

PREVIEW COPY

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NCA ADMIN LAW – NOTES PREVIEW

CHAPTER 1: SETTING THE STAGE

What is Administrative Law?

Administrative Law applies to the exercise of public authority in ways that affect a person or group and as such, raise the possibility of review before a specialized tribunal or court.

The Subject Matter of administrative law is the law governing the implementation of public programs, particularly at the point of delivery, where they are likely to have their most immediate impact on the lives and rights of individuals.

Most of these programs are administered under the authority of a Statute.

Having identified the problem, government may respond in a number of ways:

- To do nothing about it;
- To deal with the problem through existing legal tools and institutions;
- To create a new framework administered by specialised agencies which are not Courts of law.

It is in the third option that administrative law comes into picture.

Administrative law focuses on the following aspect:

- Fairness of the administrative procedure;
- Providing an opportunity for the affected/interested party to participate;
- Adjudging the factual and legal authority of the administrative decision-maker;
- Ensuring rational exercise of discretion;
- Ensuring adequacy of remedies to challenge abuse of power by public bodies.

The Subject Matter of Public Administration

- Often, it is in the following areas that administrative disputes and Employment; litigation arise:
- Regulated industries such as oil and gas;
- Economic activities;
- Professions and trades;
- Social control such as imprisonment;
- Human rights. In this sphere, the Human Rights Code are applicable and not the Charter of Rights;

- Income support;
- Public service.

Institutions of the Administrative State

1. Legislatures:

Nearly all public programs originate with a statute enacted by either the provincial or federal legislature to create new legal rights and duties. Thus, legislatures often have a role to play in its subsequent administration. Additionally, the concerned Minister in-Charge of a particular program may also be questioned in the legislature. For example, in the context of Ontario and British Columbia it is the Legislative Assembly of Ontario and the Legislative Assembly of British Columbia respectively.

2. Cabinet and Ministers

They are collectively responsible to the Parliament regarding the conduct of the government. Ministers are individually accountable for the exercise of powers assigned to them. Ministers, via departmental officials may exercise discretionary powers that directly affect individuals. It is only in exceptional cases that a right of appeal may lie to the Cabinet from the decisions of administrative agencies. Example: Defence Minister of Canada handles the Ministry of Defence.

3. Municipalities

Municipalities are local administrative bodies that are established to conduct and oversee local operations. For example, in the Greater Toronto Area (GTA) in Ontario, we have the Municipality of Clarington, City of Burlington Municipality, City of Mississauga Municipality, etc. They derive power as delegated by the provincial legislature. This includes the power of taxation. For example, in the province of Ontario, it is the Municipal Act, 2001 that is the main statute which governs the creation, administration and government of municipalities.

Many programs that have the most frequent impact on people are administered at the local level of government. The elected members of municipal councils' debate and pass the by-laws and resolutions at public meetings. However, municipalities do not work without direction. Control standards may be exercised in the following manner:

- By virtue of the enabling legislation;
- Through Ministerial policy directives or guidelines;
- According to the terms on which provincial funding is provided.

4. Crown Corporations

Crown corporations offer certain important public services. The foremost examples of crown corporations would be Canadian Broadcasting Corporation (CBC), via Rail and Canada Post. They are granted sufficient independence and autonomy in their daily functioning. These bodies operate on the fringes of public and private law in the sense that they may compete with privately owned corporations, yet much of their decision making will be based on commercial principles, and their legal relations with suppliers and customers are governed by contract. However, the government continues to exert considerable authority over them through:

- The power of the purse;
- Appointment of Board of Directors.

For example, in the context of Canadian Broadcasting Act of 1991 is the Broadcasting Corporation (CBC), the governing statute owing to which the corporation is directly responsible to the Parliament through the Department of Canadian Heritage.

This exercise of government power is justified owing to the government characteristics that the corporation has such as statutory establishment and public ownership.

5. Private bodies and public functions

Some typically private bodies may share resemblance to administrative agencies owing to the functions that they perform. The foremost example is of sports governance bodies. These bodies establish rules on the affiliation of clubs to the governing body and resolve disputes over club and player eligibility.

Another example would be of universities which are also at the fringes of the government. While they have contractual relations with their employees, all universities in Canada function under a statutory mechanism and execute functions which are viewed to be public in nature. Further, Canadian universities typically derive most of their funding from the government.

