

**LAW 301 - ADMINISTRATIVE LAW PROCESS
FALL 2011 -- PROFESSOR CRANE
COURSE SYLLABUS (COURSE OUTLINE)**

This document identifies required readings for the course.

Unless otherwise indicated, the listed readings and page references are from the required text by Gus Van Harten, Gerald Heckman, and David Mullan: *Administrative Law: Cases, Text, and Materials, 6th Edition*, Emond Montgomery Publications Ltd., 2010 (referred to as “Text”).

For ease of reference, the names of cases that are found within in the assigned readings from the Text have been separately identified in the syllabus. These cases will be a focus of discussion in the course.

Required readings that are not found in the Text are listed in the syllabus and identified by the notation “**ADD**”. These additional materials (or links to them) will be posted on the Moodle course website under the heading “course materials”. All materials listed under that heading are mandatory unless they are expressly designated not to be.

The Moodle website for the course can be found at: <http://moodle.uvic.ca/>. **Any student who has difficulties accessing any of the supplementary materials should advise me immediately.**

From time to time, **some of the assigned readings in the syllabus may be deleted while other required readings may be added.** The latter will be posted on the course website, circulated on the list-serve, placed on reserve in the Law Library, or otherwise provided to you. More detailed instructions regarding required readings can be expected as the course proceeds.

PART I INTRODUCTION

A. ADMINISTRATIVE LAW: THE ADMINISTRATIVE STATE AND RULE OF LAW

Readings: Chapter 1: Text pp. 3 - 34

B. THE CONSTITUTIONAL BASIS FOR JUDICIAL REVIEW

Readings: Chapter 9 Text pp. 706 - 719
Relevant Case: *Crevier v. Quebec (Attorney General)*, p. 712

C. THE SUPERVISORY ROLE OF JUDICIAL REVIEW – AN INTRODUCTORY EXAMPLE

Readings: Chapter 2 Text pp. 37 - 66
Relevant Case: *Baker v. Canada (Minister of Immigration)*, p. 37

Note: As will become apparent, *Baker* is a very important decision in administrative law and we will be returning to it at several times throughout the course. We are looking at the case at this stage of the course primarily because it provides a good introduction to the various ways in which judicial review can be used to oversee administrative decision-making. As you read through the case, make sure that you (a) review the facts carefully, (b) understand how the matter got to the S.C.C., and (c) identify the various “grounds of attack” that were used to challenge the administrative decision at issue, and the outcome reached on each of those grounds. In this first reading of the case, you do not need to focus unduly on the reasoning of the Court on the various legal issues because that is something that we will be looking at in much more detail later.

PART II PROCEDURES (PROCEDURAL REVIEW)

A. INTRODUCTION TO PART II – SOME GENERAL CONSIDERATIONS

Readings: General Introduction to Procedures: Text pp. 67 - 75
 Rationales for fair procedures: Text pp. 259 - 261 (**Mashaw** article extract)

B. SOURCES OF PROCEDURAL FAIRNESS OBLIGATIONS

(1) Statutory Sources

Readings: Text pp. 77 - 80
Note: Relevant provisions of the *Administrative Tribunals Act*, S.B.C. 2004 c. 45 **will be referred to later in the course.**

(2) Rights Documents

Note: Relevant provisions of the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights*, and the *Quebec Charter of Rights and Freedoms* as constitutional and quasi-constitutional sources of procedural protections in some situations in administrative law will be referred to later in the course.

(3) Common Law Procedural Fairness (Introduction and Historical Development)

Readings: Text pp. 80 - 91
 Relevant Cases: *Cooper v. Board of Works for Wandsworth District*, p.82
Nicholson v. Haldimand-Norfolk Police Commissioners, p.85

C. “THRESHOLD ISSUES” – WHEN DOES THE COMMON LAW DUTY OF FAIRNESS APPLY?

(1) Elaboration and Development of the Fairness Doctrine following *Nicholson* and Identification of the ongoing “Threshold” Problem

Readings: Text pp. 91 - 105 and pp. 110 - 113
 Relevant Cases: *Knight v. Indian Head School Division No.19*, p. 92
 See also: *Dunsmuir v. New Brunswick*, as referred to in note 3 at p. 105

(2) Further Elaboration of the Fairness Doctrine and Threshold Issues: When will the duty of fairness apply most fully ... least fully... or perhaps not at all?

