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***Spoiler Alert! What's Happening in Administrative Law?***

# THE YEAR IN REVIEW IN ADMINISTRATIVE LAW

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# I. INTRODUCTION[1]

In December 2019, the Supreme Court of Canada rendered its much-anticipated decisions in the "trilogy" dealing with the scope of judicial review and the standard of review.[2] These cases reformulated how standards of review are to be determined in both applications for judicial review and in statutory appeals. Other important administrative law decisions involve standing, procedural fairness, the *Charter* and privilege.

# II. STANDARDS OF REVIEW

## A. Take-aways from *Vavilov*

*Vavilov* is the sixth attempt in 50 years by the Supreme Court of Canada to grapple with standard of review.[3] The reasons in *Vavilov* are quite extensive, and provide a great deal of food for thought. The majority changes some of the previous approach to standards of

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1. I gratefully acknowledge the very capable assistance of Dawn M. Knowles, LL.B. from our office in the preparation of this paper. I also appreciate those colleagues from across the country who draw my attention to interesting developments in administrative law in their jurisdictions.

2. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 which included the decision in *National Football League v. Canada (Attorney General)*. The Court's very next decision dealt with how to apply the newly articulated reasonableness standard of review: *Canada Post Corporation v. Canadian Union of Public Employees*, 2019 SCC 67.

3. *Anisminic* (1968) and *Metropolitan Life* (1970); *CUPE v. NB Liquor* (1979); *Bibeault* (1988); *Pushpanathan* (1998); *Dunsmuir* (2008); now *Vavilov* (2019). Looking back over the 50 years, is this really just a case of *plus ça change, plus c'est la même chose*?

review in the context of a large part of Administrative Law. The minority sharply disagrees with some of the majority's analysis and approach. This paper will concentrate on some important highlights and take-aways from *Vavilov*, leaving detailed dissection to other places[4] and other authors.[5]

***Highlights of the majority decision***

The most significant principles established by the majority[6] in *Vavilov* are:

1. The overriding principle is determining legislative intent. Accordingly, legislative provisions prescribing the standard of review will govern for both appeals and judicial review.

2. Where there is no statutorily prescribed standard of review:

   (a) For statutory appeals, the standards set out in *Housen v. Nikolaisen*[7] are to be used.[8] Therefore, correctness is to be used for questions of law and

4. For a detailed analysis, see Chapter 12 in the recently published Seventh Edition of Jones & de Villars, *Principles of Administrative Law* (Carswell/Thomson Reuters).

5. An excellent source of sustained commentary on *Vavilov* (and many other topics in administrative law) can be found at Professor Paul Daly's blog at https://www.administrativelawmatters.com/.

6. The majority consisted of Chief Justice Wagner and Justices Moldaver, Gascon, Côté, Brown, Rowe and Martin. Justices Abella and Karakatsanis gave joint reasons concurring in the outcome but dissenting from some of the majority's analysis.

7. 2002 SCC 33.

8. As in civil litigation.

"palpable and overriding error" is to be applied for questions of fact or mixed law and fact. This is a major shift.

(b) For applications for judicial review, there is a rebuttable strong presumption that the standard of review is reasonableness for all issues, except that presumption is rebutted in the following circumstances:

(i) Where the legislature has indicated that it intends a different standard of review to apply by either stipulating the standard of review to be used in a statutory provision or by providing a statutory right of appeal from the decisions of the statutory delegate; and

(ii) Where the Rule of Law requires the standard of correctness to apply. Examples include constitutional questions (such as the division of powers, the relationship between the legislature and other branches of the state, the scope of Aboriginal and treaty rights); general questions of law that are of central importance to the legal system as a whole; and issues of conflicting jurisdiction between different statutory delegates. This list is not exhaustive. However, "true questions of jurisdiction" are no longer a separate category of issues which automatically engage the correctness standard.[9]

9. Though the concept of "jurisdiction" has not been abolished—indeed, it remains the foundation which underlies all of Administrative Law.

3. Because of the strong presumption that reasonableness is the applicable standard of review in applications for judicial review, the first step in judicial review (determining the applicable standard of review) no longer includes the"pragmatic and functional" analysis of the context that was set out in the court's previous decision in *Pushpanathan*[10] and left at least as a remnant in *Dunsmuir*. Nor is it necessary at this stage to consider the expertise of the statutory delegate. These factors, among others, are now only to be taken into account at the subsequent step of applying the reasonableness standard of review. This is also a significant shift in the analysis, particularly about where expertise fits in.

4. In applying the reasonableness standard, a wide range of (contextual) factors must be considered, including but not limited to:

    - the governing statutory scheme;
    - the purpose of the legislation;
    - the statutory and common law context in which the decision was made;
    - the principles of statutory interpretation;
    - the expertise of the statutory delegate;
    - the factual context, including the record and submissions; past practices and decisions of the statutory delegate; and
    - the potential impact of the decision on those to whom it applies.[11]

10. *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982.

11. Para. 106.

In many ways, these look like the *Pushpanathan* analysis, but at the second stage of determining whether the impugned decision is unreasonable in all of the context, rather than at the first stage of determining the applicable standard of review.

5. "Reasonableness" relates to both the outcome and the justification, intelligibility, and transparency of the reasons for the particular decision. The reviewing court's focus should be on the actual decision at issue; it should not start its reasonableness review from its own view of the right answer or the possible range of reasonable answers; and reasonableness review does not entail nitpicking or intense scrutiny.

6. If a decision is set aside on judicial review as being unreasonable, the usual remedy would be for the court to remit the matter back to the statutory delegate. However, there are some circumstances in which it would be appropriate for the court to make the decision itself. This may be the case, for example, where to send the matter back to the statutory delegate would stymie the timely and efficient resolution of matters or where a particular outcome is inevitable.[12]

The majority is clear that the courts should respect and give credence to the intention of the legislature in setting up the particular legislative scheme.[13]

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12. See *Farrier v. Canada (Attorney General)*, 2020 FCA 25 for an example of a case in which the court held it would be pointless to remit a matter back to the decision-maker.

13. See paras. 23 to 32.

***The minority's criticism***

Justices Abella and Karakatsanis concurred in the outcome, and agreed with the majority that there should be a presumption of reasonableness in judicial review, the contextual factor analysis should be eliminated from the first step of selecting the applicable standard of review, and that "true questions of jurisdiction" should not be a separate category of issues which automatically engage the correctness standard of review.

However, the minority was concerned that the majority's new framework for judicial review is formalistic; would undermine a meaningful presumption of deference to statutory delegates; obliterates expertise especially as a rationale for deference; ignores the legislature's intention to leave certain legal and policy questions to statutory delegates; and could result in expanded correctness review and more intensive reasonableness review.

With respect to statutory appeals, the minority objected that the new framework overrules precedent without justification. It noted that the mere fact that a statute confers an appeal says nothing about the degree of deference required in the review process. For at least 25 years (long before *Dunsmuir*), the courts had not treated the presence of a statutory appeal as a determinative indication of the legislature's intention about the applicable standard of review—it was just one factor. The minority argued that adopting the correctness standard [on a question of law] where there is a statutory right of appeal, but reasonableness where there is judicial review, creates a two-tier system, and will affect many statutory delegates.[14] If the legislatures had disagreed with the court's previous decisions about the purposes and

14. At para. 251.

effect of statutory appeal provisions, they were free to clarify their intent through legislative amendment, but had not generally done so.[15]

While acknowledging that the court should offer additional direction on conducting reasonableness review,[16] the minority was concerned that the multi-factored, open-ended list of factors to be considered in determining the reasonableness of administrative decisions would encourage reviewing courts to dissect administrative decisions in a line-by-line hunt for error—not all of which are necessarily material in determining reasonableness. The minority cautioned that courts must be alert not to use correctness in the guise of reasonableness, including in cases involving statutory interpretation.

In summary, the minority criticized the new framework for not giving sufficient weight to curial deference,[17] which is the hallmark of reasonableness review, and which has three dimensions:

(a) Deference is the attitude a reviewing court must adopt towards a statutory delegate, respecting its specialized expertise and institutional setting.

(b) Deference affects how a court frames the question it must answer and the nature of its analysis—a reviewing court should not ask how it would have resolved an issue, but rather whether the answer provided by the statutory delegate was

15. Of course, the legislatures could always legislate now if they are not content with the majority's new framework.

16. At para. 284.

17. At paras. 286-295.

unreasonable, given the context, the reasons it gave, the record, the statutory scheme, and the particular issues raised, etc.

(c) Deference impacts how a reviewing court evaluates challenges to a decision—the party seeking judicial review bears the onus of showing that the decision was unreasonable; the statutory delegate does not have to persuade the court that its decision is reasonable.

***The majority's response to the minority's criticism***

The majority responded to the minority's criticism as follows:

> 75 We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.
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> . . .
>
> [145] Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

In my respectful view, the majority's lengthy explanation and conceptual justification for the presumption in judicial review that reasonableness is the default standard of review[18] does appreciate the "delicate balance" between judicial review and curial deference. The fact that certain core issues engage the correctness standard of review, or that sometimes decisions by statutory delegates may actually be unreasonable, does not make the majority blind to that delicate balance. The majority's reference to the panoply of possible reasons why a statutory delegate's decision might be unreasonable does not contain anything new; the issue is what to do about those possible defects. Judicial review is not a mathematical equation or scientific formula that can be applied by artificial intelligence—it is an attitude and an approach that requires judgment.

And I also agree with majority's change to make *Hausen v. Nicholaisen* applicable to administrative appeals, assimilating this part of administrative law to the rest of *civil* litigation.

### *Six questions about* Vavilov

There are at least seven areas that bear watching:

### 1. *The concept of "jurisdiction" is not dead*

In my view, it would be wrong to conclude that the concept of "jurisdiction" is dead. While there have been numerous statements over the years that "jurisdiction" is a difficult and not always helpful concept, it nevertheless underlies the whole foundation of Administrative

18. See paras. 16 to 32.

Law. It provides the *grounds* for review, even if a jurisdictional defect does not automatically engage the correctness standard of review,

This is what the majority said about "true questions of jurisdiction" not automatically engaging the correctness standard of review:

> 65 We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.
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> 66 As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.
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> 67 In *CHRC*, the majority, while noting this inherent difficulty – and the negative impact on litigants of the resulting uncertainty in the law – nonetheless left the question of whether

> the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category – in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority – can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

However, none of this deals with jurisdictional defects as *grounds* for judicial review. The concept of jurisdiction (or lack thereof) is the very foundation of administrative law. It provides the justification for courts to intervene and grant judicial review remedies; otherwise, the courts themselves would have no jurisdiction. The concept of the standard of review does not displace the fundamental concept of jurisdiction.

### 2. ***The continuing role of expertise—but at a later step in judicial review***

The analytical framework established by the majority makes consideration of expertise unnecessary in the selection of the applicable standard of review (the first step in judicial review). This makes sense because of their strong overarching presumption that reasonableness is the applicable standard of review (which is what a reference to expertise was previously intended to achieve).[19] In the majority's new analytical framework, expertise

19. Subject to certain Rule of Law categories where correctness is the applicable standard (where the majority would say expertise is irrelevant). See para. 32.

is only relevant at the second step of the analysis—namely, determining whether the statutory delegate's decision is reasonable.[20]

On the other hand, the minority in *Vavilov* take the position that expertise is the foundation of the modern understanding of legislative intent in delegating authority to a statutory delegate, because expertise (and specialization) permits an appreciation of the (a) on-the-ground consequences of particular legal interpretations, (b) statutory context, (c) purposes of a provision or legislative scheme, and (d) specialized terminology—all of which are the core reason for deference. Removing this as the conceptual basis for deference removes the possibility that reasonableness might be the appropriate standard of review even where there is a statutory appeal,[21] and opens the gates for more intensive (successful) judicial review (which the minority argue amounts to correctness review).[22]

It will be interesting to see what role expertise plays in the courts' application of *Vavilov* reasonableness,[23] and in particular in contexts involving statutory interpretations.[24]

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20. See paras. 27-31, 93.

21. See paras. 217, 221, 225-229, and 245-252.

22. See paras. 221-224, 229.

23. What role would expertise play in a statutory appeal where *Hausen v. Nicholaisen* determines the applicable standards of review?

24. The issue from *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 involving the interplay between deference (generally and to expert bodies specifically) and the principles of statutory interpretation: what makes a statutory delegate's statutory interpretation unreasonable?

### 3. *Privative clauses*

Prior to *Vavilov*, the presence or absence of a privative clause in the statutory delegate's enabling legislation was one of the four *Pushpanathan* factors the court considered in determining the standard of review which it would apply on an application for judicial review.[25] However, the presumption of reasonableness under the *Vavilov* framework significantly diminishes the impact of a privative clause in determining the standard of review. The majority stated:

> 49 . . . in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

One may wonder, however, whether the presence of a strong privative clause would provide some of the context in which the impugned decision was made, at least potentially colouring the court's appreciation of the reasonableness of that decision. What about a privative clause that explicitly provides that none of the remedies available on judicial review would be available, or squarely covers how a statutory delegate exercises its discretion?[26]

How does ignoring a privative clause square with honouring the intention of the legislature?

