arbitrator's decision as to whether teachers' right to privacy violated.

Two teachers employed by an Ontario public school board recorded their private communications regarding workplace concerns on a shared personal, password-protected log stored in the cloud. The school principal, who had been made aware of the log, entered the classroom of one of the teachers and, in her absence, touched the mousepad of her board laptop, saw the log that opened on the screen, read

what was visible, then scrolled through the document and took screenshots with his cellphone. These communications then formed the basis for the school board to issue written reprimands. The teachers' union grieved the discipline, claiming that the search violated the teachers' right to privacy at work. No *Charter* breach was alleged. A labour arbitrator, appointed pursuant to the collective agreement, dismissed the grievance. Applying the arbitral balancing of interests framework, the arbitrator found there was no breach of the teachers' reasonable expectation of privacy when balanced against the school board's interest in managing the workplace.

On judicial review, the majority of the Divisional Court upheld the reasonableness of the arbitrator's decision. The majority held that no *Charter* issues arose from the search because an employee does not have the right under s. 8 of the *Charter* to be secure against unreasonable search or seizure in a workplace environment, unlike in a criminal context. The dissent found that the *Charter* applied and the arbitrator's decision was unreasonable because she misunderstood the nature of the s. 8 right. The Court of Appeal unanimously allowed the union's appeal and quashed the arbitrator's decision. It held that the majority of the Divisional Court erred in concluding that s. 8 did not apply. The Court of Appeal conducted a correctness review of the arbitrator's decision and held that the search was unreasonable under s. 8 of the *Charter*.

Held: The appeal should be dismissed.

Per Wagner C.J. and Côté, **Rowe**, Kasirer and Jamal JJ.: Ontario public school board teachers are protected by s. 8 of the *Charter* in the workplace, as these boards are inherently governmental for the purposes of s. 32 of the *Charter*. Consequently, the grievance at issue implicated an alleged violation of a *Charter* right, and s. 8 of the *Charter* was a legal constraint bearing on the arbitrator's analysis. On review, applying the correctness standard, the arbitrator erred by limiting her inquiry to the arbitral framework without regard for the legal framework under s. 8 that, as a matter of law, she was required to respect. This error is fatal and the arbitrator's decision should be set aside.

Section 32 of the *Constitution Act, 1982* sets out the scope of the *Charter*'s application. The Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, established a two-branch framework to determine when the *Charter* applies to an entity. Under the first branch of the *Eldridge* framework, it may be determined that an entity is itself "government" for the purposes of s. 32 where, by (1) its very nature or (2) the degree of governmental control exercised over it, the entity is akin to a government. Under this branch, where the entity is found to be "government", the *Charter* applies to all its actions.

A review of Ontario's *Education Act* confirms that Ontario public school boards are government by nature and therefore are subject to the *Charter* under *Eldridge*'s first branch. They are, in effect, an arm of government, in that they exercise powers conferred on them by the provincial legislature, powers and functions which

the legislature would otherwise have to perform itself. Public education is inherently a governmental function. It has a unique constitutional quality, as exemplified by s. 93 of the *Constitution Act, 1867* and by s. 23 of the *Charter*. All actions carried on by Ontario public school boards are subject to *Charter* scrutiny, including the principal's actions in the instant case, as he acted in his official capacity as an agent of the board, a statutory delegate, and not in his personal capacity.

Administrative tribunals are competent to and tasked with the work of adjudicating *Charter* questions where they arise. Administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them and must act consistently with the *Charter* and its values when exercising its statutory function. The principles governing remedial jurisdiction under the *Charter* apply to both courts and administrative tribunals. Tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction. This is in part an access to justice issue: there are practical advantages and a constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available. *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes, meaning that claimants do not need to have separate recourse to the courts for their *Charter* rights to be vindicated. Where a *Charter* right applies, an administrative decision-maker should therefore perform an analysis that is consistent with the relevant *Charter* provision.

The arbitrator in the instant case is broadly empowered, by Ontario's *Labour Relations Act, 1995*, to answer questions regarding all differences between the parties arising from the interpretation, application, administration or alleged violation of the collective agreement, including any question as to whether a matter is arbitrable. Thus, the arbitrator has the power to decide questions of law, and was therefore required to decide the grievance consistent with the requirements of s. 8 of the *Charter*. This would properly entail drawing on both the relevant body of arbitral decisions and the s. 8 jurisprudence. However, the arbitrator approached her task differently, conducting an analysis by reference to management rights versus privacy interests of employees. When a *Charter* right applies, it is not sufficient that the arbitrator made some references to the *Charter* jurisprudence. There must be clear acknowledgment of and analysis of that right. While administrative justice may not always take the form of judicial justice, nowhere in the arbitrator's reasons, read functionally and holistically, did it indicate s. 8 *Charter* rights were being considered.

While the Court of Appeal properly applied a correctness standard of review to the question of whether the teachers had a reasonable expectation of privacy, the court erred in deriving the standard of review from *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, dealing with an appellate standard of review. Where a court reviews a decision of an administrative tribunal, the standard of review must be determined on the basis of administrative law principles. Accordingly, this appeal is governed by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653. Correctness applies because the issue of constitutionality on

judicial review — of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of the analysis — is a constitutional question that requires a final and determinate answer from the courts and therefore falls within the rule of law exception. *Vavilov* does not restrict the scope of “constitutional questions” to only issues of federalism and the constitutional delegation of state power to administrative decision-makers; it used non-exhaustive language in articulating the constitutional questions category, including within it “other constitutional matters”. This category should not be unduly narrowed.

Per Karakatsanis and Martin JJ.: There is agreement with the majority that the *Charter* applies to Ontario public school boards. However, there is disagreement as to how the majority reviews the arbitrator’s decision. Reviewing the arbitrator’s decision on the correctness standard overshoots the ambit of the correctness exceptions laid down in *Vavilov*. The issue before the arbitrator was whether the teachers’ privacy rights had been breached, an application and assessment which heavily depended on the specific factual and statutory context. As a result, the presumption of reasonableness review applies. Reviewing the arbitrator’s reasons on that standard, the arbitrator’s reasoning is not consistent with the principle of content neutrality, which lies at the heart of s. 8’s normative approach to privacy, and therefore her decision is unreasonable.

Vavilov was intended to provide a stable framework for determining and applying the standard of review and to encourage parties to focus instead on the merits.

The Court affirmed a broad presumption of reasonableness review. The correctness exception for constitutional questions is justified by the need for consistency, finality, and determinate answers; but, importantly, *Vavilov* was clear that constitutional matters not requiring courts to supply final and determinate answers fall outside the exception to the presumption of reasonableness review. Accordingly, individualized decisions involving the application of the *Charter* that are intrinsically linked to a specific factual and statutory context will generally not engage the same rule of law concern about potential inconsistency as that which motivated the correctness exception for constitutional questions in *Vavilov*. Courts do not possess a monopoly over the adjudication of *Charter*-related issues in the administrative context.

Although the arbitrator's decision in the instant case is unreasonable, there is disagreement with the majority that it must be quashed because the arbitrator did not expressly state that s. 8 of the *Charter* applied or that she conducted her analysis without regard to the legal framework under s. 8. That conclusion seizes on form, contrary to *Vavilov*'s teachings. Administrative decisions are to be considered functionally, with an eye to substance, not form. The Court's s. 8 *Charter* jurisprudence was specifically argued by the parties, and the arbitrator's reasons clearly demonstrate she appreciated that the s. 8 privacy framework constrained her decision. The arbitrator's reasons demonstrate she was reviewing the challenged conduct using the s. 8 *Charter* framework as a touchstone. The arbitrator understood that administrative decision-makers must act consistently with the *Charter* and its values when exercising statutory functions. Reading the arbitrator's decision as a whole as *Vavilov* instructs,

and with sensitivity to the institutional and procedural context in which it was made, she plainly understood that the *Charter* and s. 8 jurisprudence bore on the grievance.

Cases Cited

By Rowe J.

Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; **considered:** *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; **referred to:** *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Longuepée v. University of Waterloo*, 2020 ONCA 830, 153 O.R. (3d) 641; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *R. v. Collins*, [1987] 1 S.C.R. 26; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *Canadian Broadcasting Corp. v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705; *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13; *Canadian Broadcasting Corporation v. Canada (Parole Board)*, 2023 FCA 166, 429 C.C.C. (3d) 69; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710;

British Columbia Public School Employers' Assn. v. B.C.T.F., 2005 BCCA 393, 257 D.L.R. (4th) 385; *Gillies (Litigation Guardian of) v. Toronto District School Board*, 2015 ONSC 1038, 125 O.R. (3d) 17; *Calgary Roman Catholic Separate School District No. 1 v. O'Malley*, 2007 ABQB 574, 81 Alta. L.R. (4th) 261; *Hamilton v. Rocky View School Division No. 41*, 2009 ABQB 225, 192 C.R.R. (2d) 22; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *UAlberta Pro-Life v. Governors of the University of Alberta*, 2020 ABCA 1, 98 Alta. L.R. (6th) 252; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Doman Forest Products Ltd. and I.W.A., Loc. 1-357, Re* (1990), 13 L.A.C. (4th) 275; *Toronto Transit Commission and A.T.U., Loc. 113 (Belsito) (Re)* (1999), 95 L.A.C. (4th) 402.

By Karakatsanis and Martin JJ.

Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; **distinguished:** *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13; **referred**

to: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21; *Syndicat canadien de la fonction publique, section locale 1108 v. CHU de Québec — Université Laval*, 2020 QCCA 857; *Canadian Broadcasting Corp. v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705; *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 23, 32.

