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PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS

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AUTHOR'S NOTE

In *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 CSC 31, 2023 SCC 31, 2023 CarswellNWT 43, 2023 CarswellNWT 44, EYB 2023-536786 (S.C.C.), the Supreme Court held that government decision-makers must consider *Charter* values in relation to education language rights, even where the affected parties are not *Charter* rights-holders. The appeal concerned a group of five parents who asked the then NWT Minister of Education, Culture and Employment to exercise her discretion to admit their children to a French first-language education program. In each case, the Commission scolaire francophone des Territoires du Nord-Ouest recommended admission, essentially because it would promote the development of the Francophone community of the Northwest Territories. Nevertheless, the Minister denied each of the applications for admission. The Court quashed the decision on the basis that the Minister failed to consider *Charter* values in denying the applications.

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In the course of its analysis, , Côté J., writing for the Court, reviewed and confirmed the *Dor*é framework for the consideration of *Charter* values in government decision-making. Notably, she held that *Charter* values had to be considered by the government decision-makers even where the affected parties, as in this case, were not s. 23 rights holders themselves.

> [84] It is not in dispute that the appellant parents have no constitutional right to have their children receive instruction in French. That being said, viewing the protections of s. 23 of the *Charter* as being engaged only in cases where an infringement of this section has been shown is contrary to the approach set out in *Doré*. As I explained above, the *Dor*é framework applies when limitations are imposed on *Charter* values. I add that taking such a strict view would also be contrary to the remedial purpose of s. 23, which is aimed at "promoting the development of official language minority communities and changing the status quo" (*Conseil scolaire francophone de la Colombie-Britannique*, at paras. 3 and 16; see also *Doucet-Boudreau*, at para. 29), as well as contrary to its preventive purpose.
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> [85] A contextual approach must be adopted to determine whether the values of preservation and development of minority language communities were limited by the Minister's decisions against admitting the children of the appellant parents to the schools of the Francophone minority in the Northwest Territories. Because of their collective dimension, the protections conferred by s. 23 of the *Charter* must be assessed in light of the unique language dynamics of a province or territory (*Reference re Public Schools Act (Man.),* at p. 851; *Solski*, at paras. 34 and 44). This requires an analysis of the relationship between the minority and majority language groups in order to understand "the historical and social context of the situation to be redressed" (*Arsenault-Cameron*, at para. 27).

While this extension of *Charter* values may not have direct application outside the minority language rights context, it nonetheless confirms that the accountability framework of *Charter* values extends beyond the scope of *Charter* rights. Having established that *Charter* values applied to the decisions at issue, Côté J. concluded that the Minister failed to consider those values in reaching the decisions. Consequently, she held those decisions were unreasonable.

> [92] The balancing exercise called for by *Dor*é requires an administrative decision maker to "giv[e] effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). Here, this exercise required, at a minimum, that the Minister truly take into account the constitutional values of preservation and development of official language minority communities, in other words, that she meaningfully address the considerations arising therefrom (*Vavilov*, at para. 128). The reasons for the Minister's decisions do not show that she did so. I conclude that those decisions are unreasonable.
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> …
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> [94] The reasons for the decisions rendered following the 2019 judgment do not show that the Minister truly considered s. 23 by meaningfully address-

> ing this provision so as to reflect the significant impact that the decisions might have on the Francophone community of the Northwest Territories. The Minister did mention the provision, but, with respect, she did not give the proper weight to the relevant values.
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> ...
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> [97] [I] this case, *Dor*é required the Minister to consider how the admission of the children for whom the applications for admission had been made would promote the development of the Francophone community of the Northwest Territories. The aim of s. 23 of the *Charter* is more ambitious than simply preserving the Francophone community of the Northwest Territories; the ultimate purpose of the provision is to promote the development of that community (*Reference re Public Schools Act (Man.),* at p. 849; *Conseil scolaire francophone de la Colombie-Britannique*, at para. 15) in order to fulfil s. 23's promise to give effect to the equal partnership of the country's two official language groups in the context of education. In short, considering s. 23 only when it has been shown that the community is threatened is inconsistent with such a purpose.