6. Independent administrative agencies

These predominantly emerged post WWII as result of rapid expansion of responsibilities which began to be assumed by the government. The common examples include but are not limited to boards, tribunals and commissions. In the context of the Canadian province of Ontario, independent administrative agencies

such as the Animal Care Review Board, Fire Safety Commission, Human Rights Tribunal of Ontario, Landlord and Tenant Board are some of the examples. In the context of the Canadian province of British Columbia, the well-known administrative tribunals are British Columbia Human Rights Tribunal, British Columbia Utilities Commission, and the British Columbia Farm Industry Review Board.

These serve an important function as they are viewed to have consistent long-term policies owing to lack of governmental interference. They resemble administrative bodies in the following ways:

- They have a certain degree of independence from government functioning and interference. The implication of this that they operate with relative autonomy from the Minister who cannot dictate their terms of functioning.
- They often are mandated to give affected parties an opportunity to partake in the decision-making process. This opportunity may be in the form of providing evidence and making submissions. They operate at the point where a public program is applied to the individual.

They are specialised bodies delivering particular public programs. They differ from administrative bodies in the following ways:

- Their decisions lie along a continuum that spans from those resembling courts to those that share greater similarities with the decisions made in the political process.
- They operate only with a limited degree of discretion that is exercised in accordance with the particular factual matrix of a case.
- Some agencies have a huge caseload. The foremost example of this would be the Immigration and Refugee Board which is the largest Tribunal in Canada and is responsible for determining thousands of refugee and immigration claims in a year.
- Their areas of operation are varied. Some agencies may only make recommendations to a final decision-making body. On the other hand, some agencies make the initial and even the final determination of individuals' legal rights. An example would be the Ontario Human Rights Tribunal and the Ontario Securities Tribunal.

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NCA ADMIN LAW – Q&As SET PREVIEW

ADMINISTRATIVE LAW NCA SAMPLE PAPER

FACTS

Mr Arnest is a foreign national currently in prison in Canada. He was extradited to Canada from Belgium on charges of computer hacking under the *Criminal Code*. After his trial, he was convicted and sentenced to 5-years imprisonment. At the same time, the Canadian immigration authorities prepared an inadmissibility report under the *Immigration and Refugee Protection Act*. This report deemed Arnest inadmissible to Canada for serious criminality and he was ordered deported, with deportation delayed until the end of his prison sentence.

Mr Arnest is Buddhist – his father (whose surname he uses) was a Belgian. Arnest's mother is from Tibet, and Arnest follows his mother's religion. The Correctional Service of Canada (CSC) has a chaplaincy service available for inmates, but it does not include religious figures of all faiths. There are no Buddhist chaplains employed by the CSC.

Mr Arnest brought a complaint to the Canadian Human Rights Commission (the Commission), under the *Canadian Human Rights Act* (the Act), arguing that the CSC has discriminated against him on religious grounds by failing to provide a Buddhist chaplain. Section 5 of the Act reads:

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
- a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
 - b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.

“Prohibited grounds of discrimination” include “religion”. Upon receipt of Arnest's complaint, the Commission appointed an investigator, as authorized under the Act. An investigator under the Act is responsible for investigating a complaint and reporting on the material facts to the Commission. The Commission then decides whether to refer the matter to a full Human Rights Tribunal proceeding.

In her correspondence with Arnest, the investigator indicated “I will conduct an interview with you before submitting my report. Based on the textual records I have consulted; I believe this is a case that deserves a full Tribunal hearing.”

The investigator did not, however, contact Arnest again. Instead, two weeks later, she issued her report to the Commission. The material parts of that report read:

I was very skeptical of this complaint, even before I started this investigation. And indeed, I was unable to establish that Arnest is, in fact, Buddhist. Since Arnest is a convicted criminal and must be presumed to be dishonest, I am not prepared to believe him when he claims to be a Buddhist. Moreover, I conducted substantial genealogical research into the surname “Arnest”. This included consultation with a genealogical expert. I determined the name “Arnest” is ethnically Flemish in origin. It seems very unlikely a person of Flemish ethnicity from Belgium is Buddhist. At any rate, given the backlog of human rights complaints, I do not believe the Commission should be prioritizing complaints by prisoners. These should be given much lower priority in favour of complaints by non-criminals.

