

Spring 2012

**THE ADMINISTRATIVE LAW PROCESS 301S**

Maneesha Deckha, Associate Professor

- UNIT VALUE:** 2.0                    **LOCATION:** Room 152, Fraser (Law) Building
- CLASS TIMES:** 10:30 a.m.-12:20 p.m., Tuesdays and Thursdays
- OFFICE HOURS:** Tuesdays between 12:30 and 1:30 p.m. Please see me after class to schedule an appointment at other times.
- CONTACT INFO:** office location: room 230  
tel.: 250.721.8175; fax: 250.721.8146  
email: [mdeckha@uvic.ca](mailto:mdeckha@uvic.ca)  
Assistant: Gail Rogers, rm. 241, tel.: 250.721.8160, [grogers@uvic.ca](mailto:grogers@uvic.ca)

**SUMMARY:** Administrative law deals with the relationships between different branches of the state. It charts the delivery of government services and the attendant rights and interests of persons and other legal entities as recipients of those services. It is a set of principles and rules that determine how courts supervise the decisions of governmental bodies acting under (mostly) statutory powers to ensure that their dealings with their constituencies comply with the law. The course explores the various reasons courts review such decisions and also considers the varying standards of review they apply in different contexts. The course also considers administrative law in social context, examining the impact of its doctrine on diversity and equity issues and questions of power. The course is a staple of public law and serves as a foundation for more specialized study in numerous other areas.

**OBJECTIVES:** The objectives of this course are for you to:

1. Acquire fluency in understanding and evaluating administrative law principles;
2. Integrate and apply acquired knowledge of doctrine and attendant critiques to offer cogent analyses of administrative law problems;
3. Understand administrative law in social context, particularly in relation to issues of diversity, equity and social justice; and
4. Realize the above objectives through helping to create a participatory classroom and a respectful and compassionate learning environment.

**TEACHING METHODOLOGY:** The course strives to be responsive to various learning styles and skill sets. As such, the traditional pure lecture method will not be followed. Instead, class time will consist of class discussion, lectures and more interactive exercises. Students should come to class *fully* willing to participate and are expected to try new techniques and interact with one another during non-lecture portions of the class. The course also implements the Faculty of Law's commitments to understanding law in social context and, in particular, its relationship to social justice, by examining the principles of administrative law in relation to social and cultural differences. The course seeks to promote critical thinking in general.

**EVALUATION:** You have two options for evaluation in this course. Students must choose **either** Option A **OR** Option B **but not both**. The options are as follows:

**Option A:** Evaluation consists of the following components:

1. Essay question(s) relating to Sections I and II of the course syllabus (45%). The assignment is an opportunity for you to demonstrate your sophisticated comprehension and analysis of course materials. The assignment must be between 2000 and 3000 words exclusive of other text such as footnotes. **The assignment will be handed out in class on Tuesday, January 31, 2012 and is due in hard copy at the beginning of class on Thursday, February 23, 2012 and by soft copy to [grogers@uvic.ca](mailto:grogers@uvic.ca) with the subject heading "Admin Law Assignment 1: (your midterm codename) by this time and date.** This assignment will cover materials covered to February 7 inclusive. Further details will be given with the assignment when it is handed out.
2. Essay question(s) relating primarily to Section III of the course syllabus (50%). The assignment is an opportunity for you to demonstrate your sophisticated comprehension and analysis of course materials. The assignment must be between 2000 and 3000 words exclusive of other text such as footnotes. **The assignment will be handed out in class on Thursday, March 8, 2012 and is due in hard copy at the front reception on Tuesday, April 10, 2012 by 12pm and by soft copy to [grogers@uvic.ca](mailto:grogers@uvic.ca) with the subject heading "Admin Law Assignment 2: (your final codename)" by this time and date.** This assignment will cover materials covered to March 29 inclusive. Further details will be given with the assignment when it is handed out.
3. Group Presentation (5%). Students will be placed into groups later this term and assigned a topic to present to the class in a 15-20 minute group presentation during the last two classes in the term (**April 3 and 5, 2012**). Preparation will require some external research. Satisfactory completion of the presentation will result in an automatic 5% of the grade. All group members present must be active in the presentation to receive the full automatic credit. Group members who are absent on their presentation dates must write a written summary of 800-1000 words of their group's presentation to be emailed to [grogers@uvic.ca](mailto:grogers@uvic.ca) by Tuesday, April 10 by 4pm to receive the automatic 5%. Additionally, attendance will be taken on group presentation dates (April 3 and 5, 2012). **All class members are expected to attend on these dates.** Absence on April 3 and/or 5 will result in a 1% deduction of the overall grade in the course for each date missed.