(a) What is a "Legislative and General" Decision?

Readings: Text pp. 113 - 122
 Relevant Cases: *Canada v. Inuit Tapirisat of Canada*, p. 114
FAI Insurances v. Winneke, at pp. 120 - 121

(b) Bylaws and Rulemaking (Substance over Form):

Readings Text pp. 122 - 125
Homex Realty and Development Co. Ltd. v. Wyoming (Village), p. 122

(c) Policy Making and Broad Discretionary Powers

Readings: Text pp. 126 - 132
 Relevant Case: *Cdn. Assoc of Regulated Importers v. Canada (Attorney General)*, p. 128

(d) What Kinds of “Rights, Privileges, Interests” are Best/Better Protected?

Readings: Text pp. 132 - 143
 Relevant Cases: *Re Webb and Ontario Housing Corporation*, p.133
Hutfield v. Board of Fort Saskatchewan General Hospital, p. 138
McInnes; Lazarov; Everett; Desjardins; and *Baker*, (referred to pp.142-143)
ADD *Canada (Attorney General) v. Mavi* (extract on course website)

(e) The Legitimate Expectations Doctrine

Readings: Text pp. 157 - 165; pp. 168 - 175
 Relevant Cases: *Reference re Canada Assistance Plan*, p. 159
Mt. Sinai Hospital v. Quebec (Minister of Health and Social Services), p. 168
ADD See also *Canada (Attorney General) v. Mavi* paras 68-72 (*supra*)
 Review Review *Baker* at Text pp. 46 - 47 (re legitimate expectations)

(f) Non-Final Decisions: Inspections, Recommendations, Inquiries ...

Readings: Text pp. 143 - 149
Re Abel and Advisory Review Board, p. 145
ADD: *Irvine v. Canada* [1987] 1 SCR 181 (extract on course website)

D. CONSTITUTIONAL AND QUASI-CONSTITUTIONAL PROCEDURAL PROTECTIONS

Readings: Text pp. 178 - 199; pp. 202 - 210; pp. 221 - 249
 Relevant Cases: *Authorson v. Canada (AG)*, p.182
Singh v. Canada (Minister of Employment and Immigration), p.186
Charkaoui v. Canada (Citizenship and Immigration), p. 202
Blencoe v. British Columbia (Human Rights Commission), p. 221
ADD *New Brunswick (Minister of Health and Community Services) v. J.G.*, [1999] 3 S.C.R. 46, (extract on course website)

E. PROCEDURAL FAIRNESS – THE LEVEL AND CHOICE OF PROCEDURES**(1) Introduction**

Readings: Text pp. 255 - 258
Baker v. Canada, at pp. 44 – 51 (re deciding the content of procedures)

(2) Statutes about Procedures

Readings: Text pp. 278 - 281
ADD: Overview of *Administrative Tribunals Act* (document posted on the course website). For full text of *Administrative Tribunals Act, S.B.C. 2004, c.45* see http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_04045_01

(3) Specific Content Issues: Pre-Hearing Issues**(a) Notice**

Readings: Text pp. 286 - 302
 Relevant Cases: *Re Hardy; Ontario Hydro; Torchinsky; Re Rymal; ex parte Taylor; Chester*, referred to pp. 287-292
Canada (Attorney General) v. Canada (Krever Commission), p. 292

(b) Pre-Hearing "Discovery" of "the Case Against"

Readings: Text pp. 302 – 312 (Note: *Stinchcombe*; *CALPA, May v. Ferndale*)
 Relevant Cases: *Ontario Human Rights Commission v. Ontario (Board of Inquiry into Northwestern General Hospital)*, p.304
Ciba Geigy v. Canada (Patented Medicine Prices Review Board), p. 308