Upon receipt of the investigator’s report, the Commission convened a meeting of five members at which the investigator presided as chair. All five members, the investigator included, then deliberated on the matter. The Commission then decided to reject Arnest’s complaint, and issued the following reasons:

On full review of this complaint, we conclude that the Commission has no jurisdiction to hear a complaint in relation to the alleged discriminatory practice. Under s.40(5)(a) of the Act, we may not hear a complaint unless the act or omission constituting the alleged discrimination “occurred in Canada and the victim of the practice was at the time of the act or omission...lawfully present in Canada”. Mr Arnest has been deemed inadmissible to Canada under immigration law – he is under a deportation order. He is not a temporary resident, permanent resident or citizen of Canada. He is not, therefore, “lawfully present in Canada” for the purposes of s.40(5)(a), even though he is physically in Canada for the duration of his prison sentence. We will not, therefore, proceed with this complaint.

Further, even if we had proceeded with this complaint, we would refuse to recommend the matter be referred to a full Human Rights Tribunal process for the reasons outlined by the investigator in her report. We adopt those reasons in full.

Case dismissed.

Section 40(5)(a) of the Act reads: “No complaint in relation to a discriminatory practice may be dealt with by the Commission under this Part unless the act or omission that constitutes the practice (a) occurred in Canada and the victim of the practice was at the time of the act or omission either lawfully present in Canada or, if temporarily absent from Canada, entitled to return to Canada”.

Question:

Arnest is upset by this series of events, and remains without a Buddhist chaplain while in prison. He wishes you to advise on the administrative law issues raised by this full sequence of events. The senior partner at Best & Hope wants a brief (but comprehensive) memorandum on the procedural and substantive administrative legal issues at stake in relation to these events. He also wants to know how this decision can be challenged. Another student in the office is addressing *Charter* issues – you are instructed **not to deal with Charter matters**. Write the requested memo.

SAMPLE ANSWER

ISSUE:

Whether Arnest can challenge the decision of the Commission?

OR

Whether the decision of the Commission was violative of Arnest's procedural obligations and has raised any substantive issues?

RULES:

- Judicial Review

Procedural Issues:

- Duty of Fairness: *Knight's* Three pong test
- Degree of Fairness: *Baker's* synthesis
- Legitimate Expectation
- Content of Procedural Obligation: 1) Right to be heard 2) Unbiased and independent Decision Maker.

Substantive Issues:

- Nature of the issue: Question of Fact/Law/jurisdiction?
- Standard of Review
- Presumption of Reasonableness-*Vavilov* Case + *Music Directors* Case

ANALYSIS:

Arnest could challenge the Commission's administrative decision through the process of Judicial Review. This involves filing an application with the appropriate court, typically a provincial superior court or the Federal Court, within a set timeframe, usually 30 days from the decision.

Wherein, Arnest must demonstrate that the decision was flawed due to jurisdictional errors, procedural unfairness, errors of law or fact, unreasonableness, or abuse of discretion. If the standard of review is correctness, the court will not defer to the decision-maker's judgment and will substitute its own decision if it finds an error.

The process includes preparing a record of the administrative proceedings, serving notice to the relevant parties, and submitting written arguments. A hearing is then held where a judge reviews the case and decides whether to uphold, quash, or remit the decision for reconsideration. If dissatisfied with the outcome, parties may appeal to a higher court. Legal representation is often crucial due to the complexity of judicial review proceedings.

Therefore, it is imperative to first analyse the Procedural and Substantive Issues in Arnest's case to confirm whether he can successfully carry out the challenge or not.

Procedural Issues:

Procedural Fairness is about whether the administrative decision maker used proper procedures in reaching a decision. The Administrative Decision Maker should always adhere to the principle of Natural Justice while dealing with cases before him.

Prima Facie, in the case of Arnest, the principle of natural justice seems to be ignored. During the investigation of the complaint, no fair hearing was given to Arnest and that the duty to fairness was also ignored. But firstly, it is imperative to check whether duty of fairness is owed by the ADM to the Aggrieved Party.

