Court File No.: 39340

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

LAW SOCIETY OF SASKATCHEWAN

Appellant
(Respondent)

- and -

PETER V. ABRAMETZ

Respondent
(Appellant)

- and -

THE ATTORNEY GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF SASKATCHEWAN, THE LAW SOCIETY OF ALBERTA, THE LAW SOCIETY OF MANITOBA, THE BARREAU DU QUÉBEC, THE FEDERATION OF LAW SOCIETIES OF CANADA, THE ALBERTA SECURITIES COMMISSION, THE BRITISH COLUMBIA SECURITIES COMMISSION, THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO, THE COLLEGE OF NURSES OF ONTARIO, THE ONTARIO COLLEGE OF PHARMACISTS, THE ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO and THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Interveners

FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF ONTARIO

Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156

Ministry of the Attorney General
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Alexandra Clark
Matthew Chung
Tel: 416.574.4421
Fax: 416.326.4181
Email: alexandra.clark@ontario.ca
matthew.chung@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener,
Attorney General of Ontario

ORIGINAL TO: **The Registrar**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPY TO

Caza Saikaley s.r.l./LLP
350 - 220 Laurier Avenue West
Ottawa, ON K1P 5Z9

Alyssa Tomkins
Charles R. Daoust
Tel: 613.565.2292
Fax: 613.565.2087
Email: atomkins@plaideurs.ca
cdaoust@plaideurs.ca

Paul Daly
Email: paul.daly@uottawa.ca

Counsel for the Appellant,
Law Society of Saskatchewan

McDougall Gauley LLP
1500 - 1881 Scarth Street
Regina, SK S4P 4K9

Gordon J. Kuski, Q.C.
Amanda M. Quayle, Q.C.
Tel: 306.757.1641
Fax: 306.359.0785
Email: gkuski@mcdougallgauley.com
aquayle@mcdougallgauley.com

Counsel for the Respondent,
Peter V. Abrametz

Goldblatt Partners LLP
500 - 30 Metcalfe Street
Ottawa, ON K1P 1J9

Colleen Bauman

Tel: 613.482.2463
Fax: 613.235.3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Respondent,
Peter V. Abrametz

Ministère de la Justice du Québec
1200 Route de l'Église, 8th Floor
Quebec City, QC G1V 4M1

Stéphane Rochette
Abdou Thiaw
Tel: 418.643.6552, ext. 20734
Fax: 418.643.9749
Email: stephane.rochette@justice.gouv.qc.ca
abdou.thiaw@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Quebec

Noël & Associés
111 rue Champlain
Gatineau, QC J8X 3R1

Sylvie Labbé

Tel: 819.771.7393
Fax: 819.771.5397
Email: s.labbe@noelassocies.com

Ottawa Agent for the Intervener,
Attorney General of Quebec

Ministry of Attorney General
Legal Service Branch
1301 - 865 Hornby Street
Vancouver, BC V6Z 2G3

Meera Bennett
Robert Danay
Tel: 604.660.3805
Fax: 604.660.3567
Email: meera.bennett@gov.bc.ca
robert.danay@gov.bc.ca

Counsel for the Intervener,
Attorney General of British Columbia

Gib van Ert Law
66 Lisgar Street
Ottawa, ON K2P 0C1

Dahlia Shuhaibar

Tel: 613.501.5350
Fax: 613.651.0304
Email: dahlia@gibvanertlaw.com

Ottawa Agent for the Intervener,
Attorney General of British Columbia

Ministry of Justice
Legal Services Division
900 - 1874 Scarth Street
Regina, SK S4P 4B3

Laura Mazenc
Johnna Van Parys
Tel: 306.787.6272
Fax: 306.787.0581
Email: laura.mazenc@gov.sk.ca
johnna.vanparys@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel: 613.786.8695
Fax: 613.788.3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Attorney General of Saskatchewan

Field LLP
2500 - 10175 101 Street NW
Edmonton, AB T5J 0H3

James T. Casey, Q.C.
Katrina Haymond
Tel: 780.423.7615
Fax: 780.428.9329
Email: jcasey@fieldlaw.com
khaymond@fieldlaw.com

