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Introduction

This is the June 2022 Version of my Canadian Administrative Law notes, necessitated by the recent updates in the NCA syllabus on the subject. Many candidates have asked to know the difference between the previous syllabus and the present one, as, according to them, they couldn't find much. I couldn't either. But, what I deduced is the fact that the 8th Edition of the *Administrative Law: Cases, Texts & Materials*, on which the syllabus is based has just been released. This edition now contains materials about the new standard of review as stipulated by the SCC in *Canada v. Vavilov*. And since the text was revised, there arose the need for NCA to update the syllabus, to match references to topics and pages in the new syllabus.

I have also had to explain to many of my users that my note already contained detailed explanation about the 'new' standard of review in *Vavilov*, exploiting the benefit of foresight. As a matter of fact, I had included many other recent judicial decisions in my note, so much so that virtually all the materials needed to upgrade your knowledge of Canadian Administrative Law are already included. But, to assuage the fears of many of my readers, I have to update this note again in line with the June 2022 syllabus, so that you are confident in the belief that you are using notes updated to the current syllabus in preparing for the exams. Therefore, I have made extensive use of the current edition of the required texts, relying on it as a major resource in preparing this note.

However, please remember, as explained above, that the bulk of the note remains the same, having been previously updated to the currently applicable laws. Though there are few additions here and there, the most additions have only been in my Chapter 10 on *Vavilov*. I have restructured the Chapter and included plenty of additional resources to help you better understand the current standard of review selection and application, arising from the SCC decision in the case. I have also broken down the contents of the syllabus in this Chapter to ensure that all what the syllabus requires you to understand are fully explained. This in itself explains why the pages of this edition of my note have now increased substantially.

Let me reiterate what I had stated in my earlier note:

As I've always stated, Canadian Administrative Law appears to be one of the toughest subjects under the NCA syllabus. The reason is simple: the course content is voluminous, with a lot of materials to read. The 8th edition of the required text alone is about 1052 pages. Unfortunately, there is no escape route as this is one of the 5 Mandatory Courses that must be assigned to all internationally-trained lawyers and law graduates.

The required materials are full of details or 'history'. And it is so easy to get lost in these details or history. But as the June 2022 NCA syllabus warns, "… history is history, and on the exam you need to understand the

rule that applies now". Mind you, knowledge of the history of the development of Canadian Administrative Law should not be overlooked, as this is equally important. But do not focus too much attention on this.

My experience with Admin law gingered me to prepare this Note, in as simple and easy-to-read manner as I could. So that at first reading, you will have a clear understanding of what the course is all about, and this helps you in the exams.

I've discovered that the totality of this Admin law course basically consists of the three major sections I've listed below. That is equally the way the NCA syllabus is structured but many of us do not even notice this. However, following this structure will give you the better chance of tackling any administrative law question, because you know which section the question relates to and you can immediately tackle it from there. To this extent and to help you understand the course much more easily, I have divided this Note into those three sections, as follows:

1. Procedural Fairness – this talks generally about the procedural obligations that administrative decision-makers must meet.
2. Substantive Constraints – (or substantive review) – this is generally about the substantive errors that administrative decision-makers must avoid and the manner their decisions will be reviewed by the courts when they fall into these errors.
3. Challenging Administrative Decisions – this deals generally with the available channels for challenging the decisions of administrative bodies and the type of reliefs available to one who wishes to challenge that decision, and where and how to go about it.

In fact, this categorization was the first thing that "opened" my understanding of the course. Of course, other topics follow, but those three are the major areas where you should devote extra attention. So, when you are faced with a relevant fact-based administrative law situation in the exam hall, you should be able to categorize it into those 3 sections and know which one applies to that question. In tackling the question, the mental picture you should always create is this:

- Stage 1 - Firstly, ask if there is any procedural obligation or duty of procedural fairness owed to the individual. To determine this, check the exam question for any stated source of procedural obligation, i.e., check whether the source provides for a procedure that must be followed. Sources here include: the enabling statute, subordinate delegation, policy or guidelines, general procedural statutes, Bill of Rights and Charter of Rights. If procedural obligation is not provided for in any of the above sources or if it's not adequately provided for, then know that common law may provide the missing obligation through the Knight's 'Three-Prong' trigger and the doctrine of legitimate expectation.

