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### **PRACTICE AND PROCEDURE BEFORE ADMINISTRATIVE TRIBUNALS**

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#### **AUTHOR'S NOTE**

In *Canada (Attorney General) v. Canadian Civil Liberties Association*, 2026 CarswellNat 108, 2026 FCA 6 (F.C.A.), the Federal Court of Appeal upheld the Federal Court's decision that the Federal Cabinet's invocation of the powers under the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.) in 2022, in response to the "freedom convoy" disruptions in Ottawa and elsewhere, was unreasonable and invalid.

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In the course of its thorough analysis of several grounds of appeal, the Federal Court of Appeal considered a particularly candid admission by the reviewing Federal Court judge about the nature of judicial review conducted in hindsight.

[182] Before concluding this discussion relating to the standard of review, a word must be said about the comments made by the Federal Court in the last paragraph of its conclusions. The AGC made much of paragraph 370, which we again quote here in full:

At the outset of these proceedings, while I had not reached a decision on any of the four applications, I was leaning to the view that the decision to invoke the [Act] was reasonable. I considered the events that occurred in Ottawa and other locations in January and February 2022 went beyond legitimate protest and reflected an unacceptable breakdown of public order. I had and continue to have considerable sympathy for those in government who were confronted with this situation. Had I been at their tables at that time, I may have agreed that it was necessary to invoke the Act. And I acknowledge that in conducting judicial review of that decision, I am revisiting that time with the benefit of hindsight and a more extensive record of the facts and law than that which was before the GIC.

[183] The AGC relies heavily on that paragraph as evidence that the Federal Court misguided itself in its application of the reasonableness standard and revisited the GIC's decision with the benefit of hindsight. It may indeed appear curious to find such a candid admission at the very end of the Federal Court's reasons. It is not for us, however, to speculate as to what exactly the Federal Court had in mind and why it felt compelled to express sympathy for those who had to decide whether or not to issue the Proclamation. We have not been persuaded that paragraph 370 taints the whole reasoning of the Federal Court or fatally undermines its findings. To the extent that the Federal Court allegedly erred in some of its conclusions because it considered events that took place after February 14, 2022, we will address these arguments in the course of our analysis.

[184] In any event, it is not the decision of the Federal Court that we are reviewing, but that of the GIC. It is the latter that must pass muster, when assessed against the standard of reasonableness. The fact that the Federal Court may have agreed on February 14, 2022 that it was necessary to invoke the Act is irrelevant and would by no means make that decision reasonable. It only means that judges, if they were put in the same situation as senior officials at the highest rank of government, would sometimes err and make mistakes. What matters, on judicial review, is whether the decision that is challenged is reasonable in light of the facts and the law that were before the decision-maker at the time the decision was made. This is the exercise we must undertake.

This statement by the reviewing judge reflects a kind of reflective and transparent reasoning by judges which, in my view, should be encouraged. The whole point of reasons is to explain how judges reached their conclusions and to

shed light on the principles and approaches governing their reasoning. Judicial review is indeed an exercise in hindsight, though importantly, it is the state of affairs at the time the decision was made, not how that decision stands the test of time, that must be the point of departure for judicial review. In this sense, while the concern over hindsight reasoning was addressed elsewhere in the judgment, the comments by the reviewing judge may have deserved more attention that the Federal Court of Appeal chose to give them.

This release also contains the following recent developments in administrative law.

In *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2026 CarswellNat 165, 2026 FCA 14 (F.C.A.), the Federal Court of Appeal considered the extent of disclosure permissible on a judicial review of an administrative decision including sensitive national security information. The Court held that the unredacted certified tribunal record could be disclosed to the Federal Court judge seized with the judicial review application while withholding it from the applicant.

In *Law Society of Ontario v. AA*, 2026 CarswellOnt 1008, 2026 ONCA 47 (Ont. C.A.), the Ontario Court of Appeal reversed a decision of the Divisional Court upholding the Law Society Tribunal's finding the applicant, AA, to be of good character notwithstanding that he had admitted to engaging in sexual assaults of children in the past. The Court of Appeal found the Hearing Division of the Tribunal's decision to be unreasonable, and also found a condition of the applicant's licence adopted by the Hearing Panel also to be reasonable. The Court of Appeal granted a motion by AA seeking a publication ban and anonymization order. In particular, the Court of Appeal found the Tribunal's decision was not consistent with the constraints arising from the text, context and purpose of the "good character" provision of the Ontario *Law Society Act*.

L.S.