Counsel for the Intervener,
Law Society of Alberta

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: 613.695.8855, ext. 102
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Law Society of Alberta

The Law Society of Manitoba
200 - 260 St. Mary Avenue
Winnipeg, MB R3C 0M6

Rocky Kravetsky
Ayli Klein
Tel: 204.926.2018
Fax: 204.956.0624
Email: rkravetsky@lawsociety.mb.ca
aklein@lawsociety.mb.ca

Counsel for the Intervener,
Law Society of Manitoba

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: 613.786.0171
Fax: 613.788.3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for the Intervener,
Law Society of Manitoba

Barreau du Québec
445 Saint-Laurent Boulevard
Montreal, QC H2Y 3T8

Sylvie Champagne
André-Philippe Mallette
Tel: 514.954.3400
Fax: 514.954.3407
Email: schampagne@barreau.qc.ca
apmallette@barreau.qc.ca

Counsel for the Intervener,
Barreau du Québec

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3

Nadia Effendi
Ewa Krajewska
Teagan Markin
Mannu Chowdhury
Tel: 416.367.6728
Fax: 416.367.6749
Email: neffendi@blg.com
ekrajewska@blg.com
tmarkin@blg.com
mchowdhury@blg.com

Counsel for the Intervener,
Federation of Law Societies of Canada

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3562
Fax: 613.230.8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener,
Federation of Law Societies of Canada

Alberta Securities Commission
600 - 250 5th Street Avenue West
Calgary, AB T2P 0R4

Lorenz Berner
Tracy Knight
Tel: 403.297.6454
Fax: 403.297.6156
Email: lorenz.berner@asc.ca
tracy.knight@asc.ca

Caza Saikaley s.r.l./LLP
350 - 220 Laurier Avenue West
Ottawa, ON K1P 5Z9

James Plotkin

Tel: 613.564.8271
Fax: 613.565.2087
Email: jplotkin@plaideurs.ca

Ottawa Agent for the Interveners,
Alberta Securities Commission and
British Columbia Securities Commission

British Columbia Securities Commission
1200 - 701 West Georgia Street
Vancouver, BC V7Y 1L2

Jennifer L. Whately
Tel: 604.899.6800
Fax: 604.899.6506
Email: jwhately@bcsc.bc.ca

Counsel for the Interveners,
Alberta Securities Commission and
British Columbia Securities Commission

College of Physicians and Surgeons of Ontario
80 College Street
Toronto, ON M5G 2E2

Lisa Brownstone
Tracy Knight
Tel: 403.297.6454
Fax: 403.297.6156
Email: brownstone@cpso.on.ca
ablock@cpso.on.ca

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Linda Rothstein
Alysha Shore
Tel: 416.646.4324
Fax: 416.646.4301
Email: linda.rothstein@paliareroland.com
alysha.shore@paliareroland.com

Counsel for the Interveners,
College of Physicians and Surgeons of Ontario, College of Nurses of Ontario, Ontario College of Pharmacists and Royal College of Dental Surgeons of Ontario

Caza Saikaley s.r.l./LLP
350 - 220 Laurier Avenue West
Ottawa, ON K1P 5Z9

James Plotkin

Tel: 613.564.8271
Fax: 613.565.2087
Email: jplotkin@plaideurs.ca

Ottawa Agent for the Interveners,
College of Physicians and Surgeons of Ontario, College of Nurses of Ontario, Ontario College of Pharmacists and Royal College of Dental Surgeons of Ontario

University of Toronto, Faculty of Law
78 Queen's Park
Toronto, ON M5S 2C5

Audrey Macklin
Tel: 416.978.7124, ext. 246
Fax: 416-978-4195
Email: audrey.macklin@utoronto.ca

Downtown Legal Services
655 Spadina Avenue
Toronto, ON M5S 2H9

Prasanna Balasundaram
Tel: 416.934.4535
Fax: 416.934.4536
Email: p.balasundaram@utoronto.ca

Counsel for the Intervener,
Canadian Association of Refugee Lawyers

INDEX

PART I – OVERVIEW

1. Ontario intervenes in this appeal as it could have broader and significant consequences for the system of administrative justice in the Province of Ontario, which includes hundreds of boards, agencies and commissions, including professional discipline bodies like the one at issue in this appeal.