- Stage 2 – If there is a duty of procedural fairness, check the question to see if any of the five Baker principles apply to the individual. Watch out for the exceptions. (The five Baker principles talk about the nature and impact of the decision on the individual, the relationship between the parties, the individual's legitimate expectations, and the choice of procedure by the administrative body).

- Stage 3 – if any of the 5 Baker principles is present, then check the exam question to see if any of the content of procedural fairness is missing, i.e., whether the individual was given fair hearing (in terms of notice, right to counsel, right to call and cross-examine witnesses, disclosure, discovery, etc.,) and whether there was an unbiased and independent decision-maker (who is free of antagonism, individual/institutional bias, relationship/association with one of the parties, or of involvement at the preliminary stage). Please note that there are exceptions here too.

- Stage 4 – Then determine the appropriate venue to seek judicial review. This could be at an appeal panel of the decision-making body, a tribunal, a Superior Court or a Federal Court. The enabling statute and the fact of the case will determine which venue is most appropriate to seek judicial review. And these will also determine the remedies that are available to the applicant. So, you must check the exam question for the source of the enabling legislation to be able to determine the appropriate venue to seek judicial review.

    - Stage 5 – at the court where the judicial review will take place, what kind of review mechanism will the court employ? In other words, how will the court review the decision of the administrative body that you have challenged? This is called substantive review, and this is where the decision of the Supreme Court in *Vavilov* and *Bell* in December 2019 applies. From the date of that decision thenceforth, all administrative decisions must be reviewed on the presumption that the standard of reasonableness will apply. This presumption applies to ALL administrative review cases. Therefore, courts do no longer need to first decide on which standard will apply before deciding the case. It is presumed to be reasonableness standard. This presumption is only rebuttable in these two instances: (1) if the legislature provides that another standard must apply, (e.g., by prescribing a particular standard or providing that appeal is available to the court, in which case, the court will apply the standard of correctness for questions of law and standard of palpable and overriding error for questions of fact or mixed facts and law); and (2), if the rule of law demands that correctness standard be applied (e.g., where the issue at stake is a constitutional question or question of central importance to the legal system, or one that relates to issue of jurisdiction between two or more tribunals).

With these five stages in mind, it will be easy for you to tackle most of the fact-based examination questions for Admin law. Mind you, the examiner may test you in any way it deems fit. For example, when I wrote my Admin law exam, all the five stages where present in the scenario that was presented. It was just one question (of 100 marks) that had sub-divisions, covering the five stages. But your own question may seek to test you on only one or more aspect of the five stages above, or equally on all. So, you must be at alert.

Please take note of the change in the law since *Vavilov* as it is very important. For emphasis, a warning is now contained in the NCA syllabus that you will not be awarded any mark if you rely on the old standards of review. Therefore, be informed that this Note reflects the present state of the law and in conformity with the current NCA syllabus. (Chapter 11 deals with this change). Of course, the history of the development of administrative law in Canada, and the history of all the previous standards of review that were in use up to the *Dunsmuir's* case is also contained in Chapter 10. Study this history too but remember that the appropriate standard of review is now *Vavilov*.

What makes this Note unique, I believe, is the simplicity. I developed it fully blending and incorporating all the contents of the current NCA syllabus on Administrative Law which I have quoted verbatim and included in this note. I interspersed them in each Chapter, at the beginning (and at times in the mid-pages as appropriate). Verbatim quotes from the NCA syllabus are denoted in red font color and in italics with adaptations where necessary, to enable you know that this is a verbatim reproduction of the current NCA syllabus on the subject.

Then, there's a summary of some of the important cases like *Vavilov*, *Bell*, *Baker*, *Knight*, etc., at the end. Reading them will be helpful, especially the ratios which will be of immense benefits to you. For effects, I have further thrown in a fresh list of cases for quick reference during the exam.

I have deliberately employed the simplest language in most chapters, knowing fully well that what candidates desperately need is to read and understand as much as possible. I have also included simple illustrations to assist candidates. All these are geared towards making you better understand the topics, so you can effectively deal with them in your exams.