(c) Delay in Proceeding

Readings: Review *Blencoe*, at pp. 232 - 239 (opinion of the majority concerning how to deal with delay pursuant to administrative law principles)

(4) Specific Content Issues at the Hearing Stage**(a) Oral Hearings; Public Hearings**

Readings: Text pp. 315 - 317; pp. 321 - 328; pp. 328 - 330
 Relevant Case: *Khan v. University of Ottawa*, p. 321

(b) Right to Counsel

Readings: Text pp. 339 - 346
 Relevant Cases: *Howard v. Stony Mountain Institution*, p. 341
 Review *New Brunswick Minister of Health (supra)* – review principles

(c) Disclosure of "the Case Against" and Access to Agency Information

Readings: Text pp. 351 - 352; pp. 364 - 375
 Relevant Cases: *Kane v. Board of Governors of the University of British Columbia*, p. 351
Re Napoli and Workers' Compensation Board, p.365

(d) Admissibility of Evidence

Readings: Text pp. 411 - 414 (skim only)

(f) Cross-Examination

Readings: Text pp. 414 - 419
 Relevant Cases: *Innisfil (Township) v. Vespra (Township)*, p. 457
Re County of Strathcona and MacLab Enterprises, p.459

(g) The Limits of Trial-Type Hearings

Readings: Text pp. 421 - 425 (skim only)

(5) Post Hearing Issues: When Is There A Duty To Give Reasons?

Readings: Text pp. 425 - 440
 Relevant Cases Review *Baker* (reasons issue) pp. 49-51
Via Rail Inc. v. National Transportation Agency, p.430

F. A NOTE ABOUT JUDICIAL REVIEW REMEDIES AND REMEDIAL DISCRETION

Readings **ADD**: *Remedies Handout* (posted on the course website)
 Read also: *Harlekin v. University of Regina* (extract in the Text pp. 1147-1157)
Canadian Pacific v. Matsqui (extract in the Text pp.1157-1160)

G. PROCEDURAL FAIRNESS – BIAS AND LACK OF INDEPENDENCE

(1) Bias Issues

(a) Introduction – General Principles

Readings: Text pp. 441 - 448
 Review *Baker* (re bias) pp. 51-53

ADD *R. v. R.D.S.*, [1997] 3 S.C.R. 484 (extract on course website)
Moreau-Bérubé, [2002] 1 S.C.R. 249 (extract on course website)

(b) Pecuniary Interests

Readings: Text pp. 492 – 500 (top of page)
 Relevant Cases: *Energy Probe v. Canada (Atomic Energy Control Board)*, p. 493
Braeburn; *Moskalyk-Walter*; *Matsqui*; *Pearlman*; (noted 498 - 499)

ADD *Imperial Oil v. Quebec (Minister of the Environment)*, [2003] S.C.R. 624
 (extract on course website)

(c) Antagonism or Association Between Party and Decision Maker

Readings: Text pp. 448 – 451 (Note *Marques v. Dylex*; *Ontario Hydro v Ont.*;
CNG Transmission Corp v. Canada (National Energy Board))

ADD *Bennett and Doman* (extract on course website)

(d) Involvement of Decision Maker at Earlier Stages

Readings: Text pp. 451 – 453 (to the middle of the page)
 Relevant Cases: *Committee For Justice and Liberty*; *Township of Vespra*;

ADD *Wewaykum Indian Band v. Canada* (extract on course website)

(e) Statutory Authorization Defence/Use of Rights Documents to Override That Defence

Readings: Text pp. 456 - 460; pp.473 - 481
 Relevant Cases *Brosseau v. Alberta (Securities Commission)*, p.456
 2747-3174 *Quebec Inc. v. Quebec (Regie des permis d'alcool)*, p. 473
MacBain v. Canada (Human Rights Commission), p. 479

ADD *CUPE v. Ont. (Minister of Labour)*, [2003] 1 S.C.R. 539 (extract on course website
 regarding impartial appointments issue)
Bell Canada v. CTEA, [2003] 1 S.C.R. 609 (extract on course website)