2. Administrative justice seeks to achieve a statutory mandate by way of expeditious decision-making and fair processes for affected parties. Neither legislative objective should be sacrificed.

3. This appeal invites this Court to revisit the framework for determining when delay in an administrative proceeding is inordinate. To adopt a universal or strictly numerical approach to administrative delay could require swift adjudication at the expense of fair and flexible processes. As the requirements of procedural fairness are "eminently variable",[1] the framework endorsed by this Court should be informed by the diversity of tribunals, the wide variety of decisions that they make and the varying degrees to which their decisions affect individuals.

4. The law on inordinate delay should be informed by the "respect for institutional design choices made by the legislature," which undergirds modern administrative law.[2] In particular, a reasonable administrative step or procedure should not count toward "undue" delay if it is undertaken for the purpose of achieving a procedurally fair outcome in accordance with a decision-maker's statutory mandate and the public interest.

5. Further, a party seeking a remedy for delay should be required to make the request first to the tribunal and to do so on a timely basis.

6. Finally, this appeal affords the Court an opportunity to clarify the process and standard of judicial review for questions of procedural fairness, including inordinate delay.

---

[1] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 5 [*Vavilov*].
[2] *Vavilov*, *supra* note 1 at para 24.

PART II – STATEMENT OF ARGUMENT

A court-centric approach to undue delay is ill-suited to administrative justice, which is based on distinct institutional design choices

7. The requirements of procedural fairness are "circumstance-specific."[3] To uncritically import a framework for inordinate delay developed in other legal contexts risks creating a "yardstick ethos" in administrative law.[4] To do so would be inconsistent with "respect for the distinct role of administrative decision makers" which informs the modern approach to judicial review.[5]

8. In acknowledging the diversity of administrative processes,[6] this Court has taken pains to distinguish the administrative justice system from its civil[7] and criminal[8] counterparts. This Court has also affirmed that, whether due to its enabling statute or its ability to control its own processes,[9] a tribunal is not required in all cases to adopt procedures that replicate those of a court.[10] While it has been noted that some tribunal adjudicative processes are court-like,[11] many adjudicative tribunals employ a variety of procedures including those that are adversarial, inquisitorial, or employ alternative methods of dispute resolution.[12] The aim of employing such hybrid procedures

---

[3] *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 231 [*VIA Rail*].
[4] Judith McCormack, "Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change" (1995) 59 Sask L Rev 385 at 392.
[5] *Vavilov*, *supra* note 1 a par 13. See also *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 48.
[6] *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706 at para 26 [*Consolidated Maybrun*]; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 158, LeBel J, dissenting in part [*Blencoe*].
[7] *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para 22 [*Paul*].
[8] *R v 974649 Ontario Inc*, 2001 SCC 81 at para 65.
[9] See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 68. See also *VIA Rail*, *supra* note 3 at paras 230-231; Michelle A Alton, "Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice" (2019) 32 Can J Admin L & Prac 151 at 168-169.
[10] *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 685.
[11] See *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 23 (describing the Administrative Tribunal of Quebec as "similar in many ways to Canadian courts of law").
[12] See Alton, *supra* note 9 at 159-160.

is to promote expeditious decision making, flexibility and responsiveness while advancing access to justice, particularly for parties who are not represented by lawyers.[13]

9. Dispute-resolution mechanisms which address polycentric interests that transcend those of the immediate parties do not fit within the party-centric adjudicative model employed by courts. Many adjudicative tribunals operate within a "broad policy context"[14] and are required to consider the public interest when adjudicating cases.[15] As this Court has explained,

> [w]hile judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties.[16]

10. This Court recognized in *Blencoe* that tribunal processes, and particularly those which incorporate investigative functions, engage a broader and potentially more complex array of functions than do civil or criminal courts.[17] It is therefore inappropriate to directly import criminal or civil law jurisprudence, including jurisprudence relating to institutional delay, into administrative law without appropriate consideration of the unique features of administrative justice.