Constitution Act, 1867, s. 93.

Education Act, R.S.O. 1990, c. E.2, ss. 8, 265.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 48(1).

Authors Cited

Daly, Paul. *A Culture of Justification: Vavilov and the Future of Administrative Law*. Vancouver: UBC Press, 2023.

Daly, Paul. “Big Bang Theory: Vavilov’s New Framework for Substantive Review”, in Colleen M. Flood and Paul Daly, eds., *Administrative Law in Context*, 4th ed. Toronto: Edmond Montgomery, 2022, 327.

Daly, Paul. “Unresolved Issues after *Vavilov*” (2022), 85 *Sask. L. Rev.* 89.

Hasan, Nader, et al. *Search and Seizure*. Toronto: Edmond Montgomery, 2021.

Mancini, Mark. “The Conceptual Gap Between *Doré* and *Vavilov*” (2020), 43 *Dal. L.J.* 793.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Benotto and Huscroft JJ.A.), 2022 ONCA 476, 474 D.L.R. (4th) 297, 513 C.R.R. (2d) 6, 100 Admin. L.R. (6th) 1, 340 L.A.C. (4th) 365, 81 C.C.E.L. (4th) 17, 2022 CLLC ¶220-057, [2022] O.J. No. 2824 (Lexis), 2022 CarswellOnt 8666 (WL), setting aside a decision of the Divisional Court (Kiteley, Sachs and O’Bonsawin JJ.), 2020 ONSC 3685, 464 C.R.R. (2d) 100, 76 Admin. L.R. (6th) 101, 316 L.A.C. (4th) 1, [2020] O.J. No. 2714 (Lexis), 2020 CarswellOnt 8238 (WL), dismissing an application for judicial review of an arbitrator’s decision, 294 L.A.C. (4th) 341, [2018] O.L.A.A. No. 273 (Lexis), 2018 CarswellOnt 13256 (WL). Appeal dismissed.

Frank Cesario, Sean Sells and Lesley Campbell, for the appellant.

Howard Goldblatt and Kiran Kang, for the respondent.

BJ Wray and Joseph Cheng, for the intervener the Attorney General of Canada.

Daniel Huffaker and Waleed Malik, for the intervener the Attorney General of Ontario.

Jean-Vincent Lacroix, Brigitte Bussièeres and Geneviève Martin-Lafleur, for the intervener the Attorney General of Quebec.

Fraser Harland, for the intervener the British Columbia Civil Liberties Association.

Robyn Trask, Michael Sobkin and Vivian Wan, for the intervener the British Columbia Teachers' Federation.

David Wright, Mae J. Nam and Rebecca Jones, for the intervener the Centre for Free Expression.

Caroline Zayid, David Hakim and Lauren Weaver, for the intervener the Ontario College of Teachers.

Andrew Lokan, Michael Wright, Douglas Montgomery and Nora Parker, for the interveners the Power Workers' Union and the Society of United Professionals.

Malini Vijaykumar and *Claire Kane Boychuk*, for the intervener the National Police Federation.

Caroline V. (Nini) Jones and *Cassandra E. Jarvis*, for the intervener the Ontario Principals' Council.

George Avraam, *Ajanthana Anandarajah* and *Juliette Mestre*, for the intervener the Canadian Association of Counsel to Employers.

Brendan MacArthur-Stevens, *Bennett Jensen* and *Gregory Sheppard*, for the intervener Egale Canada.

Susan Ursel and *Kristen Allen*, for the intervener the David Asper Centre for Constitutional Rights.

Gerald Chan and *Olivia Eng*, for the intervener the Canadian Civil Liberties Association.

Amy Nguyen, *Marc Daoud* and *Laurence Dufault-Arsenault*, for the intervener Centrale des syndicats du Québec.

Jared Will, for the intervener the Queen's Prison Law Clinic.

The judgment of Wagner C.J. and Côté, Rowe, Kasirer and Jamal JJ. was delivered by

ROWE J. —

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I. Overview

[1] This appeal provides an opportunity for this Court to determine the applicability of the *Canadian Charter of Rights and Freedoms* to Ontario public school boards.

[2] The private communications of two teachers, recorded on their personal, password-protected log, were read and captured by screenshots taken by their school principal. These communications then formed the basis for the school board to issue written reprimands. The teachers' union grieved the discipline, claiming that the search violated the teachers' right to privacy at work. No *Charter* breach was alleged. A labour arbitrator, appointed pursuant to the collective agreement, dismissed the grievance. Applying the arbitral "balancing of interests" framework, the arbitrator found there was no breach of the teachers' reasonable expectation of privacy when balanced against the school board's interest in managing the workplace, set out in s. 265 of the *Education Act*, R.S.O. 1990, c. E.2.

[3] On judicial review, the majority of the Divisional Court upheld the reasonableness of the arbitrator's decision. The majority held that no *Charter* issues

arose from the search because an employee does not have a s. 8 *Charter* right in a workplace environment, unlike in a criminal context. The dissent found that the *Charter* applied and the arbitrator's decision was unreasonable because she misunderstood the nature of the s. 8 right. The Court of Appeal unanimously allowed the appeal and quashed the arbitrator's decision. It held that the majority of the Divisional Court erred in concluding that s. 8 did not apply. The Court of Appeal conducted a correctness review and held that the search was unreasonable under s. 8 of the *Charter*.

[4] I would dismiss the appeal, although my reasoning follows a different pathway than that of the Court of Appeal. Teachers are protected by s. 8 of the *Charter* in the workplace, as Ontario public school boards are inherently governmental for the purposes of s. 32 of the *Charter*. Consequently, the grievance at issue implicated an alleged violation of a *Charter* right, and s. 8 of the *Charter* was a legal constraint bearing on the arbitrator's analysis.

[5] The arbitrator erred by limiting her inquiry to the arbitral framework without regard for the legal framework under s. 8 that, as a matter of law, she was required to respect. The effect of my conclusion on this point is not to displace existing arbitral jurisprudence, but to supplement it in order to ensure the protection of constitutional rights in the workplace. The s. 8 framework being contextual, it must be adapted to account for the circumstances in which the *Charter* right is asserted.

II. Factual Context

[6] The arbitrator made findings of fact in her decision. They are summarized below.

[7] In the 2014-15 school year, two teachers, Ms. Shen and Ms. Rai (“Grievors”), were newly employed to teach at a public school, which was part of the York Region District School Board. The events in question took place during that academic year.

[8] Shortly after the school year began, problems arose within the group of Grade 2 teachers. The Grievors felt that one of the teachers was not effective and was receiving preferential treatment from the principal. They were concerned about how these interpersonal issues might impact their performance reviews. Ms. Shen contacted an Elementary Teachers Federation of Ontario (“Union”) representative; she was told to keep notes about her concerns.

[9] Following the Union’s advice, Ms. Shen started a private log using her personal Gmail account. Ms. Shen authorized Ms. Rai to have access to the log through Ms. Rai’s personal Gmail account. The log was accessible and could be edited by both Grievors.

[10] The log was not saved on a workplace drive or on the Board laptop. Rather, it was stored “in the cloud” as a private Google Docs document, through a private internet account unrelated to the Board. Some others at the school were aware that the Grievors were maintaining the log.

[11] The principal was told by staff members that the Grievors were keeping a log and that there were concerns about the workplace — which the arbitrator described as “toxic” (paras. 7-8, 28, 46, 79, 87 and 97). The principal discussed this with the Board superintendent, Human Resources, and IT Services. An IT search was conducted, but no log was found on any of the Board’s data storage drives.

[12] On December 16, 2014, the principal entered Ms. Shen’s classroom to return some teaching materials after classes had ended. Ms. Shen was not present. The principal saw that the Board laptop used by Ms. Shen was open and touched its mousepad. A document called “Log Google Docs” opened on the screen. The principal read what was visible on the screen and then scrolled through the document. He used his cellphone to take screenshots of the document. When the principal had finished taking photos, he shut down the laptop.

[13] The principal informed the Board superintendent via email that he had obtained contents of the log and that there was “much nastiness all the way through it” (para. 26). The principal and the Board superintendent agreed they should seize the laptop as it was a Board computer; a school caretaker did so on their behalf. The principal forwarded the photos of the log to the Board for investigation. Ms. Rai’s Board laptop was seized as well. Her laptop was closed when taken.

[14] On January 23, 2015, the Grievors were given written reprimands by the Board arising from these events, for failing to conduct themselves in accordance with the Ontario College of Teachers’ Standards of Practice.

[15] On February 6, 2015, the Union grieved the written reprimands. By way of remedy, the Union sought to have the written reprimands rescinded and asked that each Grievor be awarded \$15,000 in damages for the Board's breach of their privacy. The Union claimed that the Board violated the Grievors' right to privacy without reasonable cause and used that information as the basis to discipline the Grievors.

[16] On January 22, 2018, pursuant to a "sunset clause" under the collective agreement, the written reprimands were removed from the Grievors' records.

III. Judicial History

A. *Arbitrator's Decision (2018), 294 L.A.C. (4th) 341 (G. Misra)*

[17] Between September 16, 2016, and June 5, 2018, labour arbitrator Gail Misra held hearings on the grievance.

[18] The arbitrator considered whether the Grievors had a reasonable expectation of privacy in their log, such that the searches by the principal and the Board were breaches of their privacy. Notably, the arbitrator was not asked to consider whether s. 8 of the *Charter* had been infringed; however, principles derived from s. 8 *Charter* jurisprudence were considered.