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25. It would generally be unusual for a statute to contain both a statutory appeal and a privative clause with respect to the same matter, unless to make it doubly clear that judicial review is not available instead of or in addition to the statutory appeal.

26. And one might ask: in the face of such a privative clause, what would give the court power to set a aside a decision as being unreasonable? That the intention of the legislature could never have been that the statutory delegate could make an unreasonable decision? That is, that the statutory delegate did not have jurisdiction to make such a decision?

### 4. *Reasons*

The majority's emphasis on the role of reasons as an important element in determining the reasonableness of an impugned decision raises the question about whether it has tangentially expanded the previous law about the obligation to provide reasons. Notwithstanding the majority's caveats about not overly-finely parsing reasons and that not all errors are material, there is the possibility that in practice there will be a greater requirement for statutory delegates to provide reasons—and more extensive reasons—than they previously were required to do. Statutory delegates will need to be alert to this possibility. See the discussion below.

### 5. *Areas of Administrative Law not covered by* Vavilov

There has long been a question about whether or how the two standards of review—correctness and reasonableness—apply to all areas of Administrative Law. Two particular areas which were not clearly dealt with in *Vavilov* bear watching:

- The principles of natural justice and procedural fairness (discussed below).
- Determining the *vires* of subordinate legislation.[27]

27. Compare *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 485; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2; *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64; *Green v. Law Society of Manitoba*, 2017 SCC 20; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22.

## 6. *The meaning of the "Rule of Law"*

The majority contemplates that cases involving the Rule of Law could engage the correctness standard of review. However, they also say that inconsistent decisions by a statutory delegate do not automatically engage the Rule of Law.

In my respectful view, more work needs to be done in this area.

For example, as Justice Slatter noted in the Court of Appeal of Alberta in *Edmonton East (Capilano)*,[28] the court has a unifying role in establishing the law, particularly where there are multiple statutory bodies operating under the same statute (such as many local assessment review boards acting throughout the province). Another example would be numerous *ad hoc* labour adjudicators needing a uniform interpretation of their governing legislation: *Wilson v. Atomic Energy Ltd.*[29]

## 7. *Applying* Hausen v. Nicholaisen

Applying the standards of review in *Hausen v. Nicholaisen* to statutory appeals will require characterizing the issue as one of law (which will engage the correctness standard of review),

28. *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City),* 2015 ABCA 85; reversed by SCC in (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47. Query: effectively reversed again by *Vavilov*?

29. 2016 SCC 29.

fact (which will engage the "palpable and overriding error" standard of review), or mixed fact and law (which may require a somewhat higher but still deferential standard).[30]

It will be interesting to see how the courts go about doing this characterization.

Even where a question of law is undoubtedly involved, it will be interesting to see how the courts deal with decisions by expert statutory bodies.

And does *Hausen v. Nicholaisen* apply to internal administrative appeals from one level of administration to another? At least in the context of professional discipline, the reasonableness standard of review from *Dunsmuir* was transplanted from judicial review to internal administrative appellate bodies even with respect to questions of law. After *Vavilov*, will a revised transplant now take place to make *Hausen* the applicable standard of review for these types of appeals?

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30. Justice Côté described a "palpable and overriding error" as follows in *Hydro-Québec v. Matta*, 2020 SCC 37 as follows:

> Absent a palpable and overriding error, an appellate court must refrain from interfering with findings of fact and findings of mixed fact and law made by the trial judge: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10-37; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352. An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55-56 and 69-70; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33. As Morissette J.A. so eloquently put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77, [translation] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions": quoted in *Benhaim*, at para. 39. The beam in the eye metaphor not only illustrates the obviousness of a reviewable error, but also connotes a misreading of the case whose impact on the decision is plain to see.

## B. Some post-*Vavilov* cases of interest

The Supreme Court of Canada applied the *Vavilov* approach in *Canada Post Corp. v. Canadian Union of Public Employees*[31] the very day after *Vavilov* was released. Quite a number of other courts have considered, commented upon and applied the *Vavilov* framework for determining standard of review.[32] The following cases are particularly noteworthy.

### (i) *Professional disciplinary cases*

The Court of Appeal of Alberta applied *Vavilov* in the context of professional disciplinary proceedings in three recent cases: *Al-Ghamdi v. College of Physicians and Surgeons of Alberta*,[33] *Yee v. Chartered Professional Accountants of Alberta*,[34] and *Zuk v. Alberta Dental Association and College*.[35]

31. 2019 SCC 67.

32. See Professor Paul Daly's extensive commentary on many post-*Vavilov* decisions: https://www.administrativelawmatters.com/blog/2020/10/31/vavilov-at-one/.

33. 2020 ABCA 71. See also *Al-Ghamdi v. College and Association of Registered Nurses of Alberta*, 2020 ABCA 81 in which the court addressed the standard of review with respect to a finding of civil contempt, holding that it varies with the issue. The issue of whether a litigant is vexatious should be, absent an error of law, reviewed for reasonableness as should the exercise of judicial discretion to refuse permission to amend pleadings or to order summary judgment: see paras. 7 to 12.

34. 2020 ABCA 98.

35. 2020 ABCA 162.

### *Al-Ghamdi*

In *Al-Ghamdi*, a case involving a statutory appeal, the court summarized *Vavilov* as follows:

> [9] The standards of review on a statutory appeal from an administrative tribunal are the same as those on other appeals: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para. 49. Those standards of review can be summarized as follows:
>
> (a) conclusions on issues of law are reviewed for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. That includes questions of statutory interpretation, including interpretation of the tribunal's "home statute".
>
> (b) findings of fact, including inferences drawn from the facts, are reviewed for palpable and overriding error: *Housen* at paras. 10, 23; *H.L. v Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 SCR 401.
>
> (c) findings on questions of mixed fact and law call for a "higher standard" of review, because "matters of mixed law and fact fall along a spectrum of particularity": *Housen* at paras. 28, 36. A deferential standard is appropriate where the decision results more from a consideration of the evidence as a whole, but a correctness standard can be applied when the error arises from the statement of the legal test: *Housen* at paras. 33, 36.
>
> (d) issues of fairness and natural justice are reviewed, having regard to the context, to see whether the appropriate level of "due process" or "fairness" required by the statute or the common law has been granted: *Vavilov* at para. 77.
>
> (e) the test on review for bias is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias.
>
> [10] The members of the College of Physicians and Surgeons of Alberta, like most professions in Alberta, are afforded the privilege and responsibility of self-regulation. The ultimate objective of professional regulation is protection of the public. The presumption behind self-regulation is that no one has a greater stake in the integrity of the profession than the members of the profession, and the profession is well-positioned to judge when conduct is so unacceptable as to amount to professional misconduct that is contrary to the public interest. On the other hand, professionals subjected to discipline are entitled to have disciplinary decisions reviewed externally on appeal to this Court.
>
> [11] In professional disciplinary appeals, interpretation of the governing statute is reviewed

> for correctness. Important questions of mixed fact and law calling for deference by a reviewing court will often include i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts, the professional subjected to discipline has met that standard.

***Yee***

In *Yee*, Justice Slatter of the Court of Appeal of Alberta quoted the above passage from *Al-Ghamdi* and discussed (1) the standard of review for internal administrative appeals, (2) what reasonableness means, and (3) when the appellate body is in as good a position as the original decision-maker to make a decision about a particular matter (such as what constitutes "professional misconduct"):

> [30] In professional disciplinary appeals, interpretation of the governing statute is reviewed for correctness. Important questions of mixed fact and law calling for deference by a reviewing court will often include i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts, the professional subject to discipline has met that standard.
>
> [31] As noted, the *Regulated Accounting Profession Act* sets up a tiered system of discipline, under which findings of a discipline tribunal can be appealed to the appeal tribunal. In this case, the Appeal Tribunal concluded that the standard of review to be applied by it was "reasonableness". One of the appellant's central arguments is that the correct standard of review on an internal appeal is "correctness".
>
> [32] The Appeal Tribunal was unfortunately distracted by a lengthy discussion of the standard of review. It unhelpfully characterized certain issues as being "jurisdictional", although there was nothing in these proceedings that called into question the jurisdiction of the Discipline Tribunal. It relied on the decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, which has since been overruled by *Vavilov*. In any event, *Dunsmuir* was not the applicable authority. *Dunsmuir* dealt with the standard of review in external review of administrative action, that is, it dealt with the standard of review by a superior court of the decisions of an administrative tribunal. Different, although overlapping considerations apply to review at various internal levels within the administrative structure: *Newton v Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paras. 42-3, 57, 493 AR 89, 38 Alta LR (5th) 63. For example, on external review deference is extended by superior courts because the professional disciplinary tribunal is presumed to have heightened

expertise and insight. There is no reason to presume that a professional internal appeal tribunal has less expertise than a discipline tribunal.

[33] The mandate and powers of an appeal tribunal are set out in the *Act*:

> 111(1) Unless the parties to the appeal otherwise agree, an appeal must be based on
>
> (a) the decision of the body from which the appeal is made,
> (b) the record of proceedings before that body, and
> (c) any further evidence that the appeal tribunal agrees to receive.
>
> (2) In proceedings under this Part,
>
> (a) an appeal tribunal, in addition to the authority it has under this Part, has the authority of a discipline tribunal under Part 5, and . . .
>
> 112(1) An appeal tribunal may quash, confirm, vary or reverse all or any part of a decision of the body from which the appeal was made, make any finding or order that in its opinion ought to have been made or refer the matter back to the same or another body with or without directions.

It is well established that the breadth of the wording in s. 111(2) and s. 112(1) does not mean that an appeal tribunal should afford no deference whatsoever to the decision of the discipline tribunal: *Newton* at para. 54; *Zuk v Alberta Dental Association and College*, 2018 ABCA 270 at para. 72, 78 Alta LR (6th) 12. That would undermine the integrity of the first level of the disciplinary structure, and make the proceedings before the discipline tribunal an ineffectual waystation along the path to a final decision.

[34] Of central importance in setting the internal standard of review is the role assigned to the appeal tribunal by the governing statute: *Zuk* at para. 71; *City Centre Equities Inc v Regina (City)*, 2018 SKCA 43 at paras. 58-9, 75 MPLR (5th) 179. The wording of the *Act* makes it clear that the appeal tribunal is to conduct "appeals". Its decision is to be "based on the decision of the body from which the appeal is made", signalling that the primary role of the appeal tribunal is to review that decision. It follows that the appeal tribunal is not to re-conduct the entire proceeding *de novo*, a conclusion that is affirmed by the provision in s. 111(1)(b) that the appeal proceeds on the "record": *Newton* at para. 64. The provision allowing the introduction of fresh evidence on appeal is not intended to displace the presumption that the appeal is on the record, and fresh evidence must be allowed with caution in order to avoid undermining the proceedings before the disciplinary tribunal: *Newton* at para. 81.

[35] When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain

flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:

(a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;

(b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;

(c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;

(d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: *Newton* at para. 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;

(e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

(f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

In this case, the Appeal Tribunal erred in applying a universal standard of review of reasonableness, resulting from its overreliance on *Dunsmuir*. With respect to matters such as the appropriate standard of professional conduct, and the integrity of the discipline process, it should have engaged in a more intensive review.

***Zuk***

In *Zuk*, the Court of Appeal of Alberta also quoted the above passage from *Al-Ghamdi* and concluded that the standard of review for sanctions imposed by professional regulatory bodies is reasonableness:

> 14 The Alberta Dental Association and College, of which Dr Zuk is a member, enjoys the privilege and responsibility of self-regulation. "In professional disciplinary appeals, interpretation of the governing statute is reviewed for correctness. Important questions of mixed fact and law calling for deference by a reviewing court will often include i) the standard of practice the profession expects in any particular case, and ii) whether, on the facts, the professional subjected to discipline has met that standard": *Al-Ghamdi* at paras 10-11.
>
> 15 Pre-*Vavilov*, it was clear that deference was owed to professional disciplinary bodies on the fitness of sanctions and the fact findings underpinning them: *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 42 [*Ryan*]; *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 43, 57. As *Vavilov* does not directly address the question of standard of review for sanctions imposed by professional disciplinary bodies, this Court was asked to provide guidance on this point. In our view, the appropriate standard of review remains reasonableness. *Vavilov* provides a "revised framework that will continue to be guided by the principles underlying judicial review... articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9" [*Dunsmuir*]: para 2. The longstanding principles articulated in *Dunsmuir* and *Housen* have not been displaced: *Vavilov* at para 37. As noted in para 13 above, the standards of review on statutory appeals are the same as those applied in other appeals. The focus is on the type of question in dispute. The question of what sanction Dr Zuk should face as a result of his misconduct is a question of mixed fact and law: *Ryan* at para 41. This calls for a deferential standard where the decision results from consideration of the evidence as a whole, but a correctness standard ought to be applied when the error arises from the statement of the legal test, or where there is an extricable question of law: *Housen* at paras 33, 36; *Constable A v Edmonton (Police Service)*, 2017 ABCA 38 at para 41.
>
> [Emphasis added.]