Calculating administrative delay in light of institutional design choices

11. Reasonable administrative steps or procedures should not count toward "undue" delay if they are undertaken for the purpose of achieving just outcomes in accordance with the tribunal's statutory mandate and the public interest.[18] These procedures include, but are not limited to: (i) engagement with alternative dispute resolution mechanisms or more informal procedures; (ii) the adjournment or postponement of proceedings in the face of concurrent proceedings; and (iii) reserving decisions as required for the proper resolution of disputes.

---

[13] *Ibid* at 159-160.
[14] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd,* 2016 SCC 47 at para 33.
[15] See *Paul*, *supra* note 7 at para 30; *VIA Rail*, *supra* note 3 at para 92. See also McCormack, *supra* note 4 at 392-395.
[16] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 36.
[17] *Blencoe*, *supra* note 6 at para 125.
[18] *Blencoe*, *supra* note 6 at para 156, LeBel J, dissenting in part.

12. First, conciliation and mediation are central to administrative justice.[19] Parties' engagement with alternative dispute resolution mechanisms can result in delays that might not occur in the civil or criminal justice systems.[20] Where parties reach a mutually acceptable resolution to their disputes, they can achieve justice and the public interest purposes of the statute without taxing adjudicative and party resources.[21]

13. This Court noted in *Blencoe* that many processes undertaken by a tribunal, and in particular those conducted in the course of an investigation, are expressly required by statute or are undertaken to provide full procedural fairness to the parties.[22] And, as the Appellant in the present appeal has pointed out, disciplinary bodies such as the Law Society of Saskatchewan may be empowered to deploy a variety of remedial tools including the possibility of informal sanctions.[23] These processes should be encouraged and supported rather than penalized in formulating the test for undue delay.

14. Second, in the modern administrative state, multiple tribunals may have concurrent jurisdiction over a dispute.[24] The "clustering" of tribunals undertaken pursuant to legislation such as the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009* in Ontario has hastened the trend toward a highly interconnected system of administrative justice.[25] Where a tribunal defers consideration of a matter so that issues of fact or law can be determined in a parallel administrative proceeding, the delay is properly incurred.[26] This practice promotes consistency in

---

[19] See *Consolidated Maybrun*, *supra* note 6 at para 42.
[20] See David J Mullan & Deirdre Harrington, "The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*" (2002) 27 Queen's LJ 879 at 906-07.
[21] See *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paras 1 and 11; *MediaQMI inc v Kamel*, 2021 SCC 23 at para 96, Wagner CJ and Kasirer J dissenting.
[22] *Blencoe*, *supra* note 6 at paras 126 and 127.
[23] Factum of the Appellant at paras 116 and 117.
[24] *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 26 [*Figliola*].
[25] *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Schedule 5, s 15. See generally Lorne Sossin, "Reflections on the UK Tribunal Reform from a Canadian Perspective" (2011) 24 Can J Admin L & Prac 153.
[26] Graham J Clarke, "Duties Administrative Tribunals Owe All Parties" (2017) 30 Can J Admin L & Prac 247 at 254-55. In Ontario, many adjudicative tribunals have adopted rules of procedure, which empower them to adjourn a matter where there is a concurrent administrative proceeding

administrative decision-making[27] and avoids the unnecessary expenditure of public funds and private resources.[28]

15. These same reasons may apply with equal if not greater force when administrative proceedings are delayed or adjourned to await the outcome of related criminal law charges.[29] As the Ontario Court of Appeal has observed, in some cases, it may be "impractical and unfair" to proceed with a disciplinary hearing while related criminal charges are outstanding.[30] This approach may shorten the eventual tribunal hearing if the findings supporting a conviction, which must be established on the highest standard of proof, can be directly admitted as evidence before the tribunal.[31]

16. Third, decision-makers require time to properly deliberate regarding matters before them. This concern is heightened for tribunals, many of which do not hold oral hearings before making their decisions.[32] Issuing a prompt decision at all costs does not necessarily serve the affected parties.[33] Adopting an approach to administrative delay based on presumptive ceilings risks pressuring decision-makers into issuing hastily reasoned decisions. This, in turn, could undermine the "culture of justification in administrative decision making" mandated by this Court in *Vavilov*.[34]

Parties must be responsible for their own delay and take positive steps to advance the proceedings

---

related to the same subject-matter: see e.g. the Rules of Procedure of the Human Rights Tribunal of Ontario, rr 7 and 14.