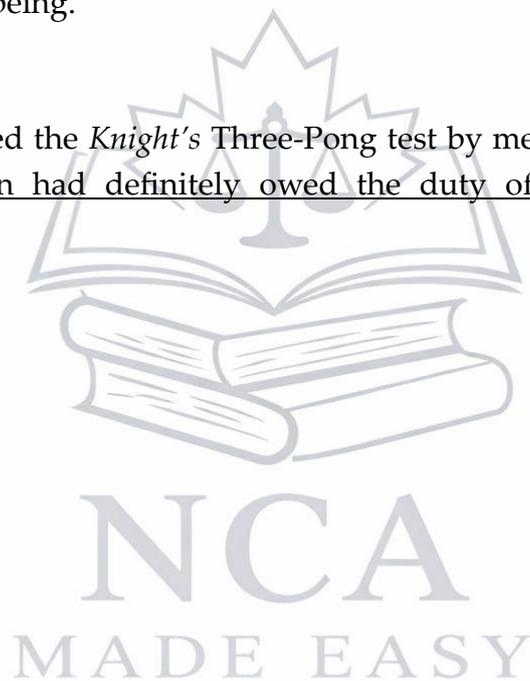
Whether duty of fairness is owed by the Commission to Arnest can be identified with the application of major landmark case of the *Knight v. Indian Head School Division No. 19* and the degree of fairness owed to Arnest by the Commission can be concluded with the application of *Backer v. Canada (Minister of Citizenship and Immigration)* as these case laws clearly lay down the formula. Therefore, we need to apply the Knight's Three Pong Test and Baker's synthesis in step-by-step manner to the present facts of the case as follows:

Knight's 3 Pong Test:

1. Nature of the Decision to be made by the decision maker: In the instant case, the nature of the decision of the Board is final as it has dismissed the complaint of Arnest based on the investigator's report and its own findings.
2. The relationship that existed between the decision maker and the individual: In the instant case, the relationship between Arnest and the Board is of a Complainant and the adjudicating body.
3. The effects of the decision on individual rights: The commission's rejection of Arnest's complaint leaves him without access to a Buddhist Chaplain in prison. This significantly impacts his ability to practice his religion, infringing on his fundamental right to religious freedom and potentially affecting his mental and emotional well-being.

Arnest's case has passed the *Knight's* Three-Pong test by meeting all three elements. Therefore, Commission had definitely owed the duty of fairness in processing Arnest's Complaint.

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NCA ADMIN LAW – IRACs PREVIEW

Topics Covered in IRACs

I. JUDICIAL REVIEW

1. Availability of Judicial Review
2. Judicial Review vs Statutory Appeal

II. DUTY OF FAIRNESS

3. Duty of Procedural Fairness – **Knight Test**
4. Degree of Fairness – **Baker Test**
5. Legitimate Expectation

III. EXCEPTIONS TO DUTY OF FAIRNESS

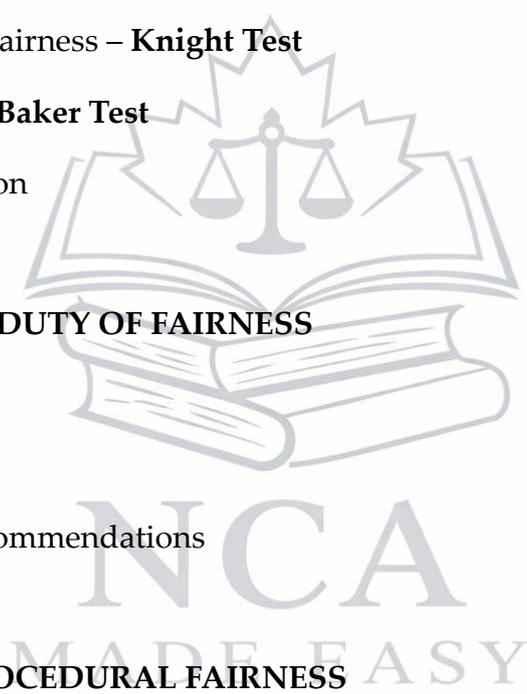
6. Legislative Decisions
7. Emergencies
8. Investigations & Recommendations