It seems clear after this decision that *Charter* values are here to stay (a point left in some doubt after *Vavilov*), and indeed that the scope of *Charter* values continues to grow.

This release also includes other important new administrative law decisions:

In *Deskin v. Ontario*, 2023 ONSC 5584, 2023 CarswellOnt 15343 (Ont. Div. Ct.), the Ontario Divisional Court dismissed an application to quash a funding decision which would curtail provincially funded services to children with autism. The Court concluded that the decision was a funding and political determination, not "a judicial issue" and therefore non-justiciable. The Court held it had no authority to direct the government to expend funds in any particular way, nor can an undertaking to provide funding bind on future governments. The Court also rejected the argument that letters of support from an Assistant Deputy Minister could create "legitimate expectation" that could affect the substance of the decision.

This release also includes updates to a range of other important new administrative law decisions, including:

In *British Columbia (Attorney General) v. 992704 Ontario Limited*, 2023 BCCA 346, 2023 CarswellBC 2537 (B.C. C.A.), the B.C. Court of Appeal heard an appeal from a Supreme Court decision which had granted an application for judicial review from the Property Assessment Review Panel ("PARP"). That judicial review had by-passed the Property Assessment Appeal Board ("PAAB"), where appeal are conducted as hearings *de novo*. This appeal relates to the adequacy of this process and whether an appeal to PAAB is an adequate alternative remedy to judicial review. The B.C. Supreme Court held that the PAAB was not an adequate alternative remedy and granted the judicial review on procedural fairness grounds. The Court of Appeal allowed the appeal, holding that the application judge erred in principle by concluding a *de novo* appeal to

PAAB was not an adequate alternate remedy in all of the circumstances.

In *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, 2023 FC 1511, 2023 CarswellNat 4583 (F.C.), the Federal Court found the federal government had acted outside its statutory authority in banning single-use plastics. Specifically, the Court granted an application for judicial review of the federal government's decisions relating to the addition of "Plastic Manufactured Items" (PMI) to the List of Toxic Substances in Schedule 1 of the *Canadian Environmental Protection Act*, 1999, SC 1999, c 33. The Court found that the PMI was too broad to be listed on the List of Toxic Substances in Schedule 1 and this breadth rendered the Order both unreasonable and unconstitutional.

In *Kitsilano Coalition for Children & Family Safety Society v. British Columbia (Attorney General)*, 2023 BCSC 1999, 2023 CarswellBC 3398 (B.C. S.C.), the B.C. Supreme Court considered whether the legislature can legislate the outcome of a judicial review application. The dispute concerned a proposed rezoning in Vancouver to clear the way for a social housing project. To avoid further delay, the B.C. Legislature enacted the *Municipalities Enabling and Validating (No. 5) Amendment Act*, Bill 26 – 2023 ("MEVA 5"). One aspect of the legislation deemed public hearings to have occurred and the rezoning application to be passed for the housing project at issue in the judicial review. The petitioners challenging the rezoning brought a new action challenging the constitutionality of MEVA 5. The B.C. Supreme Court upheld the legislation and dismissed the petitioners' challenge to the rezoning. After setting out core constitutional principles around legislative sovereignty on the one hand, and judicial independence on the other, the Court held that the MEVA 5 did not infringe s.96 of the *Constitution Act, 1867*.

In *Brar v. British Columbia (Securities Commission)*, 2023 BCCA 432, 2023 CarswellBC 3459 (B.C. C.A.), the B.C. Court of Appeal found even a very broadly worded privative clause could not oust the Court's review of a decision of the B.C. Securities Commission for breach of fairness. However, the impugned summonses issued in this case represented a preliminary stage in the Commission's process that did not decide or prescribe rights, powers, privileges, immunities, duties or liabilities of the applicants. The Court held that the duty of fairness owed to the applicants in this context was minimal and was met in this case. Further, the Court noted that to require the Commission to produce a record of the basis for issuance of the summonses at a preliminary stage would compromise the investigative process.

L.S.

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