[27] See *Figliola*, *supra* note 24 at paras 27 and 34; *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 28 [*Penner*].
[28] See *Figliola*, *supra* note 24 at paras 33 and 34; *Penner*, *supra* note 27 at para 28.
[29] A tribunal is not, however, required to await the outcome of a related criminal prosecution. On this point, see *Robinson v Ontario (Securities Commission)* (1993), 110 DLR (4th) 166 (Ont Div Ct).
[30] *Sazant v The College of Physicians and Surgeons of Ontario*, 2012 ONCA 727 at para 245.
[31] *Ibid* at para 219.
[32] Clarke, *supra* note 26 at 257.
[33] *Ibid* at 296.
[34] *Vavilov*, *supra* note 1 at para 2.

17. The legislature's institutional design choices and the integrity of the administrative justice system also require parties to bear the consequences of their own delays and of any failures to take steps to advance the proceeding. As the minority in *Blencoe* observed, parties must not let "the process decay in the hope of stopping the process on some future date."[35]

18. In this appeal, this Court should require that parties raise the issue of delay before administrative decision-makers, and not for the first time on judicial review or appeal. This point has not been expressly affirmed in this Court's jurisprudence regarding undue delay to date. Indeed, in *Blencoe*, the Court made no adverse comment on the fact the appellant did not raise the issue before the British Columbia Human Rights Tribunal and instead made his request for a stay for the first time in the British Columbia Supreme Court.[36]

19. There are at least three reasons to clarify this requirement, and to require parties to take meaningful steps to advance delayed proceedings.

20. First, under the doctrine of waiver, a party who fails to raise a breach of procedural fairness at the earliest practicable opportunity impliedly waives any right to do so.[37]

21. Second, parties that fail to act with dispatch undermine the legislature's intent to create an efficient process of adjudication that improves access to justice while accomplishing the statutory purposes.[38]

22. Third, parties who wait to raise inordinate delay for the first time on judicial review threaten to "gut the deference owed to a tribunal."[39] If a decision-maker has not had an opportunity to weigh in on the allegation of inordinate delay, the reviewing court will lack the decision-maker's reasons making findings of fact and explaining its procedural choices and its views as to whether the delay

---

[35] *Blencoe*, *supra* note 6 at para 182, LeBel J dissenting in part.
[36] *Blencoe*, *supra* note 6 at para 18.
[37] See *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 971-972, McLachlin J dissenting in part; *Canadian College of Business and Computers Inc v Ontario (Private Career Colleges)*, 2010 ONCA 856 at paras 51-52; *Lally v Telus Communications Inc*, 2014 FCA 214 at para 25; *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 at para 101.
[38] Gerald Heckman, "Remedies for Delay in Administrative Decision-making: Where Are We after *Blencoe*?" (2011) 24 Can J Admin L & Prac 177 at 188.
[39] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54 [*Alberta Teachers*].

is inordinate. This thwarts the *Vavilov* inquiry into justification, transparency and intelligibility.[40] In such circumstances, the reviewing court will be justified in refusing to hear and decide the question of inordinate delay.[41]

The standard of review for questions of procedural fairness, including inordinate delay

23. Standards of review in administrative law must be "predictable, workable and coherent."[42] As this Court emphasized in *Vavilov*, "it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed."[43]

24. While *Vavilov* confirmed that a breach of the duty of fairness is a standalone ground of judicial review,[44] it left the questions of what, if any, standard of judicial review applies to this issue for another day.[45] The values of "coherence and predictability" espoused in *Vavilov* require this Court to resolve the controversy.[46] A definitive pronouncement would offer practical utility to tribunals, parties and reviewing courts by foreclosing "costly debates surrounding the appropriate standard and its application."[47]