IV. CONTENT OF PROCEDURAL FAIRNESS

9. Right to Be Heard
10. Right to Reasons
11. Bias – Reasonable Apprehension of Bias
12. Independence of Tribunal

V. INSTITUTIONAL DECISION-MAKING

13. Institutional Decision-Making & Sub-delegation



VI. CHARTER & BILL OF RIGHTS IN ADMIN LAW

14. Charter Section 7 – Procedural Protection

15. Canadian Bill of Rights

VII. INDIGENOUS DUTY TO CONSULT

16. Duty to Consult – Haida Test

17. Duty to Accommodate

VIII. STANDARD OF REVIEW – VAVILOV

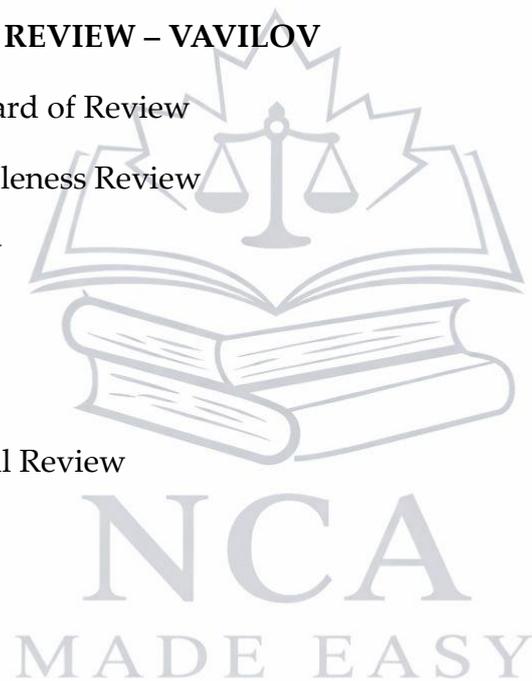
18. Selecting the Standard of Review

19. Applying Reasonableness Review

20. Correctness Review

IX. REMEDIES

21. Remedies in Judicial Review



1. Availability of Judicial Review

ISSUES:

1. Whether the decision of the _____ (Administrative Decision-Maker / Tribunal / Minister / Board) is amenable to **judicial review** by a court?
2. Whether the applicant can seek judicial review in light of:
 - the nature of the decision,
 - the authority of the decision-maker, and
 - the availability of alternative remedies?

RULES:

1. Nature and Scope of Judicial Review

Judicial review is the mechanism through which courts supervise administrative decision-making to ensure legality, procedural fairness, and rationality.

Judicial review is concerned not with the merits of the decision, but with:

- how the decision was made, and
- whether it was made within legal limits.

Case law:

- *Dunsmuir v New Brunswick* (2008 SCC)
- *Canada (Minister of Citizenship and Immigration) v Vavilov* (2019 SCC)

2. When is Judicial Review Available?

Judicial review is generally available where:

1. The decision is made by a **public authority** exercising **statutory power**
2. The decision is **administrative in nature**
3. The decision has **legal or practical effects** on rights, privileges, or interests
4. The applicant has **standing**
5. There is **no adequate alternative remedy**, or exceptional circumstances justify bypassing it

Key case:

- *Strickland v Canada (Attorney General)* (2015 SCC)

3. Public Authority Requirement

Judicial review applies only to decisions taken by:

- Government bodies
- Statutory tribunals
- Ministers
- Agencies exercising delegated public power
- Purely private decisions are not reviewable.

Case law:

- *Highwood Congregation of Jehovah's Witnesses v Wall* (2018 SCC)

4. Effect of Statutory Appeal or Alternative Remedy

Where a statute provides an appeal mechanism, courts generally require the applicant to:

- exhaust the statutory remedy first.

However, judicial review may still be available if:

- the statutory remedy is inadequate,
- the issue is constitutional,
- or the challenge concerns procedural fairness or jurisdiction.

Case law:

- *Strickland v Canada*
- *Vavilov* (statutory appeals affect standard of review, not availability per se)

ANALYSIS:

Step 1: Identify the Decision and Decision-Maker

(Students must always start here)

In the present case, the impugned decision was made by _____ (name/designation), which derives its authority from _____ (enabling statute/regulation). The decision relates to _____ (e.g., licence denial, termination, deportation, disciplinary action), and therefore involves the exercise of public statutory power.

Accordingly, the decision-maker qualifies as a public authority, making its decision prima facie subject to judicial review.

Step 2: Determine the Nature of the Decision

(Administrative vs legislative)

The decision in question is administrative rather than legislative, as it:

- applies existing law or policy,
- is directed at specific individuals,
- and determines individual rights or interests.

As held in *Nicole*, administrative decisions that affect individuals are subject to judicial supervision to ensure compliance with the rule of law.

Step 3: Assess the Impact on Rights, Privileges, or Interests

The decision directly affects the applicant's _____ (e.g., livelihood, legal status, professional licence, liberty, reputation). Even where no vested "right" exists, the Supreme Court has recognized that serious practical effects are sufficient to trigger judicial review.

This satisfies the requirement that the decision have legal or practical consequences.

Step 4: Standing

The applicant is directly affected by the impugned decision and therefore has sufficient standing to bring an application for judicial review. There is no indication that this is a generalized grievance or abstract challenge.

Step 5: Consider Alternative Remedies

Although the enabling statute provides _____ (appeal / reconsideration / internal review), this remedy is _____ (inadequate / limited / discretionary / unavailable for fairness issues).

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