[19] The Union alleged three breaches of the Grievors' privacy: (1) the Board's search of its IT platforms; (2) the principal's search of Ms. Shen's Board classroom

laptop; and (3) the searches conducted after the Board seized both of the Grievors' Board classroom laptops.

[20] On August 7, 2018, the arbitrator released her decision. She concluded that there was no breach of the Grievors' "diminished" reasonable expectation of privacy in the log when balanced against the Board's "legitimate interest" in addressing the issue of the toxic work environment allegedly caused by the Grievors (paras. 262-63). Thus, the arbitrator dismissed the grievance.

[21] She drew on this Court's decision in *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, as "authoritative and of assistance in understanding what may amount to a privacy breach, and the limits to an expectation of privacy in the context of school board cases" (para. 198). The arbitrator also considered arbitral jurisprudence with respect to balancing employee privacy rights against the employer's interests and management rights. She drew the following conclusions:

- (1) The subject matter of the search was the Grievors' log, which the principal thought was on a Board classroom laptop;
- (2) The Grievors had a privacy interest in their log: only they could access the log and make contributions to it;

- (3) The Grievors set up their log to operate privately: it was password-protected and not stored on the Board's laptop or data storage. Thus, they had a subjective expectation of privacy in their log; and
- (4) The Grievors' subjective expectation of privacy was objectively reasonable, as they had taken steps to keep their log private and out of reach of the employer, but it was diminished because they made the content of the log known prior to its discovery, and, as well, Ms. Shen left the log open and freely accessible by anyone using the Board's computer. The arbitrator also found that the log was left in "plain view".

[22] Having concluded that the Grievors had a reasonable expectation of privacy in the log, the arbitrator then turned to the three breaches alleged by the Union. She conducted her analysis by applying the arbitral framework of "balancing of the personal privacy interests of an employee with an employer's right to manage its enterprise" and in each instance, she found "the balance favours the Board in this case" (para. 223). She proceeded to analyze the three breaches.

(1) First Alleged Breach

[23] The first alleged breach was the Board's search of its data files. The arbitrator found that s. 265 of the *Education Act* authorized the principal to conduct

reasonable searches and seizures without prior judicial authorization. In balancing employees' personal privacy interests with the employers' right to manage their enterprises, the arbitrator concluded that the Board had reasonable cause to conduct the search. The search of the IT platforms did not breach the Grievors' privacy.

[24] The principal had reasonable cause for concern about the work and teaching environment and the level of cooperation and coordination of effort within the Grade 2 teaching team. It was his duty to maintain order and discipline in the school. The arbitrator found that there was reasonable cause for the Board to conduct a search of the Grievors' online Board data files.

(2) Second Alleged Breach

[25] The second alleged breach was the principal's search of Ms. Shen's Board classroom computer. The Union pointed to four distinct acts by the principal: (1) touching the mouse pad to activate the screen; (2) viewing the log; (3) scrolling through the entire log; and (4) taking photographs of the entire log with his cell phone.

[26] The arbitrator found that the principal's actions were reasonable. She wrote:

Again applying the Supreme Court's test in *M. (M.R.)*, [1998] 3 S.C.R. 393, [the principal] had the right, pursuant to s. 265 of the *Education Act*, and in the context of maintaining order in his school, to ensure that the laptop had been turned off at the end of the school day. He also had an obligation to take steps to ensure that the Grade 2 teachers were working

well together, and that there were no toxic or destabilizing elements at work in the group. I have already outlined the bases upon which I accept that [the principal] had reasonable cause to be searching for the log. [para. 230]

[27] The arbitrator found that Ms. Shen left the log in “plain view” — open and accessible without password protection where it could be viewed by anyone using the Board computer (para. 236). She concluded that once the principal found the log, it was reasonable for the Board to think that it was stored on the laptop and to search the laptop. She found “nothing nefarious” in the manner the principal found and accessed the log (para. 240).

[28] In balancing the Grievors’ diminished privacy interest against the Board’s interests as employer, she concluded that the principal’s “happenstance” discovery and the subsequent seizure of the computer did not breach the Grievors’ workplace privacy (para. 240). The principal “had a legitimate reason to be in Ms. Shen’s classroom”, “had the right to use that Board laptop”, and “the log contained information that he felt may be contributing to a toxic work environment at the school” (paras. 231 and 252).

[29] Meanwhile, the Grievors’ privacy interest was reduced because “Ms. Shen’s leaving the log open on the Board’s classroom laptop diminished her reasonable expectation of privacy” (para. 242). Furthermore, the arbitrator found that the information contained in the log was not personal or intimate, nor did it reveal the Grievors’ views about their colleagues, and thus concluded that it “did not touch on [their] biographical core” (para. 246).

(3) Third Alleged Breach

[30] The third alleged breach was the “forensic” search of Ms. Shen’s and Ms. Rai’s computers, including the seizure of the two computers, and the Board’s search of them. The arbitrator dismissed this alleged breach as well.

[31] Once the principal had found the log on Ms. Shen’s Board classroom laptop, it was reasonable for the Board to think that it may have found the location of the log and to therefore conduct a search for it on the computer. The arbitrator further concluded that “it is not necessary to consider whether there were other alternatives that the employer should have considered before it conducted an IT search” (para. 261).

B. *Ontario Superior Court of Justice (Divisional Court), 2020 ONSC 3685, 316 L.A.C. (4th) 1 (Kiteley and O’Bonsawin JJ., Sachs J. Dissenting)*

[32] The Union sought judicial review in the Divisional Court. The parties proceeded on the basis that the arbitration decision (referred to as an “award”) was subject to review on a reasonableness standard.

[33] The case was heard at Divisional Court in November 2019. The only issue on judicial review concerned the arbitrator’s conclusion that the Grievors’ reasonable expectation of privacy had not been breached by the employer’s actions. The court concluded that the issue was not moot by virtue of the removal of the written reprimand from the Grievors’ records. The court exercised its discretion to hear the judicial

review. Following the oral hearing, the court invited further submissions from the parties on the standard of review following release of this Court’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

(1) The Majority Opinion (O’Bonsawin J., Kiteley J. Concurring)

[34] In June 2020, the Divisional Court issued a split decision; the majority dismissed the application for judicial review. O’Bonsawin J. (as she then was), Kiteley J. concurring, applied a reasonableness standard of review. The majority concluded that the arbitrator’s reasoning demonstrated justification, transparency, and intelligibility, and the decision she reached was within a range of acceptable outcomes.

[35] The majority concluded that the arbitrator’s finding that the principal had a duty to maintain order and discipline in the school in accordance with s. 265 of the *Education Act* was reasonable, given the “apparently toxic work environment” within the Grade 2 teaching team (para. 76). The majority noted that the arbitrator recognized that the search had “no criminal element”, but it “was undertaken within the course of [the principal’s] duties . . . to ‘develop co-operation and co-ordination of effort among the members of the staff of the school’” pursuant to s. 265 of the *Education Act* (para. 79). The majority stated that the arbitrator’s conclusion that the legal duties of a principal under the *Education Act* could extend to such situations was reasonable (para. 79).

[36] The majority further concluded that the arbitrator interpreted and applied privacy jurisprudence reasonably. With regard to the search by IT Services of the Board's data storage system, the majority held "there was no reason for the employer to consider 'other alternatives' before having its corporate IT Services conduct a search of its own systems" (para. 88). It was also not reasonable to expect the principal to consider other alternatives before searching Ms. Shen's laptop as "[the principal's] search occurred 'by happenstance' because Ms. Shen had left the laptop on" (para. 89).

[37] As well, the majority held that it was reasonable for the arbitrator to conclude that the log was not close enough to the Grievors' biographical core because "the entries were not in the nature of emails between spouses, and were not related to medical, banking, or other intimate personal matters" (para. 94). As the arbitrator found that none of the searches impacted the Grievors' reasonable expectation of privacy, the majority concluded that there was no "cumulative aspect" of the search to consider (para. 101).

[38] Finally, the majority responded to the dissent. The majority disagreed with the *Charter* framework applied by Sachs J. as they concluded that no *Charter* issues arose from the principal's conduct in the case at bar:

[Justice Sachs] approaches her analysis as a balance between the Grievors' "rights under s. 8 of the *Charter* against the statutory objectives that the Principal was seeking to enforce". I disagree with that analytical framework. Unlike in a criminal context, in a workplace environment, an employee does not have a s. 8 right to be secure against unreasonable search and seizure. The Arbitrator reasonably concluded the Grievors had a reasonable expectation of privacy that was diminished. The Arbitrator

was required and did balance that diminished expectation of privacy against the duty of the employer to manage the workplace and the Arbitrator arrived at a reasonable conclusion. [Emphasis added; para. 103.]

[39] Thus, the majority agreed with the arbitrator that the framework for analysis was not s. 8 of the *Charter*, but rather the rights of employers and employees under the collective agreement.

(2) The Dissenting Opinion (Sachs J.)

[40] Justice Sachs, dissenting, concluded that the arbitrator's decision was unreasonable as the arbitrator's reasons disclose "a failure of rationality internal to the reasoning process" and further, "[t]he result is also untenable given the 'relevant factual and legal constraints that bear on it'" (para. 109).

[41] Justice Sachs found that employees have a s. 8 *Charter* right in the workplace, and the actions of the principal came within *Charter* scrutiny because the Board was "a state actor" (para. 127).

[42] As such, whether the Grievors' *Charter* rights had been infringed comes within the category of constitutional questions reviewable on a standard of reasonableness (paras. 114-15, citing *Vavilov*, at para. 57).