**Option B:** Evaluation consists of the following components:

1. Two Critical Reflections (20%). The precise focus of your critical reflection is up to you, but it must demonstrate an evaluative assessment of the course materials. You may wish to discuss a particular case(s) or article read or discussion from class in relation to the foundational principles/questions/debates of administrative law we will study. The goal is to advance an *analytical* critique of the course materials that demonstrates comprehension, insight and organization of the course as of the submission date of the Critical Reflection. **The first Critical Reflection is due between January 26, 2012 and February 7, 2012.** The **second Critical Reflection**, which must primarily address materials covered since February 7, **is due between March 1 and March 15, 2012.** Each Critical Reflection will be worth 10% of your grade and must be at least 600 and no longer than 850 words. You must submit the Critical Reflections to me by hard copy in class or by soft copy at [mdeckha@uvic.ca](mailto:mdeckha@uvic.ca); they are due at the start of class by the deadlines above.

2. Research Paper (75%). This component provides you with the opportunity to conduct *advanced research* and writing on a particular topic of your choice that has been approved by me. **You must submit an introduction of at least one-page that includes a thesis statement and outline that describes the focus and structure of the Research Paper by the start of class on January 26, 2012.** This introduction will not be graded but is nevertheless mandatory; the introduction may be incorporated into the final Research Paper. The Research Paper must be between 6000 and 7500 words exclusive of other text such as footnotes, appendices and bibliography. Further guidelines on paper expectations will be submitted to those who choose this option. **The Research Paper is due by 12pm on Tuesday, April 10, 2012 and must be submitted in hard copy to the Law Reception and soft copy to me at [mdeckha@uvic.ca](mailto:mdeckha@uvic.ca) by this time and date.**
3. Paper Presentation (5%). Students will present their paper to their peers in a short (between 10 and 20 minutes depending on how many students choose Option B) presentation during the last two classes in the term (**April 3 and 5, 2012**). Satisfactory completion of the presentation will result in an automatic 5% of the grade. Additionally, attendance will be taken on these presentation dates (April 3 and 5, 2012). **All class members are expected to attend on these dates.** Absence on April 3 and/or 5 will result in a 1% deduction of the overall grade in the course for each date missed.

All of the above dates and word limits are subject to change. Students are expected to follow all assignment or research paper instructions. Deadlines are firm. Work submitted late is subject to a penalty of 1% for each day or part thereof, including weekends, it exceeds the deadline.

There is no examination option in this course.

**How to decide between Options?:** Both options involve essay writing, multiple assessments spread throughout the term, critical thinking, and the ability to reflect on assignments in the process of learning. Option B may appeal to students who prefer academic research, theoretical immersion, longer essay writing, and high flexibility in scheduling academic work. While Option A also involves essay writing, external research will not be required on the written assignments. Option A may also appeal to students who prefer multiple assessments that are more evenly weighted and evaluated by codename thus assuring anonymity. With either Option, students may discuss their work with each other, but no collaboration whatsoever is permitted on written work submitted (including drafts). Students should consult me with any questions they may have regarding the two options or the limits of collaboration.

**How to indicate your choice of Option?:** Students who do not submit a one-page introduction for the Research Paper by the start of class on January 26, 2012 register their choice to be evaluated by Option A. Students who do submit a one-page introduction may still switch to Option A thereafter by not submitting the First Critical Reflection by February 7, 2012. Students who submit both a one-page introduction by January 26, 2012 and the First Critical Reflection by February 7, 2012, register their choice to be evaluated by Option B and may not switch later.

