

Fall 2009

ADMINISTRATIVE LAW 301F

Maneesha Deckha, Associate Professor

UNIT VALUE: 2.0 **LOCATION:** Room 157, Fraser (Law) Building

CLASS TIMES: 8:30 a.m.-10:30 a.m., Tuesdays and Thursdays

OFFICE HOURS: Tuesdays between 10:30 a.m. and 12:30 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
Assistant: Gail Rogers, rm. 241, tel.: 250.721.8160, 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. The course is a staple of public law and serves as a foundation for more specialized study in numerous other areas of public law including constitutional, immigration, labour, financial services, environmental, freedom of information, privacy, and human rights laws.

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 an open book, take-home final examination worth 100% of your grade. **The exam will be distributed in class on Thursday, December 3, 2009 at the end of class and your answer is due in the front office Law Reception on Friday, December 11, 2009 at noon.** *These dates are subject to change.* More detailed instructions will be handed out with the exam and may be posted a day in advance. The format of the final examination may include essay, short answer, fact patterns, multiple choice, true/false, and/or other questions. While not finalized, the maximum word limit will likely be 3000 words. Previous exams have typically involved choice as to which questions to answer in a particular Part(s). Copies of previous exams are on reserve at the Law Library for review.

Option B: Evaluation consists of three (open book, take-home) assignments as follows:

1. Short Essay/Critical Reflection relating primarily to Section I of the course syllabus. This assignment will be worth 15% of your grade. The maximum word limit will be 700 words. **The assignment will be handed out in class on Tuesday, September 22, 2009 and is due at the beginning of class on Tuesday, September 29, 2009.** Further details will be given with the assignment when it is handed out.
2. Essay question(s) relating primarily to Section II of the course syllabus. This assignment will be worth 40% of your grade. The maximum word limit will be 1800 words. **The assignment will be handed out in class on Tuesday, October 13, 2009 and is due at the beginning of class on Tuesday, November 3, 2009.** Further details will be given with the assignment when it is handed out.
3. Essay question(s) relating primarily to Section III of the course syllabus. This assignment will be worth 45% of your grade. The maximum word limit will be 2000 words. **The assignment will be handed out in class on Thursday, November 12, 2009 and is due in the front office Law Reception on Friday, December 11, 2009 at noon.** Further details will be given with the assignment when it is handed out.

All of the above dates and word limits are subject to change.

Students are expected to follow all assignment or examination instructions. Deadlines are firm. Work submitted late is subject to penalty. Students requiring accommodation for assignments or the examination due to illness, disability, religious observance or other reasons should contact Associate Dean Heather Raven as soon as possible.

How to decide between Options?: Option B may appeal to students who prefer essay writing, multiple assessments spread throughout the term, flexibility in scheduling academic work, and the ability to reflect on assessment questions in the

process of learning. Option B may also ask students to consider external materials although course materials will be central to the assignments. While Option A may also involve essay questions, other types of questions will also be present as described above and external research will not be required. Option A may appeal to students who prefer a single assessment tool at the end of the term scheduled during the examination period within a shorter timeframe reflecting a variety of question formats and involving a shorter writing requirement than Option B. Please note that no collaboration whatsoever is permitted on the examination in Option A. Students electing Option B may discuss the assignment with each other, but no collaboration whatsoever is permitted on written work submitted (including drafts). Detailed instructions will accompany the assignments and examination. Students should consult me with any questions they may have regarding the two options.

How to indicate your choice of Option?: Students who submit Assignment 1 register their choice to be evaluated by Option B and thus must submit Assignments 2 and 3; students cannot elect Option A after they have submitted Assignment 1. Students who do not submit Assignment 1 will be evaluated by Option A.

Major Paper Ineligibility: Students are not permitted to write their Major Research Paper for 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
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
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/calendar2009/FACS/UnIn/UARe/PoAcI.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.

A Statement About Classroom Climate and Professionalism

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 environment where all members feel comfortable to participate and interact with one another in inclusive and respectful ways. Please also 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. Professionalism and consideration in these and all other matters are appreciated.

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.

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 likely have parts that are out-of-date): 1) D. Mullan, *Administrative Law* (Essentials of Canadian Law Series) (Toronto: Irwin Law Inc., 2001). It is available on Library Reserve at KE5015 M84 and also on Quick Law at db mull; 2) D.W. Elliott, *Administrative Law and Process, rev. 3d ed.* (Canadian Legal Studies Series) (Concord, ON: Captus Press, 2003); and 3) D. W. Elliott, *Introduction to Public Law* (Concord, ON: Captus Press, 2007). These and a number of other reference texts are on reserve at the Law Library.