[43] Further, the framework under *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, applied as "these [*Charter*] rights must be balanced against the

statutory objectives of the *Education Act*". Justice Sachs further noted that "while not directly referencing *Doré*, it is the framework that the Arbitrator used" (para. 121).

[44] The dissenting judge concluded that the arbitrator made three significant errors in the application of s. 8 jurisprudence; this rendered the decision unreasonable. In brief, because the arbitrator misunderstood the nature of s. 8, "she was not able to proportionately balance s. 8 *Charter* values with the statutory objectives" (paras. 143-45).

[45] First, "the Arbitrator used the fruits of the search to justify the privacy violation", which is contrary to this Court's jurisprudence in *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, and *R. v. Wong*, [1990] 3 S.C.R. 36 (Div. Ct. reasons, at para. 147). The principal's "incidental finding" of the log did not entitle him to search the log further (para. 148).

[46] Second, the arbitrator erred in finding that the contents of the log did not touch on the Grievors' biographical core. "This finding contradicts her earlier finding that the Grievors' subjective expectation of privacy in the contents of the log was objectively reasonable" under *Cole* (Div. Ct. reasons, at para. 149). The dissent continued, "the Arbitrator's finding that the Grievors' subjective expectation of privacy was objectively reasonable was tantamount to an acceptance that the information in the diary was close to the 'biographical core of personal information' as that term is understood in the case law" (para. 151).

[47] Third, the arbitrator misapplied the “plain view” doctrine to justify the search. The dissent held that “even if the concept of plain view could justify the Principal’s touching of the mouse pad, it could not justify his scrolling through the log thereafter” (para. 154). Here, however, “the Arbitrator sought to use the doctrine to justify an exploratory *search* (not seizure) where the Principal was *intentionally* searching for the item in question. The law is clear that the doctrine cannot be used in these circumstances” (para. 156 (emphasis in original)).

[48] Justice Sachs concluded that it was unreasonable for the arbitrator to find “that the Principal’s scrolling through the log and taking pictures of its contents was in any way justified by the statutory objectives of the *Education Act*” (para. 176).

C. *Court of Appeal for Ontario, 2022 ONCA 476, 340 L.A.C. (4th) 365 (Doherty, Benotto and Huscroft J.J.A.)*

[49] Justice Huscroft, writing for a unanimous panel, allowed the appeal and quashed the arbitrator’s decision. He held that the arbitrator erred in interpreting and applying s. 8; and reached an unreasonable decision in dismissing the grievance. Thus, the Divisional Court erred in upholding the arbitrator’s decision. The Court of Appeal stated that “[a]lthough the Arbitrator did not specifically reference s. 8 of the *Charter*, her analysis clearly relied on s. 8 case law” (para. 36).

[50] The Court of Appeal stated that the factual findings of the arbitrator were entitled to deference. By contrast, whether the Grievors had a reasonable expectation

of privacy is a question of law that is subject to review for correctness (para. 37, citing *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20). The Court of Appeal proceeded by “stepping into the shoes” of the Divisional Court, in effect conducting a *de novo* judicial review of the arbitrator’s decision (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-46; *Longuepée v. University of Waterloo*, 2020 ONCA 830, 153 O.R. (3d) 641, at paras. 47-48).

[51] Regarding the application of the *Charter* to school boards, the Court of Appeal made “the same assumptions accepted by the Supreme Court” in *M. (M.R.) and Cole* (para. 41). The Court of Appeal concluded that it was not necessary to determine under which branch of *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the *Charter* applies (because school boards are governmental in nature or because they perform governmental activities): “It is enough to say that s. 8 applies to the actions of the Principal and the school board” (para. 41).

[52] The Court of Appeal concluded that (1) s. 8 of the *Charter* applied to the actions of the principal and the school board; (2) the Grievors had a reasonable expectation of privacy; (3) the arbitrator erred in interpreting and applying the law concerning the Grievors’ s. 8 *Charter* right; and (4) the arbitrator reached an unreasonable decision (paras. 41 and 71).

IV. Issues

[53] The appeal at bar raises three questions:

- (1) Does the *Charter* apply to public school boards in Ontario?
- (2) What is the appropriate standard of review?
- (3) Should the arbitrator's award be set aside for failing to conduct an analysis under s. 8 of the *Charter*?

V. Submissions

A. *York Region District School Board*

[54] The appellant York Region District School Board submits that the award is reasonable and should be restored, and that the Court of Appeal erred (1) in applying the correctness standard of review; (2) in concluding that the *Charter* applies to the Board; and (3) in applying the s. 8 jurisprudence and concluding that the Grievors' s. 8 rights were breached.

[55] The appellant submits that since the issue of the *Charter*'s application to the Board was never before the arbitrator, "[a] reviewing court should not be permitted to undermine [any] reasonable decision by subjecting it to analyses and facts not advanced by the parties" (A.F., at para. 66).

[56] Moreover, the appellant argues that the Court of Appeal erred by simply assuming the *Charter* applies to Ontario public school boards, without conducting an *Eldridge* analysis (A.F., at para. 76). The appellant submits that it is not “government” under the first branch, “because it does not issue legislative enactments or exercise government authority. Nor does [the second branch] apply to this case because the Board was in essence acting as an employer. On these facts, the Board was not implementing a delegated government activity or carrying out an act that was truly governmental in nature” (A.F., at para. 103).

[57] The appellant finally submits that the Court of Appeal erred in its interpretation of s. 8. First, the Court of Appeal erred in its assessment of the Grievors’ conduct and whether the Grievors’ subjective expectation of privacy was objectively reasonable. The Grievors, by failing to turn off the computer and by leaving the log open on a public workplace computer, diminished a reasonable expectation of privacy (A.F., at para. 117). Second, the arbitrator’s analysis of the biological core concept was consistent with relevant jurisprudence; she found that the log was far from the Grievors’ biographical core, and then weighed that factor in the balance (A.F., at para. 120). Third, the Court of Appeal erred by failing to consider workplace issues and context in its assessment, and instead viewed “the series of events through its own narrow and incorrect view of an employer’s ‘legitimate interests’” (A.F., para. 128).

B. *Elementary Teachers’ Federation of Ontario*

[58] The respondent Elementary Teachers' Federation of Ontario submits that the Grievors' rights against unreasonable search and seizure were violated, and that the arbitrator erred in four respects: ". . . (1) she failed to take a 'content neutral' approach to assessing the privacy interest in the log; (2) she misconstrued the very concept of the 'biographical core'; (3) she misapplied the concept of 'plain view'; (4) she failed to address [the second Grievor, Ms. Rai's,] distinct privacy interest in the log" (R.F., at paras. 160-85).

[59] The respondent argues that the standard of review for the application of the *Charter* to the Board is correctness for both constitutional questions, namely whether the *Charter* applies to the principal's conduct and whether that conduct violated s. 8. Additionally, the respondent submits that the standard of review for the arbitrator's award itself is reasonableness (R.F., at para. 42).

[60] The respondent submits that the *Charter* applies to the Board, as Ontario public school boards are inherently governmental. The criteria laid out by La Forest J. in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 51, which led him to conclude that municipalities are inherently governmental, are also met when considering school boards (R.F., at paras. 73-74). In the alternative, if the boards are not inherently governmental, then the Board was engaged in governmental action and thus comes within the second branch of *Eldridge* (R.F., at para. 107).

[61] Finally, the respondent submits that s. 8 of the *Charter* was breached. The principal lacked the necessary grounds to conduct the search of the log, and the impact

of the search outweighed the principal's interest in conducting it. The respondent notes that the jurisprudence of this Court, i.e., *M. (M.R.)* and *Cole*, pertaining to searches of schools, is not entirely applicable outside the criminal law context and that this Court must construe the scope of the search powers under s. 265 of the *Education Act*, as informed by the second step of the *Collins* framework (R.F., at paras. 115-48; *R. v. Collins*, [1987] 1 S.C.R. 26).

VI. Analysis

A. *Standard of Review*

[62] The correctness standard applies to the determination of whether the *Charter* applies to school boards pursuant to s. 32(1) of the *Charter* as this is a constitutional question that requires a final and determinate answer by the courts (*Vavilov*, at para. 55), one that will apply generally and is not dependent on the particular circumstances of the case.

[63] The correctness standard also applies to review the arbitrator's decision. I would quash the award because the arbitrator erred in failing to appreciate that a *Charter* right arose from the facts before her. The issue of constitutionality on judicial review — of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis — is a “constitutional questio[n]” that requires “a final and determinate answer from the courts” (*Vavilov*, at paras. 53 and 55).

[64] The determination of constitutionality calls on the court to exercise its unique role as the interpreter and guardian of the Constitution. Courts must provide the last word on the issue because the delimitation of the scope of constitutional guarantees that Canadians enjoy cannot vary “depending on how the state has chosen to delegate and wield its power” (*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 116, per McLachlin C.J.). The presumptive standard of reasonableness is, thus, rebutted and correctness applies.

[65] *Vavilov* does not restrict the scope of “constitutional questions” to only issues of federalism and the constitutional delegation of state power to administrative decision-makers (A.F., at para. 57; see also I.F., Attorney General of Canada, at para. 17). Notably, *Vavilov* used non-exhaustive language in articulating the constitutional questions category, including within it “other constitutional matters” (para. 55 (emphasis added)). This category should not be unduly narrowed.