(f) Attitudinal Bias (Pre-Judgment)

Readings: Text pp. 483 - 491
 Relevant Cases *Paine v. University of Toronto*, p.484
Great Atlantic & Pacific Co. v. Ontario (Human Rights Commission), p.488
Large v. City of Stratford, p. 490

(g) Variations in Standards Used To Test For Bias

Readings: Text pp. 500 - 527
 Relevant Cases *Old St. Boniface Residents Assoc. v. Winnipeg*, p. 500
Save Richmond Farmland Society v. Richmond, p.505
Newfoundland Telephone Co. v. Newfoundland, p.508

(2) Lack of Independence As A Basis For Challenge

Readings: Text pp. 528 - 530; pp. 539 - 552;
 Note: Review also: *MacBain (supra)* and *Bell Canada (supra)*
 Relevant Cases *Sethi v. Canada (Min. of Employment and Immigration)*, noted at p.528-529
Canadian Pacific Ltd. v. Matsqui Indian Band, p. 539
2747-3174 Quebec Inc v. Quebec (Regie des permis d'alcool), p. 550

ADD *Ocean Port Hotel Ltd. v. B.C.*, [2001] 2 S.C.R. 781 (extract on website)
 See also: *Administrative Tribunals Act*, ss. 1-10
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_04045_01

H. PROCEDURAL FAIRNESS AND INSTITUTIONAL DECISION-MAKING*

*** NOTE: We will cover this section only if there is time to do so. It may be omitted.**

(1) Introduction

Readings: Text pp. 557 - 559

(2) Consultation Among Agency Members

Readings: Text 569 - 603
 Relevant Cases: *IWW of America Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, p.569
Tremblay v. Quebec, p.593

(3) Use of Agency Guidelines to Guide Decision-Making by Members

Readings: Text pp. 638-643
 Relevant Case: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, p. 638

PART III SUBSTANTIVE REVIEW**A. INTRODUCTION TO SUBSTANTIVE REVIEW: ISSUES/BACKGROUND****(1) The Constitutional Basis for Judicial Review Powers**

Readings: Review *Crevier* pp. 712-716 (assigned previously)

(2) Getting Started: Underlying Issues and Questions and What to Look For in Reading Cases

ADD: Handout: Introduction to Substantive Review (to be posted on course website)

(3) Getting Situated: An Introductory Overview of (a) the Current “*Dunsmuir*” Approach to Determining the Standard of Review and (b) the Legislated Approach in British Columbia’s *Administrative Tribunals Act*

ADD: Handout: Introduction to the *Dunsmuir* Approach to Determining the SOR (to be posted)
Administrative Tribunals Act, ss. 1, 58, and 59

B. HOW DID WE GET TO DUNSMUIR? TRACING THE DEVELOPMENT OF SOR LAW

(1) Development of the Law Part I: Judicial Review in the Presence of Privative Clauses: Review on the Basis of “Jurisdictional Error” and the Original Rationale for Judicial Deference

Readings: Text pp. 698- 699 (what is a privative clause); pp. 807 - 817
 Relevant Case: *CUPE v. New Brunswick Liquor*, p. 807

ADD *UES Local 298 v. Bibeault* (extract on course website under “Bibeault”)
National Corn Growers Assn v. Canada (Import Tribunal) (extract from the decision of Justice Wilson on course website)

(2) Development of the Law Part II: The Extension of the Judicial Deference Rationale to Statutory Appeals of Administrative Decisions

Readings Text pp. 723 - 735
 Relevant Cases *Pezim v. British Columbia (Superintendent of Brokers)*, p.723
Canada (Director of Competition) v. Southam Inc., p.729

(3) Development of the Law Part III: The Entrenchment of the Pragmatic and Functional Approach Prior to *Dunsmuir*

Readings Text pp. 768 - 776; pp. 760 – 767
 Relevant Cases: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, p.768*
ADD *NOTE: Please also read paras 30 to 35 of *Pushpanathan* (extract on course website)
Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, (extract on course website)