### (ii) *Coldwater First Nation*

Another post-*Vavilov* decision that deserves mention is *Coldwater First Nation v. Canada (Attorney General)*.[36] That case involved an application for judicial review of the Governor in Council's decision to approve the Trans Mountain Pipeline Expansion Project on the grounds that the government had failed to adequately consult with Indigenous peoples. The Federal Court of Appeal dismissed the application for judicial review. In doing so, the unanimous court[37] considered *Vavilov* and adopted the standard of reasonableness:

> 25 All are agreed that *Vavilov* does not bring a material change to the standard of review in this litigation. However, *Vavilov* does bring together and clarify a number of principles in a useful way.
>
> 26 This is a statutory judicial review, not a statutory appeal. In such circumstances, there is a presumption that the standard of review is reasonableness (*Vavilov*, paras. 23-32), and none of the exceptions to reasonableness review identified in *Vavilov* apply.
>
> 27 In *Vavilov*, the Supreme Court held that questions as to "the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* [...] require a final and determinate answer from the courts" and, thus, must be reviewed for correctness (*Vavilov*, para. 55). But, as mentioned, the scope of the duty to consult under section 35 is not in issue before us. Thus, reasonableness is the standard of review (see also *TWN 2018*, paras. 225-226). That said, we are dealing with a constitutional duty of high significance to Indigenous peoples and indeed the country as a whole. This is part of the context that informs the conduct of the reasonableness review.
>
> 28 In conducting this review, it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's decision. In many ways, that is what the applicants invite us to do. But this would amount to what has now been recognized as disguised correctness review, an impermissible approach (*Vavilov*, para. 83) :

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36. 2020 FCA 34, leave to appeal to SCC refused [2020] S.C.C.A. No. 183. See also David Mullan's article "2019 Developments in Administrative Law Relevant to Energy Law and Regulation" found at http://www.energyregulationquarterly.ca for a discussion of the *Coldwater* case.

37. *Per* Chief Justice Noël, and Justices Pelletier and Laskin.

> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker – including both the rationale for the decision and the outcome to which it led – was unreasonable.

29 Rather, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review.

30 There are many such circumstances. The Supreme Court emphasized in *Vavilov* that reasonableness is a single standard that must account for context. In its words, "the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case" (*Vavilov*, para. 89). Thus, reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision-making involved and all relevant factors" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, para. 59; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, para. 18 [*Catalyst*]; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, para. 22). In other words, the circumstances, considerations and factors in particular cases influence how courts go about assessing the acceptability and defensibility of administrative decisions (*Catalyst*, para. 18; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, para. 54; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, para. 44).

31 In *Vavilov*, the Supreme Court emphasized that reasonableness review is to be conducted by appreciating the decision, the reasons for it, and the context in which it was made. This requires us to consider the reasons offered in justification of the decision in light of the evidentiary record.

### (iii) *Ferrier*

*Canadian Broadcasting Corporation v. Ferrier*[38] is an example of a case which was argued pre-*Vavilov* but where reasons were released post-*Vavilov*.

The case involved an allegation that members of the Thunder Bay Police Service were guilty of misconduct because they failed to conduct a thorough investigation into the death of an Indigenous man. The Ontario Independent Police Review Director concluded that there were reasonable grounds to advance the misconduct hearing but, because it took more than six months for the Director to issue a report, it was necessary to apply to the Police Service Board for an extension for disciplinary proceedings to be commenced. The adjudicator in the extension application, a retired judge appointed in the matter, ordered that the extension hearing would be closed to the public notwithstanding the fact that the *Police Services Act* contains a provision that police board hearings are presumptively open. Instead, the adjudicator ordered the hearing to be held *in camera*. The Divisional Court dismissed an application for judicial review of that decision.[39]

The Ontario Court of Appeal allowed the appeal, quashed the adjudicator's decision ordering an *in camera* hearing, and remitted the matter back for reconsideration.

38. 2019 ONCA 1025.

39. 2019 ONSC 34.

In the course of the proceedings, the appellants argued that the principles set out in *Dagenais v. Canadian Broadcasting Corp*.[40] and *R. v. Mentuck*[41] had the effect of limiting discretionary decisions which restricted freedom of the press to attend court proceedings. The Divisional Court held that the *Dagenais/Mentuck* test was not applicable because (1) the test did not apply to statutory bodies exercising administrative functions, and (2) the *Police Services Act* set out a specific statutory test for how to address the question of whether a hearing should be open to the public. The Court of Appeal unanimously overturned the Divisional Court's conclusion.[42] While the procedural fairness and *Charter* arguments will be discussed more fully below, the court made some interesting comments about what standard of review should be applied post-*Vavilov*:

> 29 This appeal had been argued and a complete draft of these reasons had been written before the Supreme Court released its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 modifying standard of review analysis. As I will explain, it is my view that *Vavilov* confirms that the appropriate standard of review is correctness. Moreover, even if the appropriate standard of review were reasonableness, *Vavilov* confirms that the decision to hold a closed hearing was unreasonable.
>
> 30 The decision to hold a closed hearing, as explained by the Divisional Court, would ordinarily attract the deferential "reasonableness" standard of review mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.
>
> 31 I note that in oral argument, the Complainants withdrew the submission in their factum that the standard of review was altered by the fact that the decision was that of a substitute decision maker without the expertise of a police services board. In any event, *Vavilov*, at para. 30, holds that expertise is no longer a factor to be considered when determining the appropriate standard of review.
>
> 32 In my respectful view, the Divisional Court failed to recognize that the attack on the decision focussed on the refusal to apply the *Dagenais/Mentuck* test when concluding that the extension hearing should be closed. The challenged decision was not, as the Divisional

40. [1994] 3 S.C.R. 835.

41. 2001 SCC 76.

42. *Per* Chief Justice Strathy and Justices Doherty and Sharpe.

Court suggested, a decision under s. 83(17) whether to grant an extension. Rather, it was a decision under s. 35(4) whether to hold a closed hearing. The appellants argued that that decision could only be made if the *Charter* rights to freedom of expression and freedom of the press were considered. They argued that the decision maker was wrong to conclude that the exercise of his discretion was governed solely by the terms of s. 35(4) and to refuse to take those *Charter* rights into accounts.

33 I agree with the appellants' submission that the decision that the *Dagenais/Mentuck* test does not apply is reviewable on a correctness standard of review.

34 If the *Charter* rights are considered by the administrative decision maker, the standard of reasonableness will ordinarily apply. In *Doré*, the Disciplinary Council of the Barreau du Québec considered and rejected the argument that the *Code of ethics of advocates* requirement that advocates conduct themselves with "objectivity, moderation and dignity" infringed the s. 2(b) *Charter* right to freedom of expression. Similarly, in *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, 278 D.L.R. (4th) 550, the commissioner of inquiry considered the *Dagenais/ Mentuck* test and rejected the argument that he should issue a publication ban regarding an alleged wrong-doer. In both cases, a reasonableness standard of review was applied when the decisions were challenged.

35 On the other hand, the refusal or failure to consider an applicable *Charter* right should, in my opinion, attract a correctness standard of review. As the Supreme Court explained in *Dunsmuir*, at para. 60, citing *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62: "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' ... uniform and consistent" answers are required. See also *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 20-21. This is confirmed by *Vavilov*, at para. 17: "[T]he presumption of reasonableness review will be rebutted...where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies".

36 The s. 2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question. As confirmed by *Vavilov*, at para. 53, the application of the correctness standard to "constitutional questions, general questions of law of central importance to the legal system as a whole...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".

> 37 The issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.

### (iv) *Farrier*

The Federal Court of Appeal's decision in *Farrier v. Canada (Attorney General)*[43] is an example of the court expressly recognizing the impact of *Vavilov*. The Parole Board denied parole on the grounds that the Board had failed to record the hearing. The Parole Board Appeal Division affirmed the Board's decision. In dismissing the appeal, the Federal Court of Appeal focussed on the reasons given by the Appeal Division and held that, given the Supreme Court's reasons in *Vavilov*, the reasons given by the Appeal Division were inadequate. However, the court unanimously declined to quash the decision because the appeal could not succeed and it would be pointless to do so. The case is particularly interesting because the court admitted that, prior to *Vavilov*, it would have probably held the Appeal Division's decision to be reasonable.[44]

## C. Standards of Review and Procedural Fairness

Despite the court's statement in *Al-Ghamdi* reproduced above, one issue that *Vavilov* did not definitively answer, and that courts will have to continue to grapple with, is whether a standards of review analysis is required when a decision is challenged on the basis of

43. 2020 FCA 25 *per* Justices Gauthier, Rennie and Locke.

44. See para. 12.

procedural unfairness. While *Vavilov* addresses the requirement for reasons, it does not clearly address the broader notion of the duty to be fair (apart, perhaps, from treating the duty to give proper reasons as a subset of procedural fairness).

In one respect, it could be argued that the court in *Vavilov* recognized that a standards of review analysis is not required where the issue is one of procedural fairness. The majority stated:

> 23 Where a court reviews the merits of an administrative decision (*i.e.*, judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.
>
> [Emphasis added.]

However, the majority later suggested that the reasonableness standard of review would apply to questions of procedural fairness:

> 76 Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case – and in particular whether that duty requires a decision maker to give reasons for its decision – will impact how a court conducts reasonableness review.

Indeed, as noted above, most of the court's discussion about procedural fairness focusses solely on the issue of reasons; other aspects of the duty to be fair are not addressed.

In my view, even after *Vavilov*, the procedural fairness of a proceeding should not be measured by the standards of "correctness" or "reasonableness". It should be measured by

whether the proceedings have met the level of fairness required by law. The standard is "fairness". Determining whether a process was fair does not engage deference. The process was either fair or it was not.[45]

## III. STANDING

The following cases involve questions of standing:

### A. *Good Spirit School Division*

In the 2017 case of *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan*,[46] the Saskatchewan Court of Queen's Bench granted public interest standing to a public school board ("Good Spirit") for the purposes of commencing a constitutional and *Charter* challenge to Saskatchewan's legislative framework for funding education. Good Spirit argued that the framework was unconstitutional to the extent that it provided funding to educate non-Roman-Catholic students attending Catholic separate schools.

In 2020, the Saskatchewan Court of Appeal overturned that decision. On the issue of standing, the court held that Good Spirit should not have been granted standing to assert

45. Which may be the source of the heresy that the standard of review for procedural fairness is correctness: the consequence of applying the correctness standard of review is that the court has the last word about whether the impugned decision is correct. The court also has the last word about whether the procedure used was fair. But the court having the last word does not equate to the standard of review being correctness rather than fairness.

46. 2017 SKQB 109.

*Charter* breaches or to contest the rights or privileges conferred on separate schools.[47] The court noted the following errors in the lower court's decision:[48]

- While there may have been a serious issue to be tried, that was not the issue upon which Good Spirit was granted public interest standing;

- Good Spirit had no real stake or genuine interest in the *Charter* issues that ultimately resulted in the declaration of invalidity;

- There were others whose interests were better placed to make the *Charter* arguments, who chose not to come forward, and whose interests may have been placed in jeopardy by Good Spirit's action;

- The legislative framework was protected by the terms of s. 93 of the *Constitution Act, 1867* and s. 17(2) of the *Saskatchewan Act*, and thereby protected from *Charter* scrutiny; and

- The legislative framework was a constitutional exercise of the Legislature's plenary power as conferred on it by the opening words of s. 93 of the *Constitution Act, 1867.*

47. 2020 SKCA 34.

48. See paras. 43 to 94.

## B. *Key First Nation*

*Key First Nation v. Lavallee*[49] dealt with whether a First Nation Band had standing to challenge a Band Council Resolution ("BCR") adopted by the former Band Council to retain a law firm to provide legal services to the Band. The Respondents argued that the Band had no standing to bring the application and that it was, in effect, challenging a decision of itself by claiming that it was no longer bound by the BCR. The respondents claimed that the application should have been brought by individual members of the Band and not by the Band itself. The Band, on the other hand, asked the court to distinguish between the Band and the Band Council.

The court held that the Band did lack standing and was not the appropriate party to initiate the application. Justice Walker concluded that the Band itself could not attack the BCR by way of an application for judicial review. In her decision, Walker J. relied both on the principles of standing and timeliness. Justice Walker did conclude, however, that the Band had standing to sue the law firm in a civil suit based on unjust enrichment.