[66] Post-*Vavilov*, there is a developing line of jurisprudence to support the application of correctness review in this context (*Canadian Broadcasting Corp. v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705, at para. 35; *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, at para. 92; and *Canadian Broadcasting Corporation v. Canada (Parole Board)*, 2023 FCA 166, 429 C.C.C. (3d) 69, at paras. 32-33). Academics have similarly interpreted that the scope of constitutional rights “demand[s] a uniform answer” and is therefore reviewable on the correctness standard (P. Daly, “Big Bang Theory:

Vavilov’s New Framework for Substantive Review”, in C. M. Flood and P. Daly, eds., *Administrative Law in Context* (4th ed. 2022), 327, at p. 347; P. Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (2023), at pp. 141 and 161-62; M. Mancini, “The Conceptual Gap Between *Doré* and *Vavilov*” (2020), 43 *Dal. L.J.* 793, at pp. 824-26.

[67] I would also like to clarify that while the Court of Appeal for Ontario applied a correctness standard to examine whether the teachers had a reasonable expectation of privacy (C.A. reasons, at para. 37), the court, respectfully, erred in deriving the standard of review from this Court’s decision in *Shepherd*, at para. 20, dealing with an appellate standard of review. As this Court held in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 38, where a court reviews a decision of an administrative tribunal, “the standard of review must be determined on the basis of administrative law principles”. *Vavilov* governs this appeal. Correctness applies because the question of constitutionality on this appeal falls within the rule of law exception.

[68] Ontario public school teachers are protected from unreasonable search and seizure in their place of employment under s. 8 of the *Charter*. Despite their apparent functional resemblance, a right to a reasonable expectation of privacy that is entrenched in the Constitution is distinct in source and nature from an arbitral right to privacy. For one, state actors cannot disavow their constitutional obligations no matter the terms of the collective agreement. At its core, the arbitrator’s reasons disclosed a fundamental

error because she had the wrong right in mind. The arbitrator ought to have applied the *Charter*, but failed to do so. Once she failed to appreciate the constitutional dimension of the searches conducted by the principal, there was no intelligible way for her to continue the analysis while fully engaging with the gravity of the alleged violations of the *Charter* right at issue. Courts cannot dilute the sacrosanct nature of *Charter* rights by accepting a different substitute. Nor can courts supplant the reasons proffered by the decision-maker and read the reasons as if it applied a *Charter* right when in fact it applied a different right (*Vavilov*, at para. 96).

[69] The arbitrator failed to recognize that the teachers' s. 8 *Charter* right applied. I disagree with my colleagues that the standard of reasonableness applies to review the arbitrator's reasons (Karakatsanis and Martin JJ.'s reasons, at para. 112). This appeal can and should be disposed of because of this fatal error.

[70] In *Vavilov*, this Court held that:

In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir [v. New Brunswick]*, [2008] 1 S.C.R. 190, at para. 58. [Emphasis added; para. 53.]

[71] In light of the above, the appropriate standard of review in this case is correctness.

B. *The Charter Applies to Ontario Public School Boards Under the First Branch of Eldridge*

[72] Section 32 of the *Constitution Act, 1982*, sets out the scope of the *Charter*'s application:

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[73] In this regard, the landmark ruling is *Eldridge*, in which this Court established a two-branch framework:

First, it may be determined that the entity is itself “government” for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as “government” within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as “private”. Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words,

one must scrutinize the quality of the act at issue, rather than the quality of the actor. [para. 44]

[74] Until now, this Court has made no definitive statement as to whether the *Charter* applies to school boards. While this Court has assumed that the *Charter* applies to school boards (see *Multani v. Commission scolaire Marguerite-Bourgeois*, 2006 SCC 6, [2006] 1 S.C.R. 256), it has done so without addressing the *Eldridge* framework, save as noted below.

[75] In *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, Gonthier J., dissenting (Bastarache J. concurring), examined this issue, which the majority found unnecessary to consider, at length. He held that there was “no doubt” that a school board was subject to the *Charter* under the first branch of *Eldridge* (para. 121). Subsequent to *Chamberlain*, this Court has accepted the Crown’s concession in cases before it that the *Charter* applies to the actions of school officials and proceeded on that basis (see *Cole*, at para. 38).

[76] Lower courts have analyzed whether the *Charter* applies to school boards, and have drawn different conclusions. Some have followed Gonthier J.’s reasons in *Chamberlain* and applied the *Charter* to school boards (see *British Columbia Public School Employers’ Assn. v. B.C.T.F.*, 2005 BCCA 393, 257 D.L.R. (4th) 385; and *Gillies (Litigation Guardian of) v. Toronto District School Board*, 2015 ONSC 1038, 125 O.R. (3d) 17). Others have distinguished Gonthier J.’s reasons and held that the *Charter* does not apply to school boards (see *Calgary Roman Catholic Separate School*

District No. 1 v. O'Malley, 2007 ABQB 574, 81 Alta. L.R. (4th) 261; and *Hamilton v. Rocky View School Division No. 41*, 2009 ABQB 225, 192 C.R.R. (2d) 22).

[77] The time has come to determine whether the *Charter* applies to Ontario public school boards and, if so, whether they come under the first or second branch of *Eldridge*. This is a constitutional question that requires a final and determinate answer from the courts, thus a standard of correctness applies, as per *Vavilov* (para. 55).

[78] Under the first branch of the *Eldridge* framework, “it may be determined that the entity is itself ‘government’ for the purposes of s. 32” (para. 44). This is so where, by (1) “its very nature” or (2) “the degree of governmental control exercised over it” (*Eldridge*, at para. 44), the entity is akin to a government. Under this branch, where the entity is found to be “government”, the *Charter* applies to all its actions. This includes those that would otherwise be described as “private”, were they carried out by a non-governmental actor.

[79] A review of the *Education Act* confirms that Ontario public school boards are government by nature. The section of the Act entitled “Purpose” highlights the role that school boards play in the education system; s. 8 of the Act provides for extensive powers of the Minister of Education with respect to boards. Ontario public school boards are, in effect, an arm of government, in that they “exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves” (*Chamberlain*, at para. 121, quoting *Godbout*, at para. 51).

[80] In *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at paras. 15-16, the Court further clarified that governmental action as part of a “public function” may be sufficient to bring that activity within the purview of government and attract *Charter* scrutiny (*UAlberta Pro-Life v. Governors of the University of Alberta*, 2020 ABCA 1, 98 Alta. L.R. (6th) 252, at para. 128). The Alberta Court of Appeal, for example, has described *Greater Vancouver Transportation Authority* as a starting point for applying *Eldridge* as follows: “. . . the test for s 32 resides in the analysis in *Greater Vancouver Transportation Authority* and rests on the ability to identify an area of government policy and objectives that the [entity] can be said to be implementing for the state more broadly and not just for internal . . . objectives” (*UAlberta Pro-Life*, at para. 139).

[81] Public education is inherently a governmental function. It has a unique constitutional quality, as exemplified by s. 93 of the *Constitution Act, 1867* and by s. 23 of the *Charter*. Ontario public school boards are manifestations of government and, thus, they are subject to the *Charter* under *Eldridge*’s first branch.

[82] Ontario public school boards do not fit under the second branch of *Eldridge*. They are not private entities carrying out a governmental activity. All actions carried on by Ontario public school boards are subject to *Charter* scrutiny, including the principal’s actions, in this case, as he acted in his official capacity as an agent of the Board, a statutory delegate, “and not in his personal capacity” (*Gillies*, at para. 40).

[83] The purpose of the *Eldridge* framework is to interpret s. 32(1) so as to ensure that the federal and provincial governments do not evade their constitutional responsibilities under the *Charter* by delegating governmental functions to non-governmental entities, for example private enterprises (para. 40).

[84] The analysis above relates specifically to Ontario public school boards. I leave for another day the question of the applicability of the *Charter* to public schools in other provinces, or to the operation of private schools.

C. *The Arbitrator Erred by Applying the Wrong Analytical Framework*

[85] When the *Charter* was proclaimed in 1982, its relationship with administrative tribunals was, in Abella J.'s formulation, a “*tabula rasa*” (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 3). I rely on *Conway* for the proposition that administrative tribunals — and therefore, the arbitrator in this particular instance — are competent to and tasked with the work of adjudicating *Charter* questions where they arise.

[86] It was determined in *Conway* that there was no need to bifurcate proceedings where a *Charter* question arose (para. 22). Further, the principles governing remedial jurisdiction apply in both arenas: there was not a *Charter* for the courts and another for administrative tribunals (para. 20, citing *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 70, per McLachlin J., dissenting).

[87] In determining whether to attribute *Charter* jurisdiction to a tribunal, this Court must ask itself whether the tribunal has the power to decide questions of law (*Conway*, at para. 22). If so, it can determine *Charter* questions. The arbitrator in this case meets that criteria, as it is broadly empowered to answer questions regarding “all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable” (*Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 48(1)).

[88] Further, administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn:

- (1) have the authority to resolve constitutional questions that are *linked to* matters properly before them; and
- (2) *must* act consistently with the *Charter* and its values when exercising its statutory function (*Conway*, at para. 78).

[89] The principles governing remedial jurisdiction under the *Charter* apply to both courts and administrative tribunals. Tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction (i.e., where the essential factual character of the matter falls within the tribunal’s specialized statutory jurisdiction). In exercising their statutory discretion, tribunals must comply with the *Charter* (*Conway*, at paras. 20-21 and 78-81).

[90] This is, in part, an access to justice issue. There are practical advantages and a constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available (*Conway*, at para. 79). *Charter* rights can be effectively vindicated through the exercise of statutory powers and processes, meaning that claimants do not need to have separate recourse to the courts for their *Charter* rights to be vindicated (*Conway*, at para. 103).