Jurisprudential confusion over the applicable standard of review

25. In *Baker* and in subsequent cases, this Court established that the requirements of procedural fairness are "context-specific," and "determined with reference to all of the circumstances."[48] A court must assess the level of fairness required in a particular instance before determining whether the process followed by the decision-maker was fair.[49] *Blencoe* followed shortly after *Baker* but

---

[40] *Vavilov*, *supra* note 1 at paras 81 and 86.
[41] *Vavilov*, *supra* note 1 at para 142. See also *Alberta Teachers*, *supra* note 39 at para 55.
[42] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 64, LeBel J concurring.
[43] *Vavilov*, *supra* note 1 at para 5.
[44] *Ibid* at para 23.
[45] See e.g. *Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171 at para 24; *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at para 46 ("*Vavilov* did not address the standard of review for questions of procedural fairness").
[46] *Vavilov*, *supra* note 1 at para 10.
[47] *Ibid* at para 21.
[48] *Vavilov*, *supra* note 1 at para 77; *Baker v Canada (Minister of Citizenship and Immigration* [1999] 2 SCR 817 at paras 21-23 [*Baker*].
[49] *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74.

did not address the question of the standard of review to be applied to allegations of procedural unfairness.

26. In *Khela*, this Court held that the standard of review for all issues of procedural fairness (including, presumably, issues of inordinate delay) will continue to be correctness. That decision also acknowledged, however, that the decision-maker in question was "entitled to a margin of deference."[50] In an effort to reconcile these tensions, appellate courts have adopted three competing approaches to review of procedural fairness questions: (i) to apply no standard of judicial review; (ii) to apply the correctness standard of judicial review; or (iii) to apply the reasonableness standard of judicial review.[51] None of these approaches give sufficient guidance.

27. *Khela*'s approach to questions of procedural fairness has been criticized as being "confusing and unhelpful" in its formulation,[52] if not unsound in principle.[53] There are conceptual difficulties associated with "[a]ttempting to shoehorn the question of procedural fairness into a standard of review analysis."[54] Indeed, this Court's jurisprudence provides examples of decision-makers receiving both considerable deference on matters of procedure[55] and almost none at all.[56]

---

[50] *Mission Institution v Khela*, 2014 SCC 24 at paras 79 and 89.
[51] See The Honourable Simon Ruel, "What is the Standard of Review to Be Applied to Issues of Procedural Fairness?" (2016) 29 Can J Admin L & Prac 259 at 271-278. For an overview of the scholarly debate, see, on the one hand, Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40 Queen's LJ 213; Christopher D Bredt & Alice Melcov, "Procedural Fairness in Administrative Decision-Making: A Principled Approach to the Standard of Review" (2015) 28 Can J Admin L & Prac 1; Derek McKee, "The Standard of Review for Questions of Procedural Fairness" (2016) 41 Queen's LJ 355; Edward Clark, "Reasonably Unified: The Hidden Convergence of Standards of Review in the Wake of *Baker*" (2018) 31 Can J Admin L & Prac 1 (espousing reasonableness or an otherwise deferential standard of review) and, on the other, Ruel, *supra* note 51; John M Evans, "Fair's Fair: Judging Administrative Procedures" (2015) 28 Can L Admin L & Prac 111; The Honourable Simon Ruel, "The Review of Procedural Fairness Post-*Vavilov*: More of the Same?" (2020) 33 Can J L & Prac 159 (advocating for no standard of judicial review).
[52] *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 44 [*CPR*].
[53] See Clark, *supra* note 51 at 9; *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at para 60.
[54] *CPR*, *supra* note 52 at para 55.
[55] *VIA Rail*, *supra* note 3 at para 231.
[56] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 11.

A way forward

28. Ontario recommends a process that requires parties to raise the issue of delay before the tribunal. It consequently recommends a standard of review that, first, gives deference to the tribunal's reasons and, second, maintains a high bar to obtain a remedy. The test could require prejudice to the party's right to a fair hearing or the "substantial wrong or miscarriage of justice" test which is adopted by statute in Ontario.[57]

29. In the context of allegations of procedural unfairness, Canadian appellate courts have ruled that a tribunal decision may be set aside only if it resulted in manifest unfairness or actual prejudice to the applicant's right to be heard. Minor procedural lapses or technical irregularities are not grounds to set aside a decision. What is required is fair procedure, not perfection.[58]

30. In *Blencoe* this Court assessed what constituted a reasonable delay in the circumstances and then determined whether the delay prejudiced the fairness of a hearing or whether it caused significant psychological harm or stigma sufficient to bring the administrative process into disrepute.[59] Prejudice was a key factor in both aspects of the test. However, this Court did not have the benefit of the tribunal's findings of fact or reasons on these issues.