(4) Pre-*Dunsmuir* Problems and Critiques of the SOR Jurisprudence and the “Made in BC” Response

Readings **ADD**: *Toronto v. CUPE Local 79* - Justice Le Bel’s “Cri de Coeur” (extract on course website)
Administrative Tribunals Act ss. 1, 58, 59

C. The Dunsmuir Decision and Its Aftermath

(1) The *Dunsmuir* Decision

Readings **ADD** *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (extract on course website)

NOTE: Parts of the *Dunsmuir* decision can be found in 4 separate chunks in the text: pp. 680-688: paras 24-34, para 43, and paras 51-76 (new approach to determining SOR); pp. 844-846: paras 34-42 (background on the evolution of the standards of review); pp. 847-848: paras 46-50 (meaning of reasonableness SOR); pp. 870-872: paras 71- 76 (application of reasonableness SOR)

Some Lingering Questions about SOR Analysis as a result of *Dunsmuir* ...

Readings: Text pp. 688-696;

(2) Looking More Closely At BC’s Legislated Standards of Review

Readings: **ADD** *Administrative Tribunals Act* ss. 58, 59
Lavender Cooperative Housing Assoc v. Ford (2011 BCCA) (extract on course website)
Manz v. Sundher (referred to in text pp. 892-893)

(3) Post-*Dunsmuir* Developments in the Supreme Court of Canada

(a) The *Khosa* Decision and Substantive Review under the *Federal Courts Act*

Readings **ADD**: *Canada (Citizenship and Immigration) v. Khosa* (extract on course website: “Khosa”)
Federal Courts Act ss.18, 18.1 to 18.5, and s.28

(b) What are “true” jurisdictional questions” post-*Dunsmuir*?

Readings **ADD:** *Nolan v. Kerry* (extract on course website)
Northrop Grumman Overseas Corp (extract on course website)

(c) What is the meaning and role of “precedent” in relation to determination of the SOR post-*Dunsmuir*? Are we moving towards adoption of a “categorical” approach?

Readings **ADD:** *Smith v. Alliance Pipeline* (extract on course website)

(d) Underlining the Ongoing Importance of Pre-*Dunsmuir* Law: Using the “Statutory Purpose of the Tribunal” as a Factor in Determining the SOR

Readings: Text pp. 738 - 746 (and review what we have learned from previous cases)
 Relevant new case: *Bell Canada v. Bell Aliant Regional Communications*, p.739. NOTE: read **only** to the end of page 746 (up to para 39) of the extract of *Bell Aliant*.

(e) Nature of the Question: Law? Fact? Mixed Law and Fact? Discretion? Jurisdiction? ... and What are “Questions of general law that are both of central importance to the legal system and outside the tribunal’s specialized area of expertise?”

Readings: Text pp. 757 - 760 (and review what we have learned from previous cases)
ADD: Note re *Nor-Man Regional Health Authority v. Attorney General* (to be posted)

F. “Abuse of Discretion” As A Ground for Judicial Review”**(1) Introduction and General Principles**

Readings: Text pp. 53-62 (the part of *Baker* dealing with discretion)
 Text pp. 951-970
 Relevant Cases: *Roncarelli v. Duplessis* (noted at p. 956)
Suresh v. Canada, p. 958

(2) Unreviewable Discretionary Powers?

Readings: Text pp. 987-991
 Relevant Cases: *Council of Civil Service Unions v. Minister for the Civil Service*, pp. 988-989
Black v. Canada (Prime Minister), p. 990

ADD *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 (extract on course website under “Khadr”)

PART IV TRIBUNALS’ JURISDICTION TO APPLY THE CHARTER*

* *We will cover this Part only if there is time to do so.*

Readings: Text pp. 895-909; 921-934
 Relevant Cases: *Nova Scotia (Workers’ Compensation Board) v. Martin*, p. 896
R. v. Conway, p. 921
Paul v. B.C. (Forest Appeals Commission), referred to at pp. 933-934

ADD ATA ss. 43-46
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_04045_01