[91] Where a *Charter* right applies, an administrative decision-maker should perform an analysis that is consistent with the relevant *Charter* provision. Administrative tribunals are empowered — and, for the effective administration of justice, called upon — to conduct an analysis consistent with the *Charter* where a claimant’s constitutional rights apply (*Conway*, at paras. 78-81; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409, at para. 52). It was therefore incumbent on the arbitrator to proactively address the s. 8 issue that manifested itself on the facts of the grievance. It is insufficient to revert to a separate “well developed arbitral common law” privacy right framework, or to another framework, as the arbitrator did in this instance (A.F., at para. 13). As I have explained, the *Charter* and relevant s. 8 jurisprudence were legal constraints that applied to the arbitrator’s decision (*Vavilov*, at para. 101). In other words, the arbitrator was required to decide the grievance consistent with the requirements of s. 8. This would properly entail drawing on both the relevant body of arbitral decisions and the s. 8 jurisprudence.

[92] The arbitrator approached her task differently. She conducted an analysis by reference to management rights versus the privacy interests of employees. However, arbitrators cannot disregard the *Charter*'s requirements where it applies by applying another analytical framework, even by consent.

[93] That said, s. 8 engages a highly contextual analysis, in that it contains internal limits. To give effect to these internal limits, arbitrators can properly have regard to the employment context, including the collective agreement. But they still must conduct an analysis consistent with s. 8.

[94] The appellant and my colleagues suggest that while the arbitrator did not say that she was doing a s. 8 analysis, that is what, in effect, she *did*. This is not persuasive. First and foremost, under the *Vavilov* framework, I am required to have regard to the justification for the decision *actually* given by the decision-maker, and not the justification that the decision-maker *might* have, but did not, provide. When a *Charter* right applies, it is not sufficient that the arbitrator made some references to the *Charter* jurisprudence. Any administrative action must, as a matter of course, always comply with the Constitution (*Vavilov*, at para. 56). However, when a *Charter* right applies, there must be clear acknowledgment of and analysis of that right. While I recognize that administrative justice may not always take the form of judicial justice, nowhere in the arbitrator's reasons, read functionally and holistically, did she indicate that she was considering the Grievors' s. 8 *Charter* right. This is so because she failed to appreciate that s. 8 right was directly at stake and instead proceeded to conduct her

analysis entirely within the arbitral framework and examined the Grievors' privacy right solely through the common law lens. This error is fatal. In addition to applying the wrong framework, the arbitrator's error was compounded by her misapprehension of the content neutral approach, the concept of the biographical core and the doctrine of "plain view" under s. 8 jurisprudence, as observed by the dissenting judge of the Divisional Court as well as the Court of Appeal. In sum, the arbitrator did not do what, as a matter of law, she was required to do, that is to apply the s. 8 *Charter* right.

[95] Having concluded that the arbitrator's decision erred in law, the proper remedy is to set aside the arbitrator's decision and to send the matter back for consideration by the arbitrator. However, as the matter is now moot, I would simply set aside the arbitrator's decision and leave matters there.

[96] That said, this Court has received extensive submissions regarding s. 8 and the privacy of school employees more broadly. As well, this was dealt with at length by the Divisional Court and the Court of Appeal. In light of this and of the practical utility of providing general guidance on such matters, I set out the following in *obiter*.

D. *Public School Teachers Have a Section 8 Charter Right Against Unreasonable Search and Seizure in the Workplace*

[97] As noted, Ontario public school boards are government for the purpose of s. 32 of the *Charter*; thus, school board employees, including teachers, enjoy rights under s. 8 of the *Charter* against unreasonable search and seizure in the workplace.

This Court has recognized s. 8 *Charter* protection beyond the criminal and quasi-criminal context (see *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627 (s. 8 applies to production of documents under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)); *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406 (s. 8 applies to labour inspections under provincial legislation)).

[98] This Court's criminal decisions, such as in *R. v. Edwards*, [1996] 1 S.C.R. 128, and particularly in the school context, such as in *Cole*, can assist in determining the existence and scope of a reasonable expectation of privacy in the employment context. However, courts should be cautious in adapting the s. 8 framework from the criminal law context to the employment context. The criminal law context cannot readily be analogized to the context surrounding a principal performing their tasks in accordance with their statutorily mandated role of maintaining order in a school. Criminal law thresholds — and considerations related to exigency and law enforcement objectives — should not be the starting point for analysis in the employment context. Rather, in that context, the employer's operational realities, policies and procedures can be relevant in determining the reasonableness of an employee's expectation of privacy (*Cole*, at para. 54).

[99] Criminal law jurisprudence should not be indiscriminately imported into non-criminal matters. The analysis under s. 8, being contextual, needs to be adapted to occupational realities. For instance, this Court has eschewed the requirement of prior authorization by a warrant to conduct searches of students by a school authority. In

M. (M.R.), Cory J., for the majority, reasoned that such a criminal law requirement was not feasible in this context because school administrators “must be able to respond quickly and effectively to problems that arise in their school” (para. 45).

[100] In adapting the analysis to the workplace, for example, I agree with the Attorney General of Ontario that workplaces vary in terms of the level of regulation and that the consequences for discipline in the employment context are less severe as compared to penal liability in the criminal context (see *I.F.*, at paras. 19-23).

(1) Determining the Reasonable Expectation of Privacy

[101] Whether in criminal or other contexts, s. 8 analysis proceeds in two steps: courts must determine, first, whether there is a reasonable expectation of privacy, and, second, whether the search and seizure is reasonable (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 18, citing *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293).

[102] Whether or not state action has interfered with a reasonable expectation of privacy is to be determined based on the “totality of the circumstances”. This is dispositive of both the existence and the extent of the reasonable expectation of privacy.

Four lines of inquiry serve as a guide:

- (1) an examination of the subject matter of the search;

- (2) a determination as to whether the claimant had a direct interest in the subject matter;
- (3) an inquiry into whether the claimant had a subjective expectation of privacy in the subject matter; and
- (4) an assessment as to whether this subjective expectation of privacy was objectively reasonable

(*Tessling*, at paras. 31-32; *R. v. Gomboc*, 2010 SCC 55, [2010] 3 S.C.R. 211, at paras. 18 and 78; *Cole*, at para. 40; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 27).

[103] Inevitably, the reasonable expectation of privacy takes its colour from context. Thus, the employer's operational realities, policies and procedures may affect the reasonableness of an employee's expectation of privacy (*Cole*, at para. 54). For example, in *Cole*, this Court recognized that the storing of personal information on a computer owned by the employer and the existence of a policy stating that data so stored belongs to the employer would tend to diminish the reasonable expectation of privacy (para. 52). On the other hand, permitting employees to use work laptops for personal purposes would weigh in favour of the existence of a reasonable expectation of privacy (para. 54).

(2) Determining the Reasonableness of a Search

[104] In the criminal context, a search or seizure is reasonable if (1) it is authorized by law; (2) the law itself is reasonable; and (3) the manner in which the search or seizure was carried out is reasonable (*Collins*, at p. 278). Similar to the first step of a s. 8 analysis, the *Collins* framework also calls for a contextual assessment. “[Searches that] may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context” (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 495-96 (per Wilson J., dissenting)). In *M. (M.R.)*, this Court implicitly adapted the *Collins* test to determine “whether a search conducted by a teacher or principal in the school environment was reasonable” (para. 54).

[105] I hasten to add that what may be considered proportionate in a criminal context, where penal liability is at stake, may look different in a labour relations context where the consequence, albeit serious, does not threaten liberty. In evaluating the reasonableness of the impugned search at the second step of a s. 8 analysis, arbitrators should have regard to employment relations under the terms of the collective agreements. The existing arbitral jurisprudence on the “balancing of interests”, including the consideration of management rights under the terms of the collective agreement, may properly inform the balanced analysis. There exists a considerable body of arbitral decisions regarding privacy in the context of collective agreements that

arbitrators may properly have regard to in conducting a s. 8 analysis (see, e.g., *Doman Forest Products Ltd. and I.W.A., Loc. 1-357, Re* (1990), 13 L.A.C. (4th) 275 (B.C.); *Toronto Transit Commission and A.T.U., Loc. 113 (Belsito) (Re)* (1999), 95 L.A.C. (4th) 402 (Ont.)).

[106] The effect of this decision is not to displace existing arbitral jurisprudence, but rather to ensure that it respects *Charter* rights. Arbitral jurisprudence now encompasses a considerable body of decisions that reflect a great breadth of experience; this will continue to play an important role in resolving grievances arising under collective agreements. However, such decisions should also be taken in accordance with the direction in *Conway* to analyze *Charter* rights when they apply. This must inform their decision as to the grievance under the collective agreement.

VII. Conclusion

[107] The appeal is dismissed with costs. There is no need to return the matter for further arbitral consideration, as the issue of the reprimand is moot.

The following are the reasons delivered by

KARAKATSANIS AND MARTIN JJ. —

I. Introduction

[108] We agree with the parties and Rowe J. that the issue of whether the *Canadian Charter of Rights and Freedoms* applies to Ontario public school boards is one that must be correctly determined by this Court. We further agree that under the first branch of *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the *Charter* applies to Ontario public school boards and all their activities (para. 44). However, we do not agree with how our colleague reviews the arbitrator’s decision.

[109] The arbitrator was asked to determine whether the privacy rights of two teachers (the Grievors) were violated and, as a result, whether the collective agreement was breached. The Grievors sought remedies under their collective agreement; no *Charter* remedies were sought. This Court’s s. 8 *Charter* jurisprudence was specifically argued by the parties, and the arbitrator’s reasons clearly demonstrate she appreciated that the s. 8 privacy framework applied and constrained her decision. The issue in this appeal is whether she used that framework reasonably in the circumstances of this case. We conclude, like Sachs J., in dissent at the Divisional Court, that the arbitrator’s reasoning is not consistent with the principle of content neutrality, which lies at the heart of s. 8’s normative approach to privacy, and therefore her decision is unreasonable. For the reasons that follow, we would dismiss the appeal.