31. The first step in the court's assessment should therefore require deference to the tribunal's statutory mandate and to its procedural choices when considering what degree of procedural fairness is owed in a particular situation and what specific procedural rights are engaged. Deference is also owed to the tribunal's findings of fact including explanations for the procedures that were followed and for the delays.

32. The second step in the court's assessment of an allegation of procedural unfairness should concern the key factor of prejudice. This Court in *Blencoe* identified two types of prejudice: (1) prejudice to the party's right to a fair hearing and (2) psychological harm to the party or stigma that is so significant as to bring administrative justice into disrepute. The first type should be the

---

[57] *Judicial Review Procedure Act*, RSO 1990, c J.1, s 3.
[58] *Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, 2006 FCA 398 at paras 22-25; *Nova Scotia (Director, Occupational Health and Safety) v Lafarge Canada Inc*, 2014 NSCA 9 at para 24; *CS v British Columbia (Human Rights Tribunal)*, 2018 BCCA 264 at para 15; *Abdul v Ontario College of Pharmacists*, 2018 ONCA 699 at para 27;
[59] *Blencoe*, *supra* note 6 at paras 115 and 121-133.

standard for all questions of procedural fairness. Both types must be considered when the allegation is inordinate delay. To the extent that evidence of these types of prejudice is not contained in the tribunal record, the tribunal should admit the party's evidence and make findings of fact on these issues.

33. The court should apply the *Vavilov* standard of reasonableness when reviewing the tribunal's findings of fact and its explanation on the questions of prejudice. This Court should therefore reaffirm the position that procedural fairness issues, including issues of inordinate delay, should first be raised before the tribunal with supporting evidence. Then, the contextual analysis of the tribunal's reasons should be performed so as to respect the tribunal's role in fact finding as well as its understanding of its own role, resources, statutory mandate and policy goals.

34. An allegation of inordinate delay is essentially an allegation of abuse of process. An abuse of process is unreasonable. A definitive statement by this Court would bring clarity and finality to a troubled and long-standing question in Canadian administrative law.

PART IV – SUBMISSIONS ON COSTS

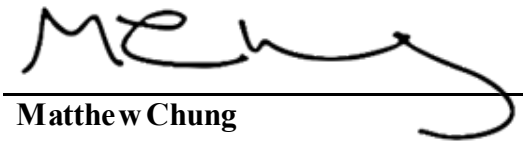
35. The Attorney General of Ontario does not seek costs and asks that no costs be awarded against him.

PART V – ORDER SOUGHT

36. The Attorney General of Ontario has been granted permission to present oral argument not exceeding five minutes at the hearing of the appeal. No other order is sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of September, 2021.

Alexandra Clark



Matthew Chung

PART VI – TABLE OF AUTHORITIES

Jurisprudence

	Authority	Paragraph Referenced
1.	*Abdul v Ontario College of Pharmacists*, 2018 ONCA 699	29
2.	*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61	22
3.	*Baker v Canada (Minister of Citizenship and Immigration* [1999] 2 SCR 817	25
4.	*Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56	8
5.	*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44	8, 10, 11, 13, 17, 18, 30
6.	*British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52	14
7.	*Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892	20
8.	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65	3, 4, 7, 16, 22, 23, 24, 25, 33
9.	*Canadian College of Business and Computers Inc v Ontario (Private Career Colleges)*, 2010 ONCA 856	20
10.	*Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69	27
11.	*Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69	24
12.	*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48	27
13.	*Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15	7, 8, 9, 27
14.	*CS v British Columbia (Human Rights Tribunal)*, 2018 BCCA 264	29
15.	*Dunsmuir v New Brunswick*, 2008 SCC 9	7