**Major Paper Eligibility:** You may not write your Major Research Paper in this course.

**Grading Scheme:** Written work will be evaluated for content, analysis, organization and writing style and assigned a percentage and letter grade. The equivalencies are:

Letter Grade	Grade Point Value	Percentage Value	Narrative Description
A+	9	90-100%	Exceptional, outstanding, and excellent performance, normally achieved by a minority of students. These grades indicate a student who is self-initiating, exceeds expectation, and has an insightful grasp of subject matter.
A	8	85-89%	
A-	7	80-84%	
B+	6	75-79%	Very good, good, and solid performance, normally achieved by the largest number of students. These grades indicate a good grasp of subject matter or excellent grasp in one area balanced with satisfactory grasp in the other area.
B	5	70-74%	
B-	4	65-69%	
C+	3	60-64%	Satisfactory or minimally satisfactory performance. These grades indicate a satisfactory performance and knowledge of subject matter.
C	2	55-59%	
D	1	50-54%	Marginal performance. A student receiving this grade demonstrates a superficial grasp of subject matter.
F	0	49 or below	Unsatisfactory performance.

### **Statement about Academic Integrity**

All student work must comply with the University's Policy on Academic Integrity, which is available at: <http://web.uvic.ca/calendar2011/FACS/UnIn/UARe/PoAcl.html>. In particular, please note that:

"A student commits plagiarism when he or she:

- submits the work of another person as original work
- gives inadequate attribution to an author or creator whose work is incorporated into the student's work, including failing to indicate clearly (through accepted practices within the discipline, such as footnotes, internal references and the crediting of all verbatim passages through indentations of longer passages or the use of quotation marks) the inclusion of another individual's work
- paraphrases material from a source without sufficient acknowledgement as described above

Students who are in doubt as to what constitutes plagiarism in a particular instance should consult their course instructor.

The University reserves the right to use plagiarism detection software programs to detect plagiarism in essays, term papers and other assignments."

Plagiarism detection software may be used to ensure academic integrity of written work.

**Accommodation**

Students requiring accommodation for classroom instruction or evaluation (assignments or the examination) due to illness, disability, religious observance or other accommodation reasons should contact Associate Dean Heather Raven as soon as possible. Please also feel free to speak to me with any questions or concerns you may have regarding accommodation.

Please also note that both the Associate Dean's Office and the University's Resource Centre for Students with a Disability (<http://rcsd.uvic.ca/services/index.html>) are available to assist students with a disability with services and supports including requests for accommodation. With respect to religious observances, please note that the University has a policy allowing for accommodation for the observance of certain religious holidays.

**A Statement About Electronic and Digital Devices**

Please be considerate to your peers and the instructor by limiting laptop use while in class to academic content related to the class and silencing sounds emitted by any electronic equipment wherever possible. In particular, please note:

- The classroom is a cell phone-free zone. If you need to keep connected for caregiving or accommodation reasons, please keep your phone on vibrate mode; otherwise, please turn off your cell phone when in class.
- Any type of electronic/digital recording of the class is not permitted. Students who will be absent from class for reasons that require accommodation may speak with the Associate Dean's office for permission to have the instructor tape the missed class.

Professionalism and consideration in these and all other matters are appreciated.

**A Statement About Classroom Climate and Community**

The Faculty of Law is committed to promoting equity and diversity by, among other initiatives, the creation of classroom environments that help foster equality and work against the systemic impact of discriminatory social norms and practices. **This effort requires everyone's commitment.** The collective goal of our class will be to facilitate a learning community where all members feel comfortable to participate and interact with one another in inclusive and respectful ways.

**REQUIRED MATERIALS:** The required texts are:

1. Readings shown below as "Text" are from the required text for this course, Colleen Flood and Lorne Sossin, *Administrative Law in Context* (Toronto: Emond Montgomery Publications Limited, 2008) and, unless otherwise indicated, the cases listed below (in italics) are found on the companion website for the text, online at <http://www.emp.ca/index.php/administrative-law-in-context-companion-website>. Cases marked **ADD** are found on the course moodle website. Important: Please remember to visit the Course Distribution Centre (CDC) to pay the required digital access fee associated with online materials.
2. Further course readings and handouts are posted on the course moodle site accessible at <http://moodle.uvic.ca/>. You will need to log-on with your netlink ID and password.