## C. *UAlberta Pro-Life*

In *UAlberta Pro-Life v. Governors of the University of Alberta*,[50] the Court of Appeal of Alberta considered whether the complainants had standing to challenge the merits of a decision by the University not to prosecute or take disciplinary action against counter-demonstrators who were the subjects of a complaint filed by the appellants pursuant to the University Code of Student Behaviour. The chambers judge held that the complainants did

49. 2019 FC 1467.

50. 2020 ABCA 1.

not have standing in the absence of allegations of procedural unfairness.[51] Bokenfohr J. stated:

> 21 The status afforded complainants under the Code is similar to the status afforded complainants in professional discipline matters. The role of a complainant in professional regulatory matters and their standing to seek judicial review has been addressed by the Alberta Court of Appeal in *Friends of the Old Man River Society v. Association of Professional Engineers*, *Geologists and Geophysicists of Alberta*, 2001 ABCA 107, *Mitten v. College of Alberta Psychologists*, 2010 ABCA 159, and *Warman v Law Society of Alberta*, 2015 ABCA 368. These cases all confirm that a complainant's standing is limited to issues of procedural fairness. Complainants are not entitled to seek review of the reasonableness of the decision on the merits.

Justice Bokenfohr quoted from the dissenting and *obiter* judgment in *Warman v Law Society of Alberta*[52] in which Wakeling J.A. noted that a complainant's interest in a complaint to a regulatory body to see that the rules are carried out according to their terms is an interest shared with the public at large. It was not an individual duty to a complainant simply because the complainant is 'interested' in the decision.

The Court of Appeal dismissed the appeal. The court was not satisfied that the appellants were genuinely raising a procedural fairness issue. Rather, the court held that the appellants' arguments came down to whether the University's decision was acceptable or reasonable.

51. 2017 ABQB 610.

52. 2015 ABCA 368 at paras. 35 to 39.

# IV. PROCEDURAL FAIRNESS

## A. Applicability of the Duty of Fairness

In *Jette v. New Brunswick Legal Aid Services Commission*,[53] the New Brunswick Court of Queen's Bench addressed whether the applicant, a lawyer that had provided services to provincial legal aid for more than three decades, was owed the duty of fairness when the Legal Aid Services Commission decided to stop sending her child protection files. The Commission argued that its Executive Director had the authority to administer its day to day operations, including contracting with private sector lawyers to act for its clients. It argued that the decision to stop sending child protection files to the applicant did not give rise to a duty of procedural fairness and was a reasonable decision.

Justice Dysart rejected the Commission's argument that the duty of fairness did not apply:

> [60] I am not convinced that the Legislature intended for the procedural safeguards set out under sections 31 to 34 of the Regulation to apply where a lawyer is removed from a panel, but for the Executive Director to have unfettered discretion to stop sending work to a lawyer and for that lawyer to have no right to be heard and no right to fairness. Such a finding would be nonsensical, in my view, and would expose lawyers to the whims of the Executive Director.

53. 2019 NBQB 320. For another decision arising from the termination of a legal aid lawyer, see *Harvey v. Saskatchewan Legal Aid Commission*, 2020 SKCA 110 in which the Saskatchewan Court of Appeal held that the Commission did not have authority to remove a lawyer from the Panel of legal aid lawyers for reasons other than just cause. Where the lawyer's term of employment with the Commission simply came to an end, the Commission did not have authority to unilaterally impose its policy or practice to remove her name from the Panel.

Dysart J. went on to consider the *Baker* factors to determine that the duty of fairness had been breached. The applicant had not received advance notice that the issue of her receiving child protection cases was being considered or that she was at risk for losing such work, had not been given an opportunity to respond, and had not received timely notice of the decision. Justice Dysart went on to hold that, even if procedural fairness had not been owed to the applicant, the decision was unreasonable and should be quashed.

In *Dabao v. Investigation Committee of the Saskatchewan Registered Nurses' Association*,[54] Justice McMurtry held that procedural fairness had not been breached when the investigation committee sent a matter to the Discipline Committee after a lengthy prolonged but unsuccessful negotiation about a possible alternative resolution.

## B. Duty of Fairness and the Public Interest

*Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*[55] is a recent example of the courts weighing the right of an individual to procedural fairness against the broader public interest. Diaz-Rodriguez, a Public Transit Officer, was accused of assaulting a complainant suspected of fare evasion. Following lengthy disciplinary proceedings, the Police Commissioner ordered a public inquiry to be held. Diaz-Rodriguez applied for judicial review of the Commissioner's decision to order a public inquiry. The British Columbia Supreme Court allowed the application and quashed the Commissioner's decision

54. 2020 SKQB 242.

55. 2020 BCCA 221.

on the grounds that it was an abuse of process and unreasonable due to inordinate delay.[56] The Commissioner appealed to the British Columbia Court of Appeal.

The Court of Appeal allowed the appeal, holding that the delay did not meet the threshold of abuse of process. The applications judge had failed to consider the time consuming procedures mandated by the *Police Act* and the fact that the administrative proceedings had been delayed by parallel criminal proceedings. The Court of Appeal held that the right to procedural fairness in this case did not outweigh the competing public interest in proceeding with the public inquiry.

## C. Open hearings

The Ontario Court of Appeal cases of *Langenfeld v. Toronto (City) Police Services Board*[57] and *Canadian Broadcasting Corporation v. Ferrier*[58] both dealt with the *Charter*'s impact on decisions which may have the effect of restricting the public's access to police board hearings. Both cases will be discussed below under "*Charter* issues". However, both cases also deserve mention in the context of the procedural fairness aspect of open hearings.

In *Langenfeld*, the Ontario Court of Appeal held that, while a decision implementing security measures requiring all persons entering Police Headquarters to pass through security did violate the section 2(b) *Charter* rights of persons wanting to enter the building for the

56. 2018 BCSC 1642.

57. 2019 ONCA 716, leave to appeal to SCC refused [2019] S.C.C.A. No. 401.

58. 2019 ONCA 1025.

purposes of attending and participating in public meetings, the decision was saved under section 1 of the *Charter* as being a reasonable limit on the attendees' freedom of expression.

In *Ferrier*, an adjudicator ordered that the hearing to determine whether a time extension should be granted would be closed to the public notwithstanding the fact that section 35 of the *Police Services Act* contains a provision that police board hearings are presumptively open to the public. Instead, the adjudicator ordered the hearing to be held *in camera*. The Divisional Court dismissed an application for judicial review of that decision.[59]

The Ontario Court of Appeal allowed the appeal, quashed the adjudicator's decision ordering an *in camera* hearing, and remitted the matter back for reconsideration.

Relying on both section 35 of the *Police Services Act* and the decision in *Langenfeld*, the Ontario Court of Appeal made the following comments:

> 62 The question the decision maker had to decide was whether the desirability of avoiding disclosure or "intimate financial or personal matters ... outweighs the desirability of adhering to the principle that proceedings be open to the public." In my view, that statutory test and not the *Dagenais/Mentuck* test governed the exercise of his discretion. However, the s. 2(b) right recognized in *Langenfeld* has a direct bearing on the exercise of that discretion. Through no fault of his own, the decision maker did not consider *Langenfeld*. The "principle that proceedings be open to the public", recognized by s. 35(4), is considerably fortified by the s. 2(b) *Charter* right recognized by *Langenfeld* in relation to police services board meetings.
>
> 63 *Doré*, at para. 56, explains that the administrative decision maker is "to ask how the *Charter* value at issue will best be protected in view of the statutory objectives" and that the core of this "proportionality exercise" will require the decision maker "to balance the severity of the interference of the *Charter* protection with the statutory objectives." As *Doré* explains, at para. 57, this proportionality exercise "calls for integrating the spirit of [the *Charter*'s s. 1 reasonable limits scrutiny] into judicial review".

59. 2019 ONSC 34.

64 As I will explain when discussing the issue of remedy, it will be for the decision maker to conduct that proportionality exercise. However, I propose to outline what seem to me to be some of the relevant considerations.

65 Section 35 reflects three relevant statutory objectives. The first objective is congruent with s. 2(b). Meetings of police services boards are presumptively open to the public. The second and third relevant statutory objectives are the protection of "intimate financial or personal matters" and the public interest in a fair and impartial hearing. Both factors require a proportional response, appropriately balancing the severity of interfering with the *Charter* right with the achievement of the statutory objectives.

66 For reasons I have explained, I do not think that the *Dagenais/Mentuck* test applies. On the other hand, the measuring of a proportional response in the context of an administrative hearing such as this is bound to take on a similar hue. As Morgan J. explained in *Toronto Star v. AG Ontario*, at para. 92: "The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals". He added, at para. 93: "The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no 'one size fits all' application of the openness principle."

67 The administrative decision maker should, as required by the *Dagenais/Mentuck* test, consider reasonably alternative measures that could avoid the risk of impeding the statutory objective. Counsel for the decision maker argues that it was not open to the decision maker to consider as an alternate measure a limited publication ban that would preclude publication of the OIPRD report and the names of the officers in order to protect their interest and the public interest in a fair and impartial hearing. I disagree with that submission. Section 35(4) provides that "[t]he board may exclude the public from all <u>or part of</u> a meeting or hearing" (emphasis added). In my view, that language indicates that the Board is not required to make an "all or nothing" order and that where an order less restrictive than a total ban will achieve the relevant statutory objectives, such an order can and should be made. It was therefore open to the decision maker to make an order banning further publication of the OIPRD investigative report and/or the names of the Respondent Officers.

68 Consideration of the s. 35(4) test in the light of s. 2(b) and freedom of the press is a highly contextual exercise and framing an appropriate order will very much depend upon the circumstances of each case.

The court went on to identify the factors favouring an open hearing:

- the extension hearing formed one small part of a much larger controversy;

- the investigative report had already been made public;

- the Board and the decision maker had structured the consideration of the extension request as if it were a quasi-judicial decision; and

- the interest of transparency in relation to police discipline.

## D. Reasons

*Vavilov*

The court in *Vavilov* commented on the role of written reasons in determining the reasonableness of a decision:

> *A. Procedural Fairness and Substantive Review*
>
> 76 Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case – and in particular whether that duty requires a decision maker to give reasons for its decision – will impact how a court conducts reasonableness review.
>
> 77 It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the

administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

78 In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

79 Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

80 The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes – albeit in the judicial context – as the "discipline of reasons": *Good Judgment*: *Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.

81 Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable – both to the affected parties and to the reviewing courts.

> It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

### *Mohr*

The Alberta Court of Appeal's decision in *Mohr v. Strathcona (County)*[60] also addressed the requirement to give reasons. A group of landowners appealed a decision of the Development Appeal Board which dismissed their appeal from a decision granting a development permit for a cannabis production facility. In a 2-1 split decision,[61] the Court of Appeal allowed the appeal on the grounds that the Board's reasons were inadequate. The majority of the court held that the Board's reasons failed to address the inconsistency between the Development Plan and the Land Use Bylaw contrary to the *Municipal Government Act (Alberta)* which now required consistency between the two. The majority emphasized how reasons assist a court in reviewing decisions of a development appeal board:

> 19 Post-*Vavilov*, the interpretation of a municipal development plan may well be reviewed for correctness (see *CFPM Management Services Ltd v Edmonton (City)*, 2020 ABCA 62 and *Edmonton (City of) v Edmonton (City of) Subdivision and Development Appeal Board*, 2020 ABCA 7 at paras 11-12). And therein lies the need for fulsome reasons from the development appeal board as to why it found compliance in this case. To simply state that the Land Use Bylaw overrides the MDP will no longer suffice, whether or not there appears to be a glaring inconsistency. Nor could such reason suffice when the Land Use Bylaw itself requires compliance with the Municipal Development Plan.

60. 2020 ABCA 187. See also *Farrier v. Canada (A.G.)*, 2020 FCA 25.

61. The majority consisted of Justices O'Ferrall and Pentelechuk. Justice Slatter dissented on the issue of adequacy of reasons.

## E. Bias

### *Zuk*

The *Zuk* case,[62] discussed above, considered an allegation of bias. The case involved a dentist who was involved in protracted disciplinary proceedings. An Appeal Panel of the Council of the Alberta Dental Association and College upheld a finding of unprofessional conduct and imposed sanctions and costs against Zuk. The Court of Appeal of Alberta overturned two findings of unprofessional conduct and directed reconsideration of the sanctions and costs.[63] On reconsideration, the Appeal Panel, consisting of the same members that heard the original appeal, reduced the period of suspension and the costs ordered against Zuk.

Zuk appealed that panel's decision on the grounds that the Court of Appeal had remitted the matter back to the "Council" for reconsideration, not the original Appeal Panel, and that members of the Appeal Panel had erred in failing to disqualify themselves from the reconsideration hearing. The Court of Appeal dismissed the appeal, finding no reasonable apprehension of bias had been demonstrated:

> 19 Dr Zuk contends however, that the plain language of s 71 of the *HPA* precludes the *same* Appeal Panel from hearing the reconsideration directed by this Court. The Appeal Panel on reconsideration disagreed, as do we. Section 71 provides:
>
> > Bias prevention
> >
> > 71 Any person who has investigated, reviewed or made a decision on a complaint or matters related to a complaint may not subsequently sit as a member of a

62. *Zuk v. Alberta Dental Association and College*, 2020 ABCA 162.