Please take notice that this Note is but a summary of the course, and contains the major highlights of each topic. It is most useful for preparing for your exam and also during the exam itself. Many candidates have told me that they relied only on this Note and passed their exam.

I wish you success in your exams. Happy reading.

- Manuel Akinshola

Chapter 1

Setting the Stage

One of the most important things to understanding studying administrative law is the "big picture". A failure to do so may result in candidates becoming lost in extraneous details.

The critical idea at the core of Administrative Law is this: it is the body of law that governs how people exercising power pursuant to a delegation of power in a statute (or occasionally the royal prerogative) go about their business. In most cases, the people who have this form of power (again, typically given to them by a statute) are members of the executive branch of government, although often at some arm's length from it. In our system, based on the rule of law, we want to make sure that people with this power exercise it properly. Almost all of administrative law is about deciding what we mean by "properly". Culled from the NCA syllabus.

This Chapter in the NCA syllabus serves as a general introduction to Canadian Administrative Law which has been described as one of the three basic areas of public law that deals with the relationship between the government and its citizens. The other two areas are constitutional law and criminal law but the core objective of administrative law is to ensure that government actions must be legal, that powers donated by enactments are exercised properly and that the citizens who are affected by any government action have recourse to effective remedies.

It is virtually impossible for the legislature to manage every aspect of public programs. Thus, the legislature delegates its powers to administrative agencies, bodies, boards and tribunals as delegated authorities. Given this background, administrative law evolved to ensure that:

1. government actions are authorized by Parliament or the provincial legislatures, and

2. laws are implemented and administered in a fair and reasonable manner.

Therefore, it goes without saying that a strong administrative law system helps to maintain public confidence in government authority.

If you want to understand the study of Canadian Administrative law, then you must understand this "big picture", as summarized above, otherwise you will be lost in the extraneous details. What is the big picture of Canadian administrative law? It means that it is the body of law that governs those people who exercise delegated power. This point may be summarised in the following way:

- a statute, (or occasionally the royal prerogative) may create a body or agency.
- this body or agency is created for it to be able to exercise delegated powers.
- typically, the people who exercise this power are members of the executive arm of government, although they are often at an arm's length from this branch of government.
- the rule of law requires that those who exercise this power do so "properly".
- in this light, almost all of administrative law is about deciding what is meant by "properly".

As stated in the Introduction above, administrative law consists of three core elements, which are:

1. Procedural fairness – at this stage, the court is not interested in the merit of the decision per se but in the procedure that was followed in reaching it. Generally, when Parliament or a provincial Legislature delegates its powers to a body or agency, and those powers affect an individual's rights or interests, then there must be some procedural fairness in the way the individual's rights or interests are dealt with.

2. Substantive fairness – before now, the courts were only focused on procedural review. Now however, the courts are more open to engage in substantive review of an administrative decision. And when a court engages in substantive review, it reviews the decision for substantive errors. In doing this, the court will utilise either the standard of correctness or standard of reasonableness to determine the merit of the administrative decision, whether it is reasonable or correct. Of course, with the Supreme Court of Canada (SCC) decision in *Vavilov*, the presumption is that reasonableness standard applies in all cases while the standard of correctness now serves as the exception.

3. Challenging administrative decisions and the remedies available for judicial review – here, the court may exercise its power of review over administrative decisions because of its original jurisdiction, or because of an appeal by an aggrieved individual as provided for in

the enabling statute, or because of the court's inherent judicial review jurisdiction. And at the end of a successful review, the applicant may be entitled to one or more of the remedies of certiorari, prohibition, mandamus, *habeas corpus*, etc.

Again, it will be beneficial for you to focus your mind on these three core elements of administrative law, as you may be sure that your administrative law exam questions will revolve around these.

These elements are discussed in fuller details below.