SYLLABUS

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 for this part of the course.

Make-up Classes: Classes on Thursday, October 1st and Thursday, October 29, 2009 are cancelled. Make-up classes have been scheduled as follows (although these dates are subject to change and further make-up classes may be scheduled):

- Friday, September 25, 2009 from 12:30-2:30pm in Room 157.
- Friday, October 23, 2009 from 12:30-2:30pm in Room 157.

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) (**skim**)

D. The Administrative State and the Rule of Law

Readings: Text Chapter 4 pp. 77- 81 (The “Diceyan view”)
Roncarelli v. Duplessis (**skim**)
Re: Manitoba Language Rights (**skim**)
British Columbia v. Imperial Tobacco Canada Ltd.

(**skim**)

Annie Bunting, “Feminism, Foucault and Law as Power/Knowledge” (moodle)
ADD *Canada House of Commons v. Vaid* (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)
 Daiva Stasiulis and Abigail Bakan, “Negotiating the Citizenship Divide”(moodle)

SECTION II SUBSTANTIVE REVIEW IN ADMINISTRATIVE LAW

A. Introduction to Substantive Review: Issues/Background

1. The Constitutional Basis for Judicial Review Powers

Readings: Review *Crevier* (assigned previously)

2. Substantive Judicial Review Policy Issues/Questions About Proper Institutional Roles: The Rule of Law, Functionalism and Rationales for Judicial Deference

Readings: Handout – Introduction to Substantive Review (moodle)
ADD *National Corn Growers Assn v. Canada (Import Tribunal)* [**Note:** Read the extract on the course moodle website instead of the case that appears 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”

2.

Readings: Text, Chapter 8, pp. 197-208
CUPE v. New Brunswick Liquor
UES Local 298 v. Bibeault

3. Development of the Law Part II: Extension of Judicial Deference Theory to Appeals of Administrative Decisions

Readings Text, Chapter 8, pp. 208-212
Canada (Director of Competition) v. Southam Inc.

4. 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

5. Pre-Dunsmuir Problems and Critiques of the SOR Jurisprudence and a “Made in BC” Response

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
 Robin Junger, “British Columbia’s Experience with the ATA” (moodle)

6. The Dunsmuir Decision - A New Departure Or Just More of the Same?

Readings Text, Chapter 8, p. 227
Dunsmuir v. New Brunswick
 “Dunsmuir – Plus ca change”, Lorne Sossin (on companion website)
ADD *Canada v. Khosa* (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)

ADD *CUPE v. Ontario (Minister of Labour)* (moodle)

Lake v Canada (Minister of Justice) (read the extract on the companion website that goes with Chapter 8)

E. “Jurisdiction” and Ability to Consider Constitutional Issues

Readings Text, Chapter 7, pp. 189-194

Administrative Tribunals Act ss. 43-46

ADD *Paul v. BC* (moodle)

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 Common Law “Procedural Fairness” Apply?

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

Readings Text Chapter 5 pp. 115-117

Nicholson v. Haldimand

Cardinal v. Kent Institution

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.)

Mount Sinai Hospital Center v. Quebec

ADD *CUPE v. MOL* (paras. 131-46) (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 case 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 7 pp. 169-181
ADD: *Authorson v. Canada (AG)* (moodle website)
Blencoe v. Human Rights Commission
ADD *New Brunswick (Minister of Health and Community Services) v.: J.G.* (moodle website)

 Patricia Hughes, “*New Brunswick v. G.(J.)*”
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 – See *Blencoe* (covered previously)

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)

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, Impartiality and Lack of Independence as Grounds for Challenge

1. Bias Issues – Recognizing and Controlling Bias in Administrative Decision-Makers

Readings: Review *Baker* re bias issue
ADD *R. v. R.D.S.* (moodle)
 Maryka 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)

2. Tribunal Independence and “Institutional Impartiality”

Readings: Text Chapter 7 pp. 139-159
Ocean Port Hotel Ltd. V. British Columbia

3. The Search for Consistency and Problem of “Institutional” Decision-Making

Readings: Text Chapter 7 pp.159-165
International Woodworkers of America v. Consolidated Bathhurst
Geza v. Canada (Minister of Citizenship and Immigration) (F.C.)