63. 2018 ABCA 270.

> council, tribunal or committee while it is holding a hearing or a review with respect to that complaint.

20 Dr Zuk contends that since a "decision on a complaint" under s 89 of the *HPA* was made by the Appeal Panel, and s 89(3) expressly states that s 71 applies to such appeal proceedings, the members of the panel were therefore prohibited by s 71 from participating in any reconsideration on sanction and costs.

21 In our view, the Appeal Panel in its reconsideration decision dated March 5, 2019, correctly interpreted s 71 as distinguishing between individuals who are involved in the initial investigation, review or decision relating to a complaint, and persons who ultimately *hear and decide* a complaint as a member of a hearing "council, tribunal or committee". That is, a person involved in the initial investigation of a complaint and/or determining whether the matter should proceed to hearing, cannot thereafter sit on the hearing tribunal which determines whether the complaint is ultimately proven.

22 The Appeal Panel in this matter falls into neither of these categories. Further, to hold otherwise would create an unnecessary and untenable conflict between s 71 and s 92(1)(c) of the *HPA*, the latter of which expressly empowered the *Zuk 2018* Court to send reconsideration matters back to the Appeal Panel.

23 As the Appeal Panel on reconsideration explained at paras 41-52, there are four stages of the complaints process under the *HPA*. The first stage involves making and receiving a complaint (ss 54-57). The second stage involves investigating complaints and determining whether they ought to be referred to the hearings director for a hearing or applications by complainants to review the dismissal of complaints (ss 61-70). The third stage relates to hearings and decisions where a complaint has been referred to a hearing tribunal (ss 71-85).

24 The final stage of the complaint process involves appeals from decisions of a hearing tribunal to the Council, and appeals from decisions of the Council to the Court of Appeal (ss 86-93). We agree with the Appeal Panel at para 47, that in the former, "[i]t is clear that the council is not considering the complaint that initiated the process but an appeal of the decision of the hearing tribunal". While s 71 would operate to preclude a member of the Council from sitting on an appeal panel if originally involved in the complaint process or having sat on the hearing tribunal, neither was at issue in this matter.

25 The legislative purpose of s 71 is to maintain a clear separation between the investigatory function, and the adjudicative role. However, section 71 does not prohibit a member of an appeal panel of the Council from sitting on a reconsideration hearing arising from a decision of this Court. Indeed, s 92(1)(c) provides for just such a reconsideration on direction by this Court, as was the determination made in *Zuk 2018*.

26 The foregoing interpretation of the interplay between s 71 and s 92(1)(c) is harmonious with the plain language of s 18(7) of the *HPA*, which provides:

> Any reference in this Act or any other enactment to a council, registration committee or competence committee *is deemed to be also a reference to a panel of the council* . . . (emphasis added).

27 Moreover, there were good, practical reasons why the Court sent the reconsideration back to the same Appeal Panel. As was set out in *Walton v Alberta Securities Commission*, 2014 ABCA 446 at paras 9-10, "[i]f the reconsideration will involve a re-weighing of the evidence, it could be wasteful or expensive to have a new panel conduct a fresh hearing." Further, the "issues of sanctions [may be] remitted back because it required reconsideration in light of the decision on the merits of the charges", as happened in this matter.

28 There is no fixed rule respecting composition of a panel on reconsideration. Here, as was the case in *Walton* at para 11:

> The appellants' request for a fresh panel can be understood. However, there is no reason to believe that the [Appeal Panel would] not reconsider the sanctions having full regard to the decision of this Court. The members of the previous panel have the advantage of a detailed knowledge of the evidence behind the charges, and considerations of efficiency support their continuing involvement. Having regard to all of the relevant factors, this [was] not an appropriate case for the Court to direct that a fresh panel be constituted.

*A reasonable person would not have a reasonable apprehension of bias*

29 The test for whether the Appeal Panel in this matter ought to have disqualified itself from the reconsideration directed by this Court, is whether a "reasonable person, viewing the matters realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias": *Al-Ghamdi* at para 9.

30 Dr Zuk asserts that in its original appeal reasons, the Appeal Panel clearly expressed its own opinion about the seriousness of the proven unprofessional conduct which far exceeded merely determining the Hearing Tribunal's decisions were reasonable.

31 Concerning the breach of an undertaking and failure to cooperate, the Appeal Panel found Dr Zuk's conduct was "very serious unprofessional conduct that harms the integrity of the profession", and that it "might have" imposed harsher sanctions than had the Hearing Tribunal: at paras 127, 182, 202 of the Appeal Panel's February 14, 2017 reasons. Dr Zuk contends these findings were such that an informed person considering whether the Appeal Panel could assess and fairly reconsider the matter of sanction and costs as directed by this Court, would have a reasonable apprehension of bias.

32 We conclude that Dr Zuk has not met the test for reasonable apprehension of bias.

***Kissel***

*Kissel v. Rocky View (County)*,[64] dealt with an application for judicial review by three Councillors of Rocky View County challenging decisions of the Chief Administrative Officer of the County to impose communication restrictions between him and the applicants and finding the applicants had breached the County's Code of Conduct. Justice Eamon of the Alberta Court of Queen's Bench held that the County's reliance on an investigator's report resulted in a reasonable apprehension of bias because there was a pre-existing and on-going relationship between the County and law firm that was appointed as investigator.

## F. Procedural fairness compared to reasonableness

As discussed above under "Standing", the case of *UAlberta Pro-Life v. Governors of the University of Alberta*[65] raised the issue of whether the complainants had standing to challenge the merits of a decision by the University not to prosecute counter-demonstrators who were the subjects of a complaint filed by the appellants. The chambers judge held that the complainants did not have standing in the absence of allegations of procedural unfairness in the decision making process. The Court of Appeal upheld that decision, and in doing so, distinguished between advancing a procedural fairness argument and advancing an argument that a decision was unreasonable:

> 43 Although Pro-Life complains that the process was unfair, the unfairness alleged seems to be derived from what Pro-Life submits is an unacceptable and unreasonable decision. I am not persuaded by that reasoning. There was no basis for the chambers judge to find fundamental unfairness in the appeal process. Unfairness in the appeal process would

64. 2020 ABQB 406 (Watson JA).

65. 2020 ABCA 1.

> presumably involve some apparent clear disregard of essential elements to be followed in the appeal process. That sort of disregard is not proven merely because the conclusion at the end of the process differs from what the complainant sought.[66]

## G. Procedural fairness and the duty to consult

Two recent cases of the Federal Court of Appeal recognize the connection between the duty to be fair and the duty to consult with Indigenous peoples. Both cases arose in the context of obtaining approval from the federal government to proposed projects with potentially negative environmental consequences.

### *Coldwater First Nation*

*Coldwater First Nation v. Canada (Attorney General)*[67] dealt with the proposed expansion of the Trans Mountain Pipeline and whether the consultation with Indigenous groups was adequate. The Federal Court of Appeal noted that, in order for consultation to be adequate, it must be "meaningful" and "reasonable" and that, like the duty to be fair, the content of the duty to consult will vary from case to case. It described the duty to consult in these terms:

> 38 The practical requirements of the duty to consult have been compared to administrative law standards of procedural fairness (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, para. 41 [*Haida Nation*]; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, para. 46 [*Beckman*]). The cases on point emphasize that consultation need not be perfect (*Haida Nation*, para. 62; *TWN 2018*, paras. 226, 508). It follows that the Governor in Council was entitled to give the government actors leeway in assessing whether their efforts resulted in compliance with the duty to consult.

66. The court went on to discuss how discretionary decisions not to prosecute the targets of complaints are to be determined unreasonable: see paras. 44 to 62.

67. 2020 FCA 34.

39 The words of this Court in *Gitxaala Nation* are apposite here (para. 182):

> In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.

(See also *TWN 2018*, paras. 509, 762; *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722, para. 54 [*Ahousaht First Nation*]; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209, para. 133 [*Long Plain First Nation*]; *Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350, para. 56 [*Yellowknives Dene First Nation*].)

40 For example, it has been said that to satisfy the duty, consultation must be "reasonable" (*Haida Nation*, paras. 62-63, 68; *Gitxaala Nation*, paras. 8, 179, 182-185; *TWN 2018*, paras. 226, 508-509; *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216, para. 31 [*Squamish First Nation*]). "Reasonable" consultation means Canada must show that it has considered and addressed the rights claimed by Indigenous peoples in a meaningful way (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, para. 41 [*Clyde River*]; *Squamish First Nation*, para. 37; *Haida Nation*, para. 42). "Meaningful" is a standard that also appears in the case law (*Gitxaala Nation*, paras. 179, 181, 231-234; *TWN 2018*, paras. 6, 494-501, 762; *Haida Nation*, paras. 10, 36, 42; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, paras. 2, 29 [*Taku River*]; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, paras. 32, 44 [*Chippewas of the Thames*]).

41 So what do the words "reasonable" and "meaningful" mean in this context? The case law is replete with indicia, such as consultation being more than "blowing off steam" (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 54 [*Mikisew 2005*]), the Crown possessing a state of open-mindedness about accommodation (*Gitxaala Nation*, para. 233), the Crown exercising "good faith" (*Haida Nation*, para. 41; *Clyde River*, paras. 23-24; *Chippewas of the Thames*, para. 44), the existence of two- way dialogue (*Gitxaala Nation*, para. 279), the process being more than "a process for exchanging and discussing information" (*TWN 2018*, paras. 500-502), the conducting of "dialogue [...] that leads to a demonstrably serious consideration of accommodation" (*TWN 2018*, para. 501) and the Crown "grappl[ing] with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns" (*TWN 2018*, para. 6). In cases like this where deep consultation is required, the Supreme Court has suggested the following non- binding indicia (*Chippewas of the Thames*, para. 47; *Haida Nation*, para. 44; *Squamish First Nation*, para. 36; see also *Yellowknives Dene First Nation*, para. 66) :

> the opportunity to make submissions for consideration;

> formal participation in the decision-making process;
>
> provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the decision; and dispute resolution procedures like mediation or administrative regimes with impartial decision-makers.
>
> 42 Examples and indicia in the case law are nothing more than indicators. The Supreme Court, while providing us with many of these indicia, has made it clear that what will satisfy the duty will vary from case to case, depending on the circumstances (*Haida Nation*, para. 45)...

### *Taseko Mines*

*Taseko Mines Limited v. Canada (Environment)*[68] dealt with the New Prosperity Gold-Copper Mine Project. The issue was whether Taseko Mines was entitled to be made aware of, and given an opportunity to respond to, submissions that had been raised by Indigenous groups during the consultation process.

The Federal Court of Appeal addressed the interaction between the "*constitutionally mandated duty to consult and the common law principles of procedural fairness and natural justice*".[69] The court acknowledged that:

> [31]...the need for reconciliation and the duty to consult with and accommodate Indigenous groups is part and parcel of the social context to be considered in delineating the requirements of procedural fairness...

68. 2019 FCA 320. See also *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 319, leave to appeal to SCC refused [2019] S.C.C.A. No. 49 in which the court held that the Final Report of the Federal Review Panel was not subject to judicial review.

69. Para. 3.

The court distinguished between the duty to consult, which has constitutional underpinnings and is part of the process of reconciliation, and the duty of fairness owed to other parties in the approval process. Justice de Montigny made the following comments:[70]

> 42 Throughout their submissions, the appellant made much of the interrelation between the duty to consult and the duty of procedural fairness. In its view, the application judge erred in failing to integrate the duty to consult into the *audi alteram partem* rule, and in choosing instead to restrict a proponent's right to be made aware of adverse submissions and to respond to these submissions in those limited circumstances where the Crown changes its position as a result. The gist of the judge's finding in this respect is reflected in the following two paragraphs of his reasons:
>
> > [86] In this case, the TNG acknowledged that certain circumstances will require a proponent to be made aware of submissions made in the course of consultation: the TNG suggest that a proponent should be informed if the Crown intends to alter its position or make a decision that is contrary to the Panel Report due to new concerns raised by a First Nation. Similarly, at the hearing, the TNG suggested that the proponent's procedural fairness rights are engaged when the Crown is considering information arising in the course of consultation that is substantially new, that the Crown intends to rely on, and that materially effects the proponent.
> >
> > ...
> >
> > [88] In my view, this is a fair, practical and principled rule that ensures the rights of project proponents are protected, while also recognizing the importance of the duty to consult.
>
> 43 According to the appellant, this approach is flawed; a proponent should have the right to know and to respond to all adverse information provided during consultations with Indigenous groups except when it can be established that providing such information in a given case would violate the duty to consult. I am inclined to think that Taseko's proposal would trivialize the duty to consult and empty it of its true content. It must be remembered that the duty to consult (and accommodate) is part of a process of reconciliation, which itself flows from rights guaranteed by section 35(1) of the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32). It could hardly be said that the duty to consult supports and promotes reconciliation and re-affirms the nation-to-nation relationships with the First Nations if the Crown was equally to consult with the proponent and, for that matter, any other interested parties.