From time to time, some assigned readings may be deleted or other required readings and handouts may be added by being placed on moodle, emailed to your Uvic account through the course listserv (to which you are automatically subscribed), or otherwise provided to you. Students are expected to read all email and moodle correspondence in relation to the course.

Recommended reading is listed at the end of each chapter in the required text. Students may also find the following texts to be useful references for supplementary reading (keep in mind that administrative law changes quickly and that older texts will have parts that are out-of-date): 1) S. Blake, *Administrative law in Canada* (Toronto: LexisNexis Butterworths, 2006). It is available on Library Reserve at KE5015 B54; 2) D. Mullan, *Administrative Law: cases, text, and materials, 5th ed.* (Toronto: Emond Montgomery, 2010). It is available on Library Reserve at KE5015 V36; and 3) D. W. Elliott, *Introduction to Public Law* (Concord, ON: Captus Press, 2007). It is available on Library Reserve at KE4120 I57 2007. Other reference texts are also on reserve at the Law Library.

## SYLLABUS

**Important:** Class will be cancelled on Thursday, February 9 and Tuesday, February 21, 2012. **A DOUBLE make-up class has been scheduled for Friday, January 27, 2012 in room 158 between 12 and 3:50pm.**

**Please note:** 1) in some cases I have indicated that an assigned reading is to be “skimmed”. I will deal in class with such materials in a more cursory fashion, often using them primarily to illustrate or to extract the key legal principles they stand for; and 2) additions or deletions may be made to the following list of readings.

### SECTION I INTRODUCTION TO ADMINISTRATIVE LAW

#### A. **Overview: Scope, Content, and Basic Principles of Administrative Law**

Readings: Text, Chapter 1 pp. 1-18

#### B. **The Tools of the Administrative State and the Regulatory Mix**

Readings: Text, Chapter 2 Part III (pp. 31-36) and Part V (pp 40-42)

#### C. **The Constitutional Basis for, and Role of, Judicial Review**

Readings: Text, Chapter 1 pp. 19-21  
*Constitution Act, 1867* (**skim**)  
*Re Residential Tenancies Act* (**skim**)  
*Crevier v. Quebec (Attorney General)*  
 Tina L. Dion, “Approaches to Administrative Law: Tsawwassen First Nation” (moodle)

**D. The Administrative State and the Rule of Law**

Readings: Text, Chapter 4, pp. 77- 81 (The “Diceyan view”), 87-97  
*Roncarelli v. Duplessis* (**skim**)  
*Re: Manitoba Language Rights* (**skim**)  
*British Columbia v. Imperial Tobacco Canada Ltd.* (**skim**)  
**ADD** *Canada House of Commons v. Vaid* (moodle)  
**ADD** *Canada v. Khadr*, paras. 1-2, 22-27, 32-48 (moodle)  
 K. Roach, “Did Sept. 11 Change Everything?” (moodle)

**E. The *Baker* Case as an Example of Administrative Law In Action**

Readings: Text, Chapter 1 pp. 21-23 (questions to consider)  
*Baker v. Canada (Minister of Citizenship and Immigration)*  
 D. Stasiulis and A. Bakan, “Negotiating the Citizenship Divide” (moodle)

**SECTION II SUBSTANTIVE REVIEW IN ADMINISTRATIVE LAW****A. Introduction to Substantive Review: Issues/Background**

Readings: Handout – Introduction to Substantive Review (moodle)  
 Text, Chapter 4, pp. 99-104  
**ADD** *National Corn Growers Assn v. Canada (Import Tribunal)* [**Note:** Read the extract on moodle instead of the one on the companion website for the text.]