But before then, it is important for you to know those institutions that are involved in the administrative state and how their decisions are impacted by administrative law principles in those three core areas; these are the major decision-makers and you will regularly come across them in the course of study. They are the institutions whose actions, policies or programs may affect individual rights and which may in turn give rise to the enforcement of administrative law principles, including those of natural justice. They include:

1. Legislatures – whether Parliament or provincial, legislatures are the public forum where the most important political decisions are taken on behalf of the people. They debate and approve legislations that establish different government programs. They also play a role in the subsequent administration of those legislation and make amendments where required.
2. Cabinet and Ministers – they adopt strategic polices, pass regulations and orders in council pursuant to enactments made by the legislature and are responsible to the legislature for the conduct of government. The Cabinet or individual ministers may also exercise discretionary powers that directly affect individual's rights.
3. Indigenous Governments – they make decisions or administer programs on behalf of indigenous communities, individuals or lands. They include First Nations chiefs and band councils, local governments recognized through modern treaties and self-government agreements, tribal councils, Metis Nation organizations, etc. They may exercise authorities that have been delegated to them in a state legislation or draw on inherent rights, indigenous legal orders, constitutional law or international law. Their decisions also impact on the people's rights and are subject to administrative law principles if circumstances demand it.
4. Municipalities – are created by provinces and exercise powers delegated to them at the local level in the administration of many programs that may affect the citizens in a

number of ways, e.g., collection of taxes, administration of schools, police and fire services, child welfare, park or road maintenance, or licensing of trades. These decisions have substantial impacts on the rights and interests of the citizens are must be subject to administrative law principles.

5. Crown Corporations – which are created to provide commercial services and enjoy independence from the government, although the government still controls them. Many of these Crown Corporations make decisions that affect the commercial and legal interests of their customers. Many of them are regarded as having government characteristics because they were established by statute to perform those functions neglected by private corporations, they are publicly owned, and they report to the legislature through the minister responsible.
6. Private Bodies and Public Functions – many of these derive their legal authority purely from contract, but because of the control they exercise over particular activities, and because of the nature of the functions which they perform, these private bodies may resemble administrative agencies that discharge governmental functions. Examples of such bodies include the governing bodies of many sports which make rules, issue licenses, resolve disputes and generally regulate activities related to that sport. Other examples include Ontario's Children's aid societies (the bodies responsible for child welfare at the local level by virtue of the power conferred on them), or regulatory powers conferred by statutes on real estate boards in some other provinces.
7. Independent Administrative Agencies – may also be known as boards, tribunals, and commissions, which occupy important positions in public law and administration. Though created by governments, these agencies enjoy a measure of independence from the government or responsible minister who cannot influence or direct them in their decision-making tasks. These agencies are usually specialized and operate at the point where a program is applied to the individual. For these reasons, they are subject to the rules of natural justice and are required to give persons that are liable to be affected by their decisions the opportunity to participate in the decision-making process. And this is why their decisions are also subject to judicial reviews by the courts to ensure they are reasonable or correct in law.

SECTION 1: P R O C E D U R A L F A I R N E S S.

As a form of general introduction, as stated above, Canadian Administrative Law consists broadly of 3 main issues: issue of procedural fairness (i.e., the participatory rights every administrative decision maker must observe); issue of substantive review (which determines whether the administrative decision can withstand judicial scrutiny using the reasonableness or correctness standard), and remedies available to an aggrieved party.

In this first section, we shall consider issues relating to procedural fairness and I will seek to provide a general overview of the topics in this manner: in its most basic terms, procedural fairness indicates that administrative agencies must follow proper procedure in arriving at their decisions. As stated previously, this procedure is often times stated in the statute or regulation that created that agency and it governs the process that must be followed in arriving at a decision. They include procedures such as whether there should be oral hearing; what notices must be given in respect of a hearing and to whom; whether there should be a right to call witnesses or cross-examine witnesses, whether there should be disclosure, whether a decision should be in writing, etc. So, all these are usually contained in the enabling statute and an administrative agency or tribunal is bound to follow them.

But when the statute does not establish a procedure, or the procedure established is not sufficient, then common law principles will apply to ensure that all the affected parties are treated fairly. These are the principles of *audi alterem partem* and *nemo dat* that we stated earlier. The basic objectives of these two principles are that: (1) every person whose rights or interest is at stake is entitled to participate in the process that will determine that right or interest, whether through hearing or otherwise, and (2) any decision made by the decision-maker must be impartial and not biased.