70. The reasons of Justice de Montigny were concurred with by Justices Near and Stratas.

# V. CONSTITUTIONAL AND *CHARTER* ISSUES

As always, there are recent examples of constitutional and *Charter* issues interplaying with administrative law issues.

## A. *Conseil scolaire francophone de la Columbie-Britannique*

The Supreme Court of Canada addressed minority language education rights, and the remedies available for denial of those rights, in *Conseil scolaire francophone de la Columbie-Britannique v. British Columbia*.[71] The court agreed with the trial judge that the Province of British Columbia had under-funded French-language education in breach of section 23 of the *Charter*, which was not saved under section 1, and restored the trial judge's order awarding $6 million in damages for inadequate funding of school transportation and ordered an additional $1.1 million in damages for insufficient funding for rural minority language schools.

71. 2020 SCC 13.

## B. *Langenfeld* and *Ferrier*

The *Langenfeld*[72] and *Ferrier*[73] cases both addressed the connection between the freedom of expression guaranteed by section 2(b) of the *Charter* and the right to public access to police board hearings.

In *Langenfeld*, the Ontario Court of Appeal held that security measures put in place by the Chief of Police that required all persons who entered Police Headquarters to pass through a security screening process violated the section 2(b) rights of parties entering the building for the purposes of attending a public meeting. However, the court held that the security measures were saved under section 1 of the *Charter*.

In *Ferrier*, the Ontario Court of Appeal considered whether the *Dagenais/Mentuck* test applies to statutory delegates performing administrative functions. The test was articulated by the court in *Ferrier* as follows:[74]

> 43 *Dagenais* and *Mentuck* hold that the *Charter*'s s. 2(b) guarantee of freedom of expression and freedom of the press fortifies the common law open court principle. "[T]he presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society." Closed proceedings can only be ordered upon "a convincing evidentiary basis" that such an order "is necessary in order to prevent a serious risk to the proper administration of justice."

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72. *Langenfeld v. Toronto (City) Police Services Board*, 2019 ONCA 716, leave to appeal to the SCC refused [2019] S.C.C.A. No. 401.

73. *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025.

74. Citing *R. v. Mentuck*, 2001 SCC 76 at paras. 39 and 32. See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

The court in *Ferrier* held that the test did not apply to the discretionary decision of an adjudicator to hold an extension of time application *in camera*. The jurisprudence does not support expanding the test beyond judicial and quasi-judicial decisions. However, the court held that the *Dagenais/Mentuck* test "does not exhaustively define the application of the s. 2(b) right to freedom of expression and freedom of the press...".[75] The court relied on its previous decision in *Langenfeld* to decide the broader issue of the application of section 2(b) to administrative meetings of police service boards. The court concluded that the presumption of an open court under section 35(3) of the *Police Services Act* and section 2(b) of the *Charter* did apply and the adjudicator's decision to hold the extension hearing *in camera* should be remitted back to the adjudicator to be reconsidered in light of the court's decision in *Langenfeld*.

## C. *UAlberta Pro-Life*

In *UAlberta Pro-Life v. Governors of the University of Alberta*,[76] the Court of Appeal of Alberta held that the University's regulation of freedom of expression by students demonstrating on University grounds was a form of governmental action subject to *Charter* scrutiny. The court gave a very interesting and historical review of the importance of freedom of expression on university campuses.

75. At para. 53.

76. 2020 ABCA 1.

## D. *Good Spirit School Division*

In 2017, the Saskatchewan Court of Queen's Bench rendered its decision in *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212 and the Government of Saskatchewan*.[77] That decision discusses the historical and constitutional framework under which school funding decisions are made and the impact such funding decisions have on the rights guaranteed under sections 2(a) and 15 of the *Charter*. In particular, the issue before the court was whether the funding of non-Roman-Catholic students attending a public school was a right protected by section 93 of the *Constitution Act, 1867*.

Justice Layh concluded that the legislation and Government action that provided funding of non-Catholic students to attend Catholic schools was not a protected right under section 93(1) of the *Constitution Act, 1867* and violated sections 2(a) and 15 of the *Charter*.

In 2020, the Saskatchewan Court of Appeal allowed the appeal of Justice Layh's decision.[78] The appeal was allowed on both the grounds of public interest standing, discussed above, and on the basis of the constitutional issues and the *Charter*. The court concluded that the legislative scheme was a valid exercise of the government's legislative authority and was, therefore, immune from *Charter* scrutiny. Even if the *Charter* applied, the framework was consistent with the *Constitution* and the *Charter*, was religiously neutral and was not inherently discriminatory. The court held that the legislative framework did not violate the *Charter*, and that even if it did, it was saved under section 1.

77. 2017 SKQB 109.

78. 2020 SKCA 34.

### E. *Brown*

In *Brown v. Canada (Minister of Citizenship and Immigration)*,[79] the Federal Court of Appeal upheld a decision of the Federal Court finding that the immigration detention regime did not violate sections 7, 9, 12 and 15 of the *Charter*.

### F. Manitoba's Bill 32

Manitoba's current Bill 32, *The Administrative Tribunal Jurisdiction Act*, addresses the ability of administrative tribunals to decide questions of constitutional law. Under the Act, an administrative tribunal cannot decide a question of constitutional law unless it has been designated by regulation as having jurisdiction to do so. In addition, a party who intends on raising a constitutional question in a proceeding before a designated administrative tribunal is required to give notice to specified recipients before the start of the proceeding. A list of designated administrative tribunals has not been completed. This Bill is similar to the provisions in the Alberta *Administrative Procedures and Jurisdiction Act*.[80]

## VI. PRIVILEGE AND CONFIDENTIALITY

### A. Solicitor-client privilege

Two noteworthy Alberta cases dealt with solicitor-client privilege.

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79. 2020 FCA 130.

80. RSA 2000, c. A-3, Part 2, sections 10-16.

*Morris*

In *Morris v. Law Society of Alberta (Trust Safety Committee)*,[81] a member of the Law Society Alberta refused to submit the required annual reporting of his trust account to the Law Society on the ground that doing so amounted to a disclosure of privileged information (namely, the names of clients for whom he held trust funds and the matter descriptions of their files). The applicant argued that the Law Society does not have the statutory authority to require disclosure of such information because it was protected by solicitor-client privilege. The Law Society denied the applicant's request to submit modified information and the Appeal Panel of the Law Society dismissed the appeal. The applicant applied for judicial review of that decision.

Justice Loparco of the Alberta Court of Queen's Bench dismissed the application for judicial review. She described the issue as follows:

> [8] At issue is whether the LSA can impose rules that require a lawyer to report information to it which may be solicitor-client privileged as part of the lawyer's responsibility with respect to client trust accounts.

Loparco J. concluded that:

> [9] ...[i]n its oversight role, the LSA has broad discretion to establish rules for the maintenance, regulation, examination, review or audit of records in respect of money entrusted to its members. This includes the implicit legislative authority, as derived from the overall purpose and mandate of the Act, to demand a disclosure of solicitor-client privileged information.
>
> [10] The Trust Safety Rules are necessary and proper in light of the legislative objective to protect the public from fraudulent uses of trust accounts.

81. 2020 ABQB 137. No appeal was filed.

> [11] The impugned TSC Decision was reasonable in concluding that the LSA has the legislative authority to impose rules that require a lawyer to report information to it, which may be solicitor-client privileged, as part of the lawyer's responsibility with respect to client trust accounts.

### *Farkas*

*Alberta Health Services v. Farkas*[82] involved an application by Alberta Health Services ("AHS") for judicial review of an adjudicator's decision ordering the disclosure of records. Farkas' mother's health care team recommended that she change her goals of care designation, but Farkas did not agree with the change. Notwithstanding his objection, the change was made. Farkas received notice of the change and subsequently requested, under the *Freedom of Information and Protection of Privacy Act*, copies of AHS records related to his mother's care in the hospital, records related to the change in goals of care designation, any documents authored by the ethics committee or legal opinions regarding the change in goals of care, and all records regarding a meeting he had with AHS about the reduction in goals of care. AHS provided records to Farkas but with substantial redactions, claiming solicitor-client privilege and/or common interest privilege. Farkas submitted a request for review to the Office of the Information and Privacy Commissioner. The adjudicator found that (1) the redactions were health information records, (2) solicitor-client privilege did not apply and (3) that the *Health Information Act* did not permit AHS to withhold them. AHS applied for judicial review of that decision.

Justice de Wit of the Alberta Court of Queen's Bench allowed the application for judicial review and held that the adjudicator had erred in finding that the redactions were health information records. The redactions contained information that AHS provided to its lawyer

82. 2020 ABQB 281.

in the context of seeking legal advice, not about a particular health service. The information was given to the lawyer to provide him with the information necessary to give proper legal advice. The redactions related to the proper legal procedure for changing the goals of care and informing Farkas about it, not whether the goals should be changed.

## B. Confidentiality and investigative powers

*College of Physicians and Surgeons v. SJO*[83] dealt with an investigation by the College of Physicians and Surgeons of Ontario in which serious issues of confidentiality and privilege arose.

After an employee of the College was terminated from her employment, the College learned that she had been emailing her psychiatrist details about her work at the College, including draft decisions of the College's Inquiries, Complaints and Reports Committee, for the purposes of receiving the psychiatrist's editorial and substantive commentary. The emails divulged names of third party patients and physicians involved with College investigations.

The College initiated an investigation against the psychiatrist for receiving and engaging with confidential information with a patient. Because the patient was a former employee of the College, she was well-known to the College's investigative staff. As part of the investigation into the psychiatrist's conduct, the College requested the patient's medical records but the psychiatrist refused to produce them on the basis of privilege.

Justice Morgan of the Ontario Supreme Court ordered the College to appoint an outside investigator to handle the investigation and directed that, to the extent feasible, College staff

83. 2020 ONSC 1047.

were not to participate in the investigation. He then ordered that all of the patient's medical records be produced to the investigator at the offices of the psychiatrist's legal counsel. On the issue of privilege, Morgan J. gave the following analysis:

> 41 As regulator of the medical profession, the College and its investigative staff play an important role in "monitoring competence and supervising the conduct of professionals [which] stems from the extent to which the public places trust in them": *Pharmascience Inc. v Binet*, [2006] 2 S.C.R. 513, para 36. Under section 3(1)(2) of the Code, it has a duty to serve and protect the public interest and, in general, it is authorized to "inquire into and examine the practice of the member to be investigated": *Gore v College of Physicians and Surgeons of Ontario*, 2009 ONCA 546, para 11.
>
> 42 This power is a necessary component of the College's public interest mandate, which courts have interpreted generously "with a view to ensuring that such statutes protect the public interest in the proper regulation of the professions": *Sazant v College of Physicians and Surgeons of Ontario*, (2012) 113 OR (3d) 420 (Ont CA), leave to appeal to SCC refused [2012] S.C.C.A. No. 549, (2013) 320 OAC 387. In view of this mandate, the Court of Appeal has held that the power to conduct an investigation authorized by the College's Registrar under s. 76(1) of the Code acting on reasonable and probable grounds "should be given a broad and purposive interpretation to enable an investigator to carry out his or her duty to investigate": *Ibid*, para 99.
>
> . . .
>
> 44 Section 76(4) of the Code is particularly important under the circumstances, as it expressly provides that the investigation provisions apply "despite any provision in any act relating to the confidentiality of health records." As the Court of Appeal observed in *Gore*, the College's statutory powers of investigation contemplate the prospect of an intrusion into the confidentiality of the relationship between a physician and patient. The Court noted, at para 23, that, "An investigation under s. 76 will have to take into account the patients' interests and the section does not purport to override those interests, *except with respect to health records as articulated in subsection 4* [emphasis added]."
>
> 45 Accordingly, the Court of Appeal reasoned that the principle of patient confidentiality does not provide grounds for a physician under investigation to refuse to release medical records:
>
> > Further, both the Act and the Code contain explicit provisions to prevent public disclosure of confidential patient information. For example, College employees and agents are required, with limited specific exceptions, to keep confidential all information that comes to their knowledge in the course of their duties. I also find compelling the observations of McLachlin J.A. in *College of Physicians and*

> *Surgeons of British Columbia v. Bishop*, 1989 CanLII 2674 (BC SC), [1989] B.C.J. No. 48, 56 D.L.R. (4th) 164 (S.C.), at p. 171 D.L.R., that 'while the public has an expectation that medical records will be kept confidential, that expectation is subject to the higher need to maintain appropriate standards in the profession'.
>
> Gore, para 24.