**B. Judicial Review of Tribunal Decisions on Questions of Law or Jurisdiction****1. Development of the Law Part I: Judicial Review in the Presence of Privative Clauses: Review on the Basis of “Jurisdictional Error”**

Readings: Text, Chapter 8, pp. 197-208  
*CUPE v. New Brunswick Liquor*

**2. Development of the Law Part II: Extension of Judicial Deference Theory to Appeals**

Readings Text, Chapter 8, pp. 208-212

**3. Development of the Law Part III: The Entrenchment of the Pragmatic and Functional Approach Pre-*Dunsmuir***

Readings Text, Chapter 8, pp. 212-222  
*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*  
*Law Society of New Brunswick v. Ryan*

**4. Pre-*Dunsmuir* Problems and Critiques of the SOR Jurisprudence**

- Readings Text, Chapter 8, pp. 222-224  
Text, Chapter 9, pp. 261-267  
**ADD** *Toronto (City) v. CUPE Local 79* (Justice Le Bel's "Cri de Coeur" (moodle)  
*Administrative Tribunals Act*: read ss. 1, 58, 59  
**ADD** *Manz. v. BC* (paras. 1-8, 18-36) (moodle)

## 5. The Dunsmuir Decision - A New Departure or Just More of the Same?

- Readings Text, Chapter 8, p. 227

### a) The Decision

*Dunsmuir v. New Brunswick*

L. Sossin, "Dunsmuir – Plus ca change", (on companion website)

**ADD** *Canada v. Khosa* (moodle)

Michel Bastarache, "Modernizing Judicial review" (on companion website)

### b) Impact on ATA

**ADD** *Victoria Times Colonist* (paras. 1-10) (moodle)

**ADD** *Carter v. Travelex* (paras. 1-2, 25-27) (moodle)

**ADD** *Kerton v. WCAT* (paras. 1-5, 21-34) (moodle)

**ADD** *Lavender Co-operative Housing* (paras. 15, 22-24, 31-58) (moodle)

**ADD** *Westergaard v. Registrar* (paras. 33-54) (moodle)

### c) Recent Post-Dunsmuir Cases on Standard of Review Analysis

Skim the following cases:

**ADD** *Proprio Direct v. Pigeon* (moodle); **ADD** *Kerry v. Ontario* (moodle)

**ADD** *Bell Canada v. Bell Aliant* (moodle); **ADD** *Northrup v. Canada* (moodle)

**ADD** *Wal-mart v. Quebec* (moodle); **ADD** *Montreal v. Montreal* (moodle)

Read the following cases:

**ADD** *Smith v. Alliance* (paras. 22-40) (moodle)

**ADD** *CHRC v. Mowat* (paras. 1-4, 7-10, 14-47, 50-51, 53-57, 59-64) (moodle)

**ADD** *Nor-Man Regional Health* (paras. 1-7, 29-62) (moodle)

**ADD** *Alberta Teachers' Association* (moodle)

## C. Judicial Review of Tribunal Decisions on Questions of Fact

- Readings This topic will be addressed briefly in class.

## D. Judicial Review of Discretionary Decisions

- Readings Text, Chapter 10, pp. 269-282  
*Roncarelli v. Duplessis*  
Text, Chapter 10, pp. 282-288  
*Baker v. Canada (Minister of Citizenship and Immigration)* (read the extract that goes with Chapter 10 on the companion website)

*Suresh v. Canada (Minister of Citizenship and Immigration)* (read the extract on the companion website that goes with Chapter 10)  
 Brian Laghi, “Don’t Expel Refugees at Risk of Being Tortured” (moodle)  
 UN Report on the Committee Against Torture (moodle)  
*Lake v. Canada (Minister of Justice)* (read the extract on the companion website that goes with Chapter 8)

### E. Further Constitutional Issues related to Standard of Review Analysis

Readings      Text, Chapter 7, pp. 185-194

#### 1.                                    “Jurisdiction” and Ability to Consider Constitutional Issues

*Administrative Tribunals Act* ss. 43-46  
**ADD** *Paul v. BC* (moodle)  
**ADD** *R. v. Conway* (paras. 1-3, 63-85) (moodle)  
**ADD** *Rio Tinto* (paras. 30-38, 55-75, 94-95) (moodle)  
**ADD** *Little Salmon* (paras. 33-48, 84-89) (moodle)

#### 2.                                    SOR for Constitutional Determinations

David Mullen, “Administrative Tribunals and Judicial Review of Charter Issues after *Multani*” (moodle)