II. Standard of Review and Proper Analytical Framework

[110] Our colleague faults the arbitrator for “applying the wrong analytical framework” and “failing to appreciate that a *Charter* right arose from the facts before her” (paras. 63, 68-69, 85 and 94-95). Relying on the “constitutional questions”

exception to the presumption of reasonableness review from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, he explains that the “issue of constitutionality on judicial review — of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis”, is a constitutional question requiring a single, determinate answer from this Court (para. 63). Accordingly, he concludes the correctness standard applies to the review of the arbitrator’s decision because she did not appreciate that the *Charter* applied to the decision she was tasked to make.

[111] We do not agree with this broad statement of the constitutional questions exception or the characterization of the inquiry at the heart of this appeal. Clearly, whether or not teachers have a privacy right in their workplace is an issue that deserves to be correctly determined for all. We agree that they do.

[112] While we also agree with our colleague that any analysis had to be consistent with the *Charter* framework, the arbitrator’s reasons demonstrate she was reviewing the challenged conduct using the s. 8 *Charter* framework as a touchstone. However, focusing on whether the arbitrator asked the right question and reviewing the arbitrator’s decision on the correctness standard overshoots the ambit of the correctness exceptions laid down in *Vavilov*. The issue before the arbitrator was whether the Grievors’ privacy rights had been breached — an application and assessment which heavily depended on the specific factual and statutory context. As a result, the presumption of reasonableness review applies.

A. *The Arbitrator Recognized That Section 8 of the Charter Constrained Her Decision*

[113] The case was argued before the arbitrator as a labour grievance, with the parties focusing on the facts of the case and on whether the appellant Board's investigation, which led to discipline, breached the collective agreement. The arbitrator was tasked with determining whether the Grievors' privacy rights were violated and, as part of that inquiry, she recognized that the *Charter* and s. 8 jurisprudence were relevant constraints.

[114] The arbitrator understood that administrative decision-makers must act consistently with the *Charter* and its values when exercising statutory functions (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 78; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409, at para. 52). This Court's jurisprudence recognizes that "*Charter* rights can be effectively vindicated through the exercise of statutory powers and processes" (*Conway*, at para. 103; see also para. 5; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1077-78, adopted in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 875; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 53-56).

[115] Consistency with s. 8 of the *Charter*, however, looks different in different contexts (see generally N. Hasan et al., *Search and Seizure* (2021), at pp. 294-97; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at pp. 644-46; *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406, at pp. 445-47; *R. v. Wholesale*

Travel Group Inc., [1991] 3 S.C.R. 154, at pp. 224-27, per Cory J.; see also 2022 ONCA 476, 340 L.A.C. (4th) 365, at paras. 3 and 42). While the s. 8 principles governing administrative powers of search and seizure may be analytically distinct from their operation in criminal investigations, the *Charter* and the s. 8 jurisprudence were legal constraints bearing on the grievance within the meaning of *Vavilov*, at para. 105.

[116] *Vavilov* instructs that administrative decisions are to be considered functionally — with an eye to substance, not form. Administrative decisions must be read as a whole and in light of the institutional context and history of the proceedings (paras. 91, 94 and 99). Administrators “cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge”, and this reality impacts the form and content of reasons (para. 92). That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside (para. 91, quoting *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). In sum, reviewing courts must remain cognizant of the fact that “[a]dministrative justice’ will not always look like ‘judicial justice’” (para. 92).

[117] Reading the arbitrator’s decision as a whole as *Vavilov* instructs, and with sensitivity to the institutional and procedural context in which it was made, she plainly understood that the *Charter* arose and s. 8 jurisprudence bore on the grievance. Both

the Board and the respondent Union relied on s. 8 case law before her (see arbitrator's reasons: (2018), 294 L.A.C. (4th) 341, at paras. 171 and 179). As the Union notes, the arbitrator cited s. 8 case law and expressly recognized that this case law was applying s. 8 of the *Charter* (see C.A. reasons, at para. 36; see also R.F., at paras. 31-33). The arbitrator engaged with the concepts of reasonable expectation of privacy, diminished reasonable expectation of privacy, plain view, and biographical core.

[118] Thus, we cannot agree that the decision must be quashed because the arbitrator did not expressly state that s. 8 of the *Charter* applied or because she conducted her analysis “without regard” to the legal framework under s. 8 (Rowe J.'s reasons, at paras. 5, 69 and 94). That conclusion seizes on form, contrary to *Vavilov*'s teachings. In our view, the arbitrator directed herself to the relevant legal constraints on her decision making.

B. *No Basis To Depart From the Presumption of Reasonableness Review*

[119] *Vavilov* was intended to provide a stable framework for determining and applying the standard of review and to encourage parties to focus instead on the merits (para. 69; see also *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at para. 7). This Court affirmed a broad presumption of reasonableness review and discouraged reviewing courts from parsing sub-issues and assigning them different standards of review by articulating a limited number of exceptions where correctness review is warranted (*Vavilov*, at paras. 23, 33-64 and 69).

[120] Correctness exceptions from *Vavilov* based on the rule of law are united by the need for courts to “provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary” (*Vavilov*, at para. 53; see also P. Daly, “Big Bang Theory: Vavilov’s New Framework for Substantive Review”, in C. M. Flood and P. Daly, eds., *Administrative Law in Context* (4th ed. 2022), 327, at pp. 346-47). Within this category, the correctness exception for constitutional questions is similarly justified by the need for consistency, finality, and determinate answers:

Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions. [Emphasis added; citations omitted.]

(*Vavilov*, at para. 55)

[121] Importantly, *Vavilov* was equally clear that constitutional matters not requiring courts to supply final and determinate answers fall outside the exception to the presumption of reasonableness review. Pre-*Vavilov* jurisprudence did not support correctness review for all cases involving the *Charter*, and that remains true today. This Court in *Vavilov* expressly drew a distinction between “cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the [*Charter*] and those in which the issue on review is whether a provision of the decision maker’s enabling statute violates the *Charter*” (para. 57; see also para. 55;

Syndicat canadien de la fonction publique, section locale 1108 v. CHU de Québec — Université Laval, 2020 QCCA 857, at paras. 29-33 (CanLII)). Only the latter situation requires courts to provide a final and determinate answer and, therefore, correctness review.

[122] Accordingly, individualized decisions involving the *application* of the *Charter* that are intrinsically linked to a specific factual and statutory context will generally not engage the same rule of law concern about potential inconsistency as that which motivated the correctness exception for “constitutional questions” in *Vavilov*. As Professor Daly explains, “variations between individualized decisions about the appropriate application of the Charter in a particular regulatory setting do not compromise the integrity of the legal system: different balances may perfectly legitimately be struck in different areas of regulation between individual rights and the public interest” (p. 347). This explanation reflects the conceptual underpinnings of reasonableness review, with its overall policy of deference and the recognition that courts do not possess a monopoly over the adjudication of *Charter*-related issues in the administrative context. Administrative decision-makers are empowered and required to consider the *Charter* in exercising their statutory functions (*Conway*, at para. 78).

[123] Determining the engagement and scope of *Charter* rights will sometimes entail a highly context specific exercise, which this case exemplifies. Not only will a search in an employment setting differ from a search executed by police officers in the course of a criminal investigation, the questions the arbitrator had to answer were

heavily interconnected and dependent on the particular factual and statutory context (see I.F., Attorney General of Canada, at para. 20). For instance, did the principal interfere with the Grievors' reasonable expectation of privacy such that a search within the meaning of s. 8 occurred? Was the search reasonable in that it was authorized by law and conducted reasonably? In answering these questions, the arbitrator had to consider workplace realities in an educational setting, the interpretation of the *Education Act*, R.S.O. 1990, c. E.2, and the authority it confers to conduct workplace searches in schools, and the reasonableness of the principal's exercise of authority at a particular place and time. Deference should be afforded to the arbitrator's understanding of this critical, case-specific context, one in which there is no pressing need for "judicially imposed uniformity" (see P. Daly, "Unresolved Issues after *Vavilov*" (2022), 85 *Sask. L. Rev.* 89, at pp. 106-7).

[124] In our view, the cases cited by our colleague, at para. 66, are distinguishable from the circumstances of this appeal and do not support correctness review for how administrators should assess a *Charter* right in a particular factual context.

[125] In our view, *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, is not analogous to this case. It involved a *Charter* challenge to the constitutionality of a statutory provision. We do not read this case as purporting to erase the important distinction this Court drew in

Vavilov between the constitutionality of a statute and an administrative decision's effect on *Charter* rights.

[126] Our colleague also relies on *Canadian Broadcasting Corp. v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705, and a case citing it. *Ferrier* was not considered by this Court on an appeal, and we make no comment on its conclusions. We accept that administrative decisions affecting *Charter* rights can involve a question requiring a final and determinate answer within the meaning of *Vavilov* (para. 55). As we have said, we agree that the issue of whether the *Charter* applies to Ontario public school boards must be answered correctly. Respectfully, we do not think that the principle requiring correctness for constitutional matters governs review of whether the privacy right was *infringed* in these circumstances.