(As stated elsewhere in this note, a typical exam situation may contain the provisions of a law, policy or regulation in respect of the subject matter of the dispute. When you see such a provision in your exam fact situation, your task is easy because it is an indication that the procedure is stipulated by the enactment and that is where your examiner wants you to direct your answers to confirm whether there has been a substantial compliance with the rules, otherwise the rules of procedural fairness may have been breached. On the other hand, your exam situation may make no reference to any enactment. This should give you the hint that the common law rules of natural justice will apply to that situation. This could be more demanding because you will be required to scrutinize the facts

to determine whether either or both of the principles of audi alterem partem or nemo dat have been engaged. This consists of many elements and you should endeavor to identify them all).

Chapters 3 – 7 of this Note discusses the different components of these participatory rights under the title, "Right to be Heard" while Chapters 8 and 9 discusses the components of the right to an unbiased arbiter.

Please note that the SCC has held that procedural fairness incorporates the principles of fundamental justice enshrined in section 7 of the Charter. See **Suresh v. Canada** (infra).

It is of importance for you to note too that what constitutes procedural fairness depends on many factors such as the nature of the power being exercised by that administrative body (e.g., whether it's merely investigatory, advisory or adjudicative), the party to be affected by the decision, the effect that decision will have on that party, and whether it is practical to engage in time-consuming procedures given the circumstances of the matter at hand. For example, where the issue involved is a serious one such as revoking a practicing license which may affect a source of livelihood, the courts have held that procedures similar to what obtains in court must be adopted by the administrative agency. This will include providing for oral or written hearing, allowing for calling/cross-examining witnesses, etc. On the other hand, where the issue at stake involves, e.g., termination of a lease in a public-subsidized apartment building, then there is only a duty to act fairly; and this duty is satisfied if the tenant had been previously informed of the complaints against her and has been provided with an opportunity to answer or to remedy the situation.

However, for the rules of procedural fairness to apply in any given matter, firstly, the nature of the decision must be administrative. The effect of this is that decisions that are legislative or broadly based on policy decisions will not need to be procedurally fair.

Secondly, for procedural fairness to apply, the decision complained of must be as a result of the exercise of the statutory powers given to that administrative body by its enabling statute, and this decision must affect the rights, privileges or interests of the complainant.

Lastly, however, these rules are not absolute. There are many exceptions that will not permit the rules of procedural fairness to apply in some cases. These may include policy reasons such as security, efficiency or emergency. These are known as the exceptions to the application of the duty of procedural fairness.

Then again, the amount of procedural fairness that will be required in a given situation will depend on the circumstances of that case or on the provisions of the enabling legislation. The following illustrations will demonstrate this point more effectively:

- if, for example, the procedure stipulated in the legislation resembles a court hearing, then the individual has more procedural fairness rights.
- if, for example, the enabling legislation provides that the decision of that administrative body can be appealed, then less procedural fairness is required. But if the decision of that body is final with no appeal, then more procedural fairness must be observed.
- if, for example, the decision affects the Charter or human rights of a person, or if it invokes government's international obligations, then the courts will generally require more procedural fairness to be observed.
- if, for example, the usual practice and process of the decision-maker gives the complainant a legitimate expectation that fairness will also be observed in her own case, then the court will require a higher degree of fairness.
- if the procedure adopted by the agency can produce, for example, written reasons that show the specific facts of a case and that formal policies and guidelines have been observed, then the courts will be more likely to decide that the decision was made fairly.

So, when a court receives a complaint that the procedure adopted by a decision-maker was not fair, the court may agree with the complainant and hold that the duty of procedural fairness has been breached in any of the following situations:

- if the decision-maker's actions were not procedurally fair,
- if there was an unnecessary delay that affected the complainant's participation in the process;
- if the decision-maker has shown bias, or
- if there was undue interference in the decision-making process.

And a court which finds that the duty of procedural fairness was violated in the process of reaching a decision may quash the process or the decision itself and remit the matter back to the decision maker for it to be decided properly. And if there has been a prejudicial delay, then the proceedings may be stayed.

Throughout the discussions on these topics, we shall be making references to what we call "thresholds". These generally mean a line that must be crossed before a decision can be subjected to