46 This authority to override concerns about patient confidentiality has itself been read broadly, in keeping with the College's duty to the public at large. Thus, where the College is engaged in an investigation prompted by a patient complaint, it is entitled to continue that investigation even if the patient subsequently wishes to withdraw the complaint: *Volochay v College of Massage Therapists of Ontario*, 2012 ONCA 541, para 46. Further, during the course of investigating a physician the College has the power to compel disclosure of the name and production of the patient chart of a victim of sexual abuse, even where that patient has expressed a desire to remain anonymous: *College of Physicians and Surgeons of Ontario v Kayilasanathan*, 2019 ONSC 4350, para 70.

47 As the Divisional Court said in *Iacovelli v College of Nurses of Ontario*, 2014 ONSC 7267, para 57, "The reasonable and probable grounds requirement [to commence an investigation] is the balance that the legislature has struck between the interests at stake." Of course, a patient has rights, including that their health records not be disclosed to the public or, for that matter, to the College unnecessarily; but "the case law has clearly established that there may be cases in which the College's overarching mandate to protect the public interest will prevail over the patient's individual interests": *Kayilasanathan*, para 74. In such cases, the patient's rights are protected by the legislation insofar as it ensures that the College's investigatory powers may only be exercised if there are reasonable and probable grounds to justify their exercise: *Sazant*, paras 124-125.

V. Wigmore privilege

48 As set out above, a patient's medical chart is not statutorily protected from an authorized inquiry into a physician's ethics or competence. However, the College's investigatory powers are expressly made subject to section 33(13) of the *Public Inquiries Act, 2009*, SO 2009, c. 33, Sched. 6. That section provides that "[n]othing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence."

49 It is therefore clear that the legal categories of privilege may serve to restrain the College's investigatory powers: *Sazant*, paras 99, 154, 159. Counsel for the Doctor submits that these categories should be expanded to make Patient A's medical chart and her correspondence with the Doctor inadmissible in the College's investigative process.

50 The physician-patient relationship is not an established category of privilege such that production of the medical chart would automatically be barred in the ordinary course of an adversarial process. That said, it is now well recognized that the categories of privilege are

not closed. They may be extended to new relationships on a case-by-case basis to include situations where the principles that underlie the concept of privilege are applicable: *R v Gruenke*, [1991] 3 SCR 263, 286.

51 The applicable principles on which to analyze a question of privilege derive from a list of four inquiries set out in 8 *Wigmore on Evidence* (1961) s. 2285. The Supreme Court of Canada summarized the analysis in *M(A) v Ryan*, [1997] 1 SCR 157, para 20, as follows:

> First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be 'sedulously fostered' in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

The court went on to consider the issue of confidentiality in the specific context of a patient suffering from mental health issues:

66 Under sections 35(6) and (7) of the *Mental Health Act*, RSO 1990, c. M.7 ("MHA"), the personal health information of a patient in a psychiatric facility cannot be disclosed to a third party - including the College - except under certain strict conditions. The attending physician must state their opinion as to whether disclosure of the information would likely result in harm to the patient or injury to a third party; if so, an in-camera hearing, on notice to the patient, is held to determine whether such harm or injury is likely and whether disclosure is essential in the interests of justice. Under section 7 of the MHA, these provisions apply only to patients held in psychiatric facilities, and not to patients receiving psychiatric care privately in the community.

67 Counsel for the Doctor concedes that since the Doctor saw Patient A on a private basis and not in a psychiatric facility, the provisions of the MHA, including ss. 35(6) and (7), do not apply. He submits, however, that "[o]n its face this distinction seems arbitrary, since psychiatric charts generated in the community may raise similar safety concerns (from production or use in civil or regulatory proceedings) as those generated in psychiatric facilities."

68 The Doctor's counsel relies on *R v R(L)* (1995) 100 CCC (3d) 329, 338 (Ont CA), for the argument that under the right circumstances the protections of s. 35 of the MHA could in principle be extended to situations other than where they strictly speaking apply. In *R(L)*, Arbour JA (as she then was) indicated that this could be done in conjunction with an expansion of the law of privilege under the Wigmore criteria.

69 As has been seen, the Wigmore criteria are inapplicable here and do not serve to expand privilege protection to Patient A's medical chart and communications with the Doctor. Counsel for the College points out that the Doctor's argument also fails to take into account the full context of the MHA and the way in which ss. 35(6) and (7) mesh with other relevant statutory provisions. It is the College's view that in fact the distinction between patients in psychiatric facilities and patients who see psychiatrists privately in the community is not an arbitrary one, but rather is based on rational principles and represents sound policy.

70 The College's counsel observes that the MHA does not exist in a vacuum, and that there is not an absence of legislation where the MHA does not apply. Specifically, sections 1(a) and 7(1)(b) of the *Personal Health Information Protection Act, 2004*, SO 2004, c. 3, Sched. A ("PHIPA") apply to "the use or disclosure of personal health information ... by a health information custodian". Section 3 of PHIPA makes it clear that the Doctor is a health information custodian with respect to Patient A's medical chart. Accordingly, the fact that this patient chart is not subject to the MHA does not render it subject to the common law as if it fell into a legislative void. Rather, it subjects the question of disclosure to the health privacy and disclosure regime set out in PHIPA and the RHPA/Code. That regime is comprehensive in nature, and applies to situations where the MHA does not.

71 Section 34.1 of the MHA provides that where there is a conflict between provisions of PHIPA and the MHA, the terms of the MHA override PHIPA. In similar fashion, PHIPA contains provisions with respect to its relationship with proceedings under the Code. Section 2(e) of PHIPA states: "Nothing in this Act shall be construed to interfere with...the regulatory activities of a College under the *Regulated Health Professions Act, 1991*." Likewise, s. 76(4) of the Code provides that the College's investigatory authority, including its power to compel production of a patient's chart, apply "despite any provision in any Act relating to the confidentiality of health records."

72 Thus, not only does the MHA not formally apply to a non-institutionalized patient as a matter of form, its principles do not apply in substance. The legislature has made it abundantly clear that the RHPA and Code override PHIPA for non-institutionalized patients in the same way that the MHA does for institutionalized patients.

73 That is not to say that the College is not subject to any confidentiality regime. In fact, s. 36 of the RHPA provides a number of important confidentiality rules to which the College is compelled to adhere. For example, section 36(3) of the RHPA prohibits disclosure of any information obtained by the College during the course of an investigation from use in civil legal proceedings. Likewise, section 36(2) prevents any person employed, retained, or otherwise associated with the College from being compelled to testify in a civil proceeding about matters that come into their knowledge as a result of their duties for the College. This would, of course, include civil proceedings by or against Patient A, if any were to arise.

74 The RHPA ensures that no employee or other person associated with the College is permitted to disclose the personal health information of any person except in strictly defined circumstances. These include disclosure with written consent [s. 36(j)], or under specific

> statutory authority [ss. 36(1) and 36(1)(h)], or to the police in the course of a criminal investigation [s. 36(1)(e)], or to prevent or reduce the risk of serious bodily harm [s. 36(i)], or in a number of other similarly restrictive situations. Full disclosure to the College, combined with tightly structured confidentiality requirements imposed on the College, make up the two sides of the coin when it comes to personal health records relating to an investigation under the Code.
>
> 75 In other words, the MHA is not a unique legislative initiative outside of which the common law governs disclosure of personal health information. It is also not a model for a common law privilege analysis or for establishing a parallel regime regarding disclosure of highly sensitive health information. Rather, the MHA is one aspect of a larger legislative initiative that forms a comprehensive code for the disclosure of personal health information. As part of this overall legislative scheme, the College is entitled to obtain any medical record relevant to its investigation of an Ontario physician.

## C. Parliamentary and public interest privilege

### *British Columbia Provincial Court Judges' Assn.*

In *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*,[84] the Supreme Court of Canada overturned a decision of the British Columbia Court of Appeal and held that the Attorney General did not have to produce submissions made to Cabinet concerning judicial compensation recommendations and the government's response to those submissions. The Cabinet submissions were made in response to a report by the Judicial Compensation Commission. The court unanimously held that it was not enough to show that the Cabinet submissions may be relevant. The court discussed the need to strike a balance between the several competing constitutional questions in establishing a process for determining judicial compensation.

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84. 2020 SCC 20. See also the companion decision in *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21.

***Duffy***

The Ontario Court of Appeal dismissed Senator Duffy's appeal in *Duffy v. Senate of Canada*,[85] which denied Senator Duffy a judicial remedy for being wrongfully suspended from the Senate for allegedly violating rules on living and travel expenses. The court held that it had no jurisdiction to examine the Senate's conduct because of its parliamentary privileges to discipline its members, administer its own internal affairs, determine parliamentary freedoms and enjoy freedom of speech.

## VII. REMEDIES

The most significant judgment on the topic of administrative law remedies this past year is no doubt the affirmation by the Supreme Court of Canada in *Vavilov*[86] that, while the usual remedy in judicial review when a decision is found to be unreasonable is to remit the matter back to the statutory delegate, there may be exceptions where, for example, to do so would stymie the timely and efficient resolution of matters or where a particular outcome is inevitable.[87] In such cases, the court may determine the appropriate remedy. This solidifies the discretionary nature of the prerogative remedies.

85. 2020 ONCA 536.

86. 2019 SCC 65 at paras. 141 and 142.

87. See *Farrier v. Canada (Attorney General)*, 2020 FCA 25 for an example of a case in which the court held it would be pointless to remit a matter back to the decision-maker.

# VIII. MISCELLANEOUS

## A. Availability of Judicial Review

The following cases address the availability of judicial review:

- The Supreme Court of Canada has granted leaved to appeal in *Ethiopian Orthodox Tewahedo Church of Canada v. Aga*,[88] a case which dealt with an expulsion from the Congregation of the respondent church. The appellants successfully argued at the Ontario Court of Appeal that there was a justiciable issue because there was a private contract between the parties. The case raises the interesting question of when are the rights and obligations of members of a voluntary association contractual, much like the previous Supreme Court decision in *Highwood Congregation of Jehovah's Witness (Judicial Committee) v. Wall*.[89]

- *Karahalios v. Conservative Party of Canada*[90] dealt with a challenge by a candidate for the leadership of the Conservative Party of Canada to decisions of (1) the Chief Returning Officer (CRO) imposing a financial penalty and reporting obligation on the candidate and (2) the Dispute Resolution Appeal Committee (DRAC) disqualifying him from the leadership race. The candidate brought a summary judgment application for mandatory orders restoring his candidacy. He

88. 2020 ONCA 10, leave to appeal to the SCC granted [2020] S.C.C.A. No. 74.

89. 2018 SCC 26.

90. 2020 ONSC 3145 at para. 178.

alleged that both the CRO and DRAC had exceeded their authority and acted in bad faith and that he was denied procedural fairness. Justice Perell of the Federal Court rejected the arguments of bad faith and procedural unfairness, but granted summary judgment with respect to the decision of the DRAC, holding that it had no authority to disqualify the candidate. In his decision, Perell J. reiterated the view that "political parties are private sector unincorporated associations, and that their public importance does not bring them within the public law realm". Justice Perell reviewed the principles concerning the courts' jurisdiction to review decisions of voluntary organizations, including the *Highwood Congregation* case.

- In the Alberta Court of Queen's Bench decision in *Eksteen v. University of Calgary*,[91] the court held that a decision to terminate the respondent's position as a Clinical Associate Professor was not subject to judicial review because it did not involve an exercise of state authority and was not of a sufficiently public character. The respondent's only recourse was to rely on private law remedies.

- In *Taseko Mines Limited v. Canada (Environment)*,[92] the Federal Court of Appeal held that the Final Report issued by a Federal Review Panel which concluded that the New Prosperity Gold-Copper Mine Project was likely to cause significant adverse environmental effects was not amenable to judicial review, and not justiciable, because it was only a recommendation and lacked any independent legal or practical effect.

91. 2019 ABQB 881.

92. 2019 FCA 319, leave to appeal to SCC refused [2019] S.C.C.A. No. 49.

- In *Jette v. New Brunswick Legal Aid Services Commission*,[93] the New Brunswick Court of Queen's Bench rejected the Commission's argument that the dispute about the Commission's decision to stop sending the applicant child protection cases was not subject to judicial review because the relationship between the applicant and Commission was effectively contractual. Justice Dysart noted that the applicant was not an employee of the Commission and, therefore, did not have a private remedy available to her.

- In *Democracy Watch v. Canada (Attorney General)*,[94] the Federal Court of Appeal held that a decision by the Commissioner of Lobbying not to investigate a complaint from a member of the public was not amenable to judicial review because there was no statutory obligation for the Commissioner to investigate.

- *People for the Ethical Treatment of Animals, Inc. v. Toronto (City)*[95] held that the Divisional Court of Ontario did not have jurisdiction to quash the decision of Astral Media Outdoors L.P. to remove PETA's advertising urging consumers to boycott the coat manufacturer Canada Goose and the decision of the City of Toronto not to direct Astral to replace the advertisements. The court held that the decisions were not subject to judicial review and it did not have jurisdiction to quash the decisions because the private law of contracts applied.

93. 2019 NBQB 320.