	Authority	Paragraph Referenced
16.	*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd,* 2016 SCC 47	9
17.	*Knight v Indian Head School Division No 19*, [1990] 1 SCR 653	8
18.	*Lally v Telus Communications Inc*, 2014 FCA 214	20
19.	*Likhi v Canada (Citizenship and Immigration)*, 2020 FC 171	24
20.	*Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59	27
21.	*MediaQMI inc v Kamel*, 2021 SCC 23	12
22.	*Merchant v Law Society of Saskatchewan*, 2014 SKCA 56	20
23.	*Mission Institution v Khela*, 2014 SCC 24	26
24.	*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11	25
25.	*Nova Scotia (Director, Occupational Health and Safety) v Lafarge Canada Inc*, 2014 NSCA 9	29
26.	*Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55	8
27.	*Penner v Niagara (Regional Police Services Board*), 2013 SCC 19	14
28.	*Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982	9
29.	*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39	8
30.	*R v 974649 Ontario Inc*, 2001 SCC 81	8
31.	*R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706	8, 12
32.	*Robinson v Ontario (Securities Commission)* (1993), 110 DLR (4th) 166 (Ont Div Ct)	15

	Authority	Paragraph Referenced
33.	*Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37	12
34.	*Sazant v The College of Physicians and Surgeons of Ontario*, 2012 ONCA 727	15
35.	*Toronto (City) v CUPE, Local 79*, 2003 SCC 63	23
36.	*Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, 2006 FCA 398	29

Secondary Sources

	Secondary Source	Paragraph Referenced
1.	Christopher D Bredt & Alice Melcov, "Procedural Fairness in Administrative Decision-Making: A Principled Approach to the Standard of Review" (2015) 28 Can J Admin L & Prac 1	26
2.	David J Mullan & Deirdre Harrington, "The *Charter* and Administrative Decision-Making: The Dampening Effects of *Blencoe*" (2002) 27 Queen's LJ 879	12
3.	Derek McKee, "The Standard of Review for Questions of Procedural Fairness" (2016) 41 Queen's LJ 355	26
4.	Edward Clark, "Reasonably Unified: The Hidden Convergence of Standards of Review in the Wake of *Baker*" (2018) 31 Can J Admin L & Prac 1	26
5.	Gerald Heckman, "Remedies for Delay in Administrative Decision-making: Where Are We after *Blencoe*?" (2011) 24 Can J Admin L & Prac 177	21
6.	Graham J Clarke, "Duties Administrative Tribunals Owe All Parties" (2017) 30 Can J Admin L & Prac 247	14, 16
7.	John M Evans, "Fair's Fair: Judging Administrative Procedures" (2015) 28 Can L Admin L & Prac 111	26

	Secondary Source	Paragraph Referenced
8.	Judith McCormack, "Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change" (1995) 59 Sask L Rev 385	7, 9
9.	Lorne Sossin, "Reflections on the UK Tribunal Reform from a Canadian Perspective" (2011) 24 Can J Admin L & Prac 153	14
10.	Michelle A Alton, "Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice" (2019) 32 Can J Admin L & Prac 151	8
11.	Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40 Queen's LJ 213	26
12.	The Honourable Simon Ruel, "The Review of Procedural Fairness Post-*Vavilov*: More of the Same?" (2020) 33 Can J L & Prac 159	26
13.	The Honourable Simon Ruel, "What is the Standard of Review to Be Applied to Issues of Procedural Fairness?" (2016) 29 Can J Admin L & Prac 259	26

Statutes, Regulations, Rules, etc.

	Statute, Regulation, Rule, etc.	Section, Rule No., etc.
1.	*Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Schedule 5	s 15
	Loi de 2009 sur la responsabilisation et la gouvernance des tribunaux décisionnels et les nominations à ces tribunaux, LO 2009, c 33, annexe 5	art 15
2.	Rules of Procedure of the Human Rights Tribunal of Ontario	rr 7, 14
	Règles de procédure du Tribunal des droits de la personne de l'Ontario	rr 7, 14
3.	*Judicial Review Procedure Act*, RSO 1990, c J.1	s 3
	Loi sur la procédure de révision judiciaire, LRO 1990, c J.1	art 3