[127] Nor do we accept that the cases referred to by the majority 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. Such an approach introduces uncertainty on what it means for a *Charter* right to be engaged, “appl[y]” to, or “aris[e]” from the facts (Rowe J.’s reasons, at paras. 63 and 69). It undercuts *Vavilov*’s careful recalibration of the standard of review framework, which makes plain that not all cases of constitutional interpretation require correctness review. Under *Vavilov*’s terms, questions about the engagement and scope of a *Charter* right will only sometimes require a final and determinate answer. As we have explained, the arbitrator’s decision and interpretive exercise were highly fact-specific, depended on a

particular statutory context, and concerned the application of legal principles to the particular grievance presented.

[128] In sum, while we agree that whether the *Charter* applies to Ontario public school boards at all would be a constitutional issue attracting the correctness standard, in our view, our colleague's articulation of the breadth of the "constitutional questions" category does not align with *Vavilov*'s limited exceptions to reasonableness review. The issue in this case is one of application: Were the Grievors' privacy rights breached in the context of the specific searches in issue? As a result, there is no basis to rebut *Vavilov*'s presumption that reasonableness review governs this appeal.

III. Reasonableness Review of the Arbitrator's Decision

[129] Reviewing the arbitrator's reasons, we conclude that the decision is not reasonable in light of the constraints bearing on it. The arbitrator relied on the specific contents of the Grievors' log in calibrating the privacy interest engaged and in determining the reasonableness of the search. This reasoning is inconsistent with the broad and content-neutral approach required by the normative nature of the s. 8 framework.

A. *The Arbitrator's Reasons*

[130] Before the arbitrator, the Union submitted that the Grievors had an expectation of privacy in the log, which was violated in three separate ways. The Board

submitted there was no privacy violation because there was no expectation of privacy engaged in the circumstances and, in any event, the principal had reasonable cause for the investigation and the search was reasonable.

[131] The arbitrator identified that the issue in dispute was whether the Grievors' privacy rights were violated by the search. She further identified that, in order to establish a privacy violation, it must first be established that there is a reasonable expectation of privacy engaged in the circumstances.

[132] The arbitrator reviewed the entirety of the evidence, which consisted of will-say statements and affidavits, as well as some cross-examination evidence, and she analyzed the expectation of privacy asserted by the Union. Then, she set out the legal principles that animate s. 8 and arbitral jurisprudence, to the extent of their consistency (see, e.g., para. 259), before applying those principles to the circumstances before her. Dismissing the grievance, the arbitrator found that there had been no breach of the Grievors' reasonable expectation of privacy.

[133] First, the arbitrator agreed with the Union that the Grievors had a reasonable expectation of privacy in the circumstances. She identified the subject matter of the search (the log), and she concluded that the Grievors had a direct interest and subjective expectation of privacy in that subject matter. As for objective reasonableness, the arbitrator reviewed the totality of the circumstances — control over the log, the place of the search, the private nature of the log's content, ownership of the laptop, and the applicable policies in place in the school environment (paras. 199, 202-

3 and 208-14). This led her to conclude that the Grievors had a reasonable expectation of privacy but that this expectation of privacy was diminished because one of the Grievors had left the log open on the laptop in the classroom.

[134] Turning to the asserted violations, the arbitrator reviewed the principal's conduct in touching the mousepad of the laptop, scrolling through the log, and taking screenshots of the log's content. She considered the specific administrative action taken by the principal and the general school context in which the challenged action was taken. She identified the interest furthered by the search — cooperation and the maintenance of order in the school environment — and concluded that the search was authorized by law under s. 265 of the *Education Act* (paras. 224, 230 and 247).

[135] The arbitrator then assessed the reasonableness of the search, focusing on what was known to the principal at the time. Much of her assessment was trained on the principal's investigation into the alleged workplace misconduct in the school setting, in light of the *Education Act* objectives he was furthering through the search. The arbitrator examined the contents of the log, noting that it did not reveal personal or intimate information. In particular, she found the log had a "judgmental quality", and she concluded that it did not reveal "personal or intimate information about either of [the Grievors]" (para. 246). Consequently, the arbitrator concluded that it was "not close enough" to their biographical core (at paras. 246-47), the search itself was reasonable, and, therefore, there was no breach of the Grievors' privacy.

B. *The Arbitrator's Decision Was Unreasonable*

[136] The parties raise several issues relating to the arbitrator’s privacy analysis. Read functionally, much of the arbitrator’s reasoning is sound. She was sensitive to the application of s. 8 in the administrative context before her, and she reasonably distinguished the leading authorities. The arbitrator identified *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393, and said it was similar to this case in the sense that the search under review was authorized by s. 265 of the *Education Act*. But she distinguished *M. (M.R.)* on the basis that, in that case, the search furthered a criminal investigation, which implicates different s. 8 concerns. She identified similarities and distinctions between this case and *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, which, like *M. (M.R.)*, also involved a search by school officials and a related criminal investigation.

[137] A key issue discussed by the courts below was the arbitrator’s treatment of the contents of the log (C.A. reasons, at paras. 53-57 and 69-70; 2020 ONSC 3685, 316 L.A.C. (4th) 1, at paras. 90-99 and 147-53). The respondent Union asserts that the arbitrator examined the Grievors’ privacy interest in the log based on what it revealed and then concluded that what was revealed lay far from the Grievors’ biographical core (arbitrator’s reasons, at paras. 245-47). This reasoning is incompatible with the demands of content neutrality, a principle which animates the s. 8 framework. The appellant Board says there was no such error.

[138] We agree with the Union. While administrative and regulatory investigations “may engage different interests from criminal investigations and may therefore import a different constitutional calculus than their criminal law analogues”

(Hasan et al., at p. 294), the principle of content neutrality lies at the heart of the normative nature of privacy.

[139] Under the body of law that constrained the arbitrator's decision, the actual contents of the Grievors' log could not reasonably be relevant to the question she was required to answer. The s. 8 jurisprudence makes clear that the assessment of the Grievors' reasonable expectation of privacy did not depend on what the log actually contained (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160; *R. v. Wong*, [1990] 3 S.C.R. 36, at pp. 49-50; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 31-32; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 32). Rather, as the Court of Appeal accurately identified, what mattered was the potential for the search to reveal information touching on the Grievors' biographical core.

[140] In order for s. 8 to fulfill its promise of being preventative, it must be approached in broad and neutral terms. As this Court stated in *Cole*, the information contained on Internet-connected devices, normatively, tends to reveal one's "specific interests, likes, and propensities", and as such it is "at the very heart of the 'biographical core' protected by s. 8" (paras. 47-48, quoting *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 105; see also *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at paras. 33-34). The arbitrator's conclusion to the contrary — that the log was insufficiently close to the Grievors' biographical core — is untenable in light of this proposition. The arbitrator's reasoning on this point was not reasonably reflective of privacy's normative aspirations.

[141] It is not necessary to consider the other issues raised by the parties or identified by the Court of Appeal, whose analysis employed the standard of correctness, to conclude that the decision was unreasonable. We are satisfied that the arbitrator's reliance on the contents of the log is central and significant, rendering the decision as a whole unreasonable (*Vavilov*, at para. 100).

IV. Conclusion

[142] As the dissenting judge at the Divisional Court recognized, this case should not be remitted for further arbitral proceedings given that the events took place almost 10 years ago, there have been significant proceedings to date, and remitting in these circumstances raises concerns about the efficient use of public resources (see *Vavilov*, at para. 142). The Union sought clarity on whether teachers had s. 8 privacy rights in the workplace; and they seek dismissal of the appeal. As a result, the Union has this Court's reasons that s. 8 of the *Charter* applies to Ontario public school boards and the Court of Appeal's determination that there was a breach of the Grievors' privacy rights.

[143] For these reasons, we would dismiss the appeal with costs.

Appeal dismissed with costs.

*Solicitors for the appellant: Hicks Morley Hamilton Stewart Storie,
Toronto.*

Solicitors for the respondent: Goldblatt Partners, Toronto.

Solicitors for the intervener the Attorney General of Canada: Department of Justice Canada — British Columbia Regional Office, Vancouver; Department of Justice Canada — Ontario Regional Office, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario — Constitutional Law Branch, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Ministère de la Justice du Québec — Direction du droit constitutionnel et autochtone, Québec.

Solicitors for the intervener the British Columbia Civil Liberties Association: Olthuis van Ert, Ottawa.

Solicitors for the intervener the British Columbia Teachers' Federation: British Columbia Teachers' Federation, Vancouver; Michael Sobkin Barrister & Solicitor, Ottawa.

Solicitors for the intervener the Centre for Free Expression: Ryder Wright Holmes Bryden Nam, Toronto.

Solicitors for the intervener the Ontario College of Teachers: McCarthy Tétrault, Toronto.

Solicitors for the interveners the Power Workers' Union and the Society of United Professionals: Paliare Roland Rosenberg Rothstein, Toronto; Wright Henry, Toronto.

Solicitors for the intervener the National Police Federation: Nelligan O'Brien Payne, Ottawa.

Solicitors for the intervener the Ontario Principals' Council: Jones Pearce, Toronto.

Solicitors for the intervener the Canadian Association of Counsel to Employers: Baker & McKenzie, Toronto.

Solicitors for the intervener Egale Canada: Blake, Cassels & Graydon, Calgary; Blake, Cassels & Graydon, Toronto; Egale Canada, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Ursel Philips Fellows Hopkinson, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Stockwoods, Toronto.

Solicitor for the intervener Centrale des syndicats du Québec: Barabé Morin — Les services juridiques de la CSQ, Montréal.

Solicitors for the intervener the Queen's Prison Law Clinic: Jared Will & Associates, Toronto.