94. 2020 FCA 69.

95. 2020 ONSC 2356.

- *Kissel v. Rocky View (County)*,[96] dealt with an application for judicial review by three Councillors of Rocky View County challenging decisions of the Chief Administrative Officer ("CAO") of the County to impose communication restrictions between him and the applicants and finding the applicants had breached the County's Code of Conduct. Justice Eamon of the Alberta Court of Queen's Bench held that the CAO's communications restriction was not subject to judicial review because it was not of a sufficiently public character. The restrictions had been communicated to the applicants via an email from the CAO and was simply a private communication setting out the manner of interaction between the applicants and the County administration.

- In *Harvey v. Saskatchewan Legal Aid Commission*,[97] the Saskatchewan Court of Appeal held that the Commission's decision to remove a lawyer from the Panel of legal aid lawyers for reasons other than just cause was subject to judicial review.

## B. Jurisdiction

- *Casavant v. British Columbia (Labour Relations Board)*[98] considered the jurisdiction of an arbitrator and the Labour Relations Board over the appellant's dismissal as a conservation officer. The British Columbia Court of Appeal held that the arbitrator and Board did not have jurisdiction under the collective

96. 2020 ABQB 406.

97. 2020 SKCA 110.

98. 2020 BCCA 159.

agreement but, rather, disciplinary proceedings should have proceeded in accordance with the *Police Act*. The proceedings before the arbitrator and the Board were a nullity.

- In *Overpass Farms Inc. v. Saskatchewan (Ministry of Highways and Infrastructure)*,[99] the Saskatchewan Court of Queen's Bench held that it did not have jurisdiction to hear the plaintiff's action against the government for misfeasance in a public office resulting from a decision to refuse a subdivision application. The court held that the statutory framework set out in *The Municipal Board Act (Saskatchewan)* provided an appeal mechanism that was sufficiently comprehensive that it precluded the court's jurisdiction to decide the action.

## C. Immunity

Several recent decisions address the issue of statutory immunity:

- In *Fitzpatrick v. College of Physical Therapists of Alberta*,[100] a physiotherapist and physiotherapy clinic sued the College and three investigators alleging malicious prosecution, negligent investigation, abuse of process, misfeasance in public office and intentional infliction of mental distress in relation to disciplinary proceedings that resulted in sanctions being issued against the therapist. The Court of Appeal of Alberta upheld the lower court's decision to grant summary judgment on the basis that the defendants had statutory immunity that had not been displaced by bad faith and that the action was statute barred.

99. 2020 SKQB 189.

100. 2020 ABCA 164.

- In *North Bank Potato Farms Ltd. v. Canadian Food Inspection Agency*,[101] the plaintiffs sued the Canadian Food Inspection Agency for negligence arising from a decision to quarantine their lands and destroy their seed crops. The Court of Appeal of Alberta upheld the chambers judge's decision which held that the action against the federal Crown was barred by section 9 of the *Crown Liability and Proceedings Act*.

- In *Anglin v. Alberta (Chief Electoral Officer)*,[102] the Court of Appeal of Alberta upheld the chambers judge's decision that the Crown was not vicariously liable for the actions of the Chief Electoral Officer. In a 2-1 split decision,[103] the court held that the Chief Electoral Officer was an officer of the Legislature and not an officer, employee or agent of the Crown. Pursuant to the *Election Act (Alberta)*, only the Legislative Assembly had authority to control the Chief Electoral Officer.

- In *Broda v. Alberta*,[104] Justice Summers of the Alberta Court of Queen's Bench struck a claim against the Law Society of Alberta that was grounded in bad faith and the tort of malicious prosecution on the grounds that the facts pleaded did not support a claim of bad faith and, therefore, the immunity granted to the Law

101. 2019 ABCA 344, leave to appeal to SCC refused 2019 S.C.C.A. No 416.

102. 2020 ABCA 184. See also *Anglin v. Alberta (Chief Electoral Officer)*, 2020 ABQB 131 dealing with the Chief Electoral Officer's duty to take reasonable steps to protect the list of electors.

103. The majority consisted of Justices Crighton and Feehan. Justice Slatter dissented.

104. 2020 ABQB 221.

Society under section 115 of the *Legal Profession Act (Alberta)* applied to provide immunity to the Law Society.

- In *Saskatchewan (Municipal Board) v. Cottenden*,[105] the Saskatchewan Court of Queen's Bench held that the Saskatchewan Municipal Board was not an entity that could be sued in tort, but it was not plain and obvious that it could not be sued to enforce an employment agreement. The court dismissed the application to strike the claim.

## D. Statutory Interpretation

In *Smith v. Canada (Attorney General)*,[106] the Federal Court considered whether a justice of the Superior Court of Justice of Ontario had breached his ethical obligations and violated section 55 of the *Judges Act (Canada)* by accepting an appointment as Interim Dean of the Boris Laskin Faculty of Law.

A Review Panel of the Canadian Judicial Council found that Justice Smith had contravened section 55 by engaging in an occupation or business other than his judicial duties and had failed in his ethical obligations to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office. Justice Smith applied for judicial review of the CJC's decision to investigate him and that he was in breach of section 55 and his ethical obligations.

105. 2020 SKQB 150.

106. 2020 FC 629.

Justice Zinn allowed the applications for judicial review, holding that the Review Panel of the CJC had misinterpreted section 55 by failing to read the words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. The decisions of the Review Panel were quashed and a declaration was issued that Justice Smith did not breach section 55 or his ethical obligations.

## E. Abuse of Process

- In *Broda v. Alberta*,[107] Broda, a disbarred lawyer with a lengthy history of disciplinary infractions, sued the Law Society of Alberta and the Province of Alberta seeking reinstatement to the Law Society and damages, as well as an order striking out part of the *Legal Profession Act*. Although Broda's cause of action was not easily discernible from his pleadings, the court identified a number of possible claims based on the wording of the Statement of Claim: breach of procedural fairness, lack of jurisdiction of the Law Society, breach of statutory duty and a violation of Broda's *Charter* rights. In addition, in its brief, the Law Society identified other potential causes of action in tort that had not been clearly pleaded by Broda but which it argued might have been raised by Broda at trial: malicious prosecution, abuse of process and negligence. In addition, Broda claimed that the Government of Alberta was vicariously liable for the actions of the Law Society. Master Summers of the Alberta Court of Queen's Bench struck Broda's claim in its entirety on the basis that it offended the principle of finality of litigation by violating the doctrines of issue estoppel, collateral attack and abuse of process. Although not necessary for him to dispose of the matter,

107. 2020 ABQB 221.

Master Summers went on to discuss the potential claims of malicious prosecution, abuse of process and negligence and the vicarious liability of the Crown and the decision is worth reading in its entirety for its discussion about those concepts.

- In *Smith v. Canada (Attorney General)*,[108] discussed above, Zinn J. of the Federal Court concluded that the Executive Director of the Canadian Judicial Council had committed an abuse of process by referring the matter to a Review Panel given that both the Chief Justice of the Superior Court of Justice and the Minister of Justice had approved the appointment of Justice Smith as Interim Dean.

## F. Costs

Justice Eamon of the Alberta Court of Queen's Bench provided a good review of the principles governing costs in judicial review proceedings in *Kissel v. Rocky View (County)*:[109]

> 5 The Rules of Court provide that the successful party is entitled to costs following the event (R 10.29(1)), subject to the Court's general discretion under R 10.31. This rule applies where a party is substantially (not necessarily totally) successful in a proceeding (*Clarke v Syncrude Canada Ltd*, 2014 ABQB 430 at para 7). Where success is mixed to the extent that it cannot be said that one party was "substantially successful", no order should be made as to costs and the parties will bear their own costs (*ibid* at para 12).
>
> 6 R 10.31 confirms the Court's wide discretion in providing for reasonable and proper costs of the successful party's litigation expenses, in an appropriate amount (*Stewart Estate v TAQA North Ltd*, 2016 ABCA 144 at para 17).
>
> 7 In exercising its discretion, the Court may consider any matter related to the question of reasonable and proper costs that it considers appropriate, including: the result of the action

108. 2020 FC 629.

109. 2020 ABQB 570.

> and the degree of success of each party; the importance of the issues; and the complexity of the action (R 10.33(1)). The Court may also consider: the manner in which a party conducted the action; the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action; whether any application, proceeding or step in an action was unnecessary, improper or a mistake; an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document; a contravention of or non-compliance with the rules or an order; and whether a party engaged in misconduct (R 10.33(2)).
>
> 8 Where a Court makes an award with reference to Schedule "C", the default scale in judicial review applications is column 1. It is not unusual to award party and party costs on a higher scale in judicial review applications and other proceedings where the matters at issue are particularly complex or involve matters of general importance to the public, the parties or both (*Eggertson v Alberta Teachers' Association*, 2003 ABCA 101 at paras 12-14; *International Association of Machinists and Aerospace Workers, Local Lodge No 99 v Finning International Inc*, 2006 ABQB 594 at para 15; *Waste Management of Canada Corporation v Thorhild (County)*, 2009 ABQB 157; *Louw v Hamelin-Chandler*, 2012 ABQB 52 at para 27; *Northland Material Handling Inc v Parkland (County)*, 2012 ABQB 586 at para 32; *Lum v Alberta Dental Association and College*, 2015 ABQB 276 at para 15; *Gendre v Fort Macleod (Town)*, 2016 ABQB 111).
>
> 9 Costs "are not usually apportioned on an issue by issue basis, a claim by claim basis or on a head of damages basis, although there is a discretion to do that in proper cases" (*Mahe v Boulianne*, 2010 ABCA 74 at para 6; see also *Wilde v Archean Energy Ltd*, 2008 ABCA 132). A Court might apportion costs by issue where "separate issues are easily definable and severable" and it is appropriate to do so having regard to such matters as the degree of success by each party, the conduct of the parties, the necessary length of the proceeding, and the nature and significance of the evidence presented (*Clarke* at para 15, citing *Portugal Cove-St Phillips (Town) v Willcott (1997)*, 1997 CanLII 14702 (NL CA)).

## G. COVID-19

It would be remiss if this paper did not address the impact that COVID-19 has had on administrative law proceedings in 2020. The following decisions illustrate just a few of the legal issues and procedural challenges that have arisen due to the pandemic:

- The decision in *Downey v. Nova Scotia (Attorney General)*[110] dealt with the remedy of *habeas corpus* in the context of segregation or close confinement of prison inmates. The applicants argued that the conditions were unreasonable in light of COVID-19. The Nova Scotia Supreme Court agreed.

- In *Sprague (Litigation guardian of) v. Ontario (Minister of Health)*,[111] the applicant applied for judicial review of a hospital's "No Visitor Policy" which was implemented due to COVID-19. The Ontario Superior Court of Justice rejected the applicant's arguments that the policy contravened sections 7, 12 and 15 of the *Charter* and dismissed the application.

- In *Air Passengers Rights v. Canada (Transportation Agency)*,[112] Justice Mactavish of the Federal Court of Appeal denied injunctive relief to an advocacy group that argued that the Canadian Transportation Agency's public statements that it was reasonable for airlines to provide travel vouchers rather than refunds for flights cancelled due to COVID-19 violated the Agency's Code of Conduct and raised a reasonable apprehension of bias. The court held that the test for injunctive relief had not been satisfied.

- *Democracy Watch v. Ontario Integrity Commissioner*[113] demonstrates the unique procedural challenges that COVID-19 has posed. The Ontario Superior Court

110. 2020 NSSC 213.

111. 2020 ONSC 2335.

112. 2020 FCA 92.

113. 2020 ONSC 4264.

ordered a matter to be heard by ZOOM technology, directed anyone with a speaking role to wear business attire and ordered all counsel to provide a password-protected download-only electronic drop box in which materials could be downloaded.

- In *Chartered Professional Accountants of Ontario v. Gujral*,[114] the Ontario court gave the respondent 36 months to pay the fines assessed against him and 24 months to pay the costs ordered against him because of the shutdown of the Canadian economy due to COVID-19.

On July 17, 2020, former Chief Justice Beverley McLachlin commented in an article in *The Lawyers Daily* that COVID-19 "has given the justice system a muscular nudge in the right direction" toward modernizing its practices. She cautioned against the legal system going back to its old ways once the pandemic is over and encouraged the continued use of electronic filing, computer scheduling and virtual court appearances. She also noted the need for a systemic approach to technology and for regulation and assurance of public accessibility.[115]

114. 2020 ONCJ 307.

115. Beverley McLachlin, "Access to Justice: A plea for technology in the justice system", *The Lawyer's Daily*, July 17, 2020.

# IX. CONCLUSION

2020 has been a remarkable year for many reasons. At the very end of last year, the Supreme Court of Canada's landmark decision in *Vavilov* requires courts and administrative lawyers across the country to learn and apply a new framework for determining standards of review. This is going to take some time to work out. And all of this in the context of the global pandemic which has added to the list of challenges facing the administrative and judicial systems as a whole.