## SECTION III      PROCEDURAL REVIEW IN ADMINISTRATIVE LAW

### A.                    Introduction/Overview to the Doctrine of Procedural Fairness

Readings:      Text Chapter 5

### B.                    Procedural Fairness – When Does it Apply?

#### 1.                    Historical Background and Emergence of the General Doctrine of “Fairness”

Readings      Text Chapter 5 pp. 115-117  
*Nicholson v. Haldimand*

#### 2.                    Application of the Doctrine of Fairness: Rights, Interests, Privileges

Readings:      **ADD** *Re Webb* (moodle)

#### 3. The Legitimate Expectations Doctrine

Readings:      Text Chapter 5 pp. 119-121  
*Reference Re Canada Assistance Plan (B.C.)*  
**ADD** *CUPE v. MOL* (paras. 131-46) (moodle)  
**ADD** *Canada v. Mavi* (paras. 1-9, 19-29, 38-64, 68-77) (moodle)

#### 4. Limitations on the Application of Procedural Fairness

##### a) Non-Final Decisions (Preliminary or Investigatory Processes)

Readings: I will discuss case principles in class

##### b) “Legislative and General Decisions” and “Policy” Decisions

Readings: Text Chapter 5, pp. 123-128  
*Canada (Attorney General) v. Inuit Tapirisat*  
*Homex Realty v. Wyoming (Village)*  
**ADD** *Congregation v. Lafontaine*, (paras. 1-35) (moodle)  
**ADD** *CPR v. Vancouver (City)*, (paras. 38-41) (moodle)

##### c) Emergency Doctrine

Readings: Text Chapter 5, p.128

#### C. The *Baker* Synthesis for Determining the Content of Procedural Fairness

Readings: Text Chapter 5 pp. 131-135  
*Baker*, paras. 18 – 34

#### D. Constitutional and Quasi Constitutional Guarantees of Procedural Fairness – *Canadian Bill of Rights*, ss.1(a) and 2(e) and *Charter*, Section 7

Readings: Text Chapter 7pp. 169-181  
**ADD:** *Authorson v. Canada (AG)* (moodle website)  
**ADD** *New Brunswick v. J.G.* (moodle website)  
*Suresh v. Canada (Minister of Citizenship and Immigration)*  
*Charkaoui v. Canada (Citizenship and Immigration)*

#### E. More About the Content of Procedural Fairness – Specific Procedural Issues

(Note: This material will be covered by a lecture with handouts. There are no specific readings on these issues in the Text. Additional readings may be posted prior to the class in which we will cover these topics.)

Prior to hearing

Notice of Proceedings  
 Pre-hearing discovery  
 Delay in proceeding

At the hearing stage

Oral hearing – See *Khan* (moodle)  
 Public hearing  
 Right to counsel – See *N.B. (Minister of Health...)* (covered previously)

Disclosure – See *Kane* (moodle)

Official notice

Admissibility of evidence

Cross-examination

Reasons for decision – See *Baker* (covered previously)

**ADD** *Newfoundland and Labrador Nurses' Union*

**F. Procedures and the *Administrative Tribunals Act***

Readings: *Summary of Key Aspects of the Administrative Tribunals Act (See the Act and "Administrative Tribunals Act Overview" on moodle)*

**G. Bias and Impartiality as Grounds for Challenge under Procedural Fairness**

Readings: Review *Baker* re bias issue  
**ADD** *R. v. R.D.S.* (moodle)  
M. Omatsu, "The Fiction of Judicial Impartiality" (moodle)  
Brenna Bhandar, "R v R.D.S.: A Summary" (moodle)  
**ADD** *Committee for Justice and Liberty* (moodle)  
**ADD** *Pearlman* (moodle)  
**ADD** *Imperial Oil v. Quebec (Min of Environment)* (moodle)  
**ADD** *Bennett and Doman v. B.C.* (moodle)  
**ADD** *Wewaykum Indian Band* (moodle)  
**ADD** *CUPE v. Ontario (Minister of Labour)* (moodle)  
**ADD** *Newfoundland Tel. v. The Board Commissioners* (moodle)

**SECTION IV PRESENTATIONS (April 3 and 5)**

Readings While all class members will need to prepare for their presentations, there will be no additional readings for the class to read in advance of hearing others' presentations.