

**Write Your Exam Code Here:** \_\_\_\_\_

Return this exam question paper to your invigilator at the end of the exam before you leave the classroom.

**Attachment:**

1. Appendix: Statutory Provisions  
(4 pages)

THIS EXAMINATION CONSISTS OF SIX (6) PAGES AND 4 (PAGES) OF ATTACHMENT  
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA  
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – April 2019

ADMINISTRATIVE LAW

Section 372.003/509.003  
Professor Jocelyn Stacey

TOTAL MARKS: 80

TIME ALLOWED: 3 HOURS

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NOTES:

1. This is a limited open book examination. You are allowed to bring your course materials and notes, but not textbooks or library books.
2. This examination consists of TWO (2) QUESTIONS. The amount of marks allocated to each part is indicated in the exam. I've provided guidelines for how to allocate your time.
3. Only consider the issues related to administrative law. Rely only on materials for Law 372/509 (Administrative Law) for your analysis.
4. Turn off all mobile devices.
5. If you are handwriting, please write legibly on every second line of your exam booklet and on one side of the page only.
6. Do not write your name at any place on the exam or any printed materials. All materials must be returned at the end of the exam.

THIS EXAMINATION CONSISTS OF 2 QUESTIONS.

YOU MUST ANSWER QUESTIONS 1 AND 2.

**QUESTION 1: 45 MARKS [Recommended time = 100 Minutes]**

Jenny McArthur was a licensed naturopath who works in West Point Grey Vancouver. She was licensed in 1999 and operated a steady naturopathy practice, providing clients with natural therapies such as hydrotherapy, naturopathic manipulation, acupuncture and lifestyle and nutrition counselling. She developed a speciality in prenatal care, regularly seeing pregnant women with health concerns alongside their physician or midwife during their pregnancies.

To ensure the best care for her clients, McArthur set aside time each week to read up on current relevant naturopathic literature – both peer reviewed scientific literature and online naturopathic resources. Some of these online resources expressed caution about vaccination and particularly vaccination of young infants. The online resources stated that they were not “anti-vax” (anti-vaccination), only that more “independent” research is needed to ensure that infants are not being overwhelmed with too many vaccines so early in life and to ensure that the “toxic” additives to vaccines do not cause long-term harm. The online resources claimed to identify natural remedies that boost the immune system to the same effect as the provincially-mandated vaccination schedule for infants. McArthur found these online resources quite persuasive and, while she continued to read other scientific studies, it was the information from the online resources that she consistently shared with her clients.

In 2019 Vancouver Coastal Health declared a measles outbreak in Vancouver due to 15 reported cases of measles in the city. Measles is highly contagious and can be very serious when contracted especially in young children, leading to hospitalization and in some cases, lifelong brain damage and death. The scientific consensus in peer-reviewed literature is that the vaccination for measles generally has no negative side effects and that serious side effects (such as high fever) are rare.

The College of Naturopathic Physicians of British Columbia (the “College”), the regulatory body that oversees naturopathic physicians in British Columbia, received three complaints about Jenny McArthur. Two complaints came from new mothers who had been in McArthur’s care while pregnant and all of whom had decided not to vaccinate their infants as a result of the information shared by McArthur. After learning of the measles outbreak, all the two complainants had their children vaccinated. The third complaint came from the parents of an immuno-compromised child, who cannot receive vaccinations, and thus depends on the “herd-immunity” that comes from a high proportion of the rest of the community (the herd) being vaccinated. These parents had learned from an expectant friend of the information McArthur was sharing. The complaints all alleged that McArthur counselled caution about vaccinating young infants due to the risks of vaccination, that she shared information about natural immunity boosters and that she did not inform them of the risks associated with the diseases at which the vaccines were targeted. McArthur has never before been the subject of complaints related to her professional duties.

The College has two internal committees: the inquiry committee and the disciplinary committee. After receiving the complaints, the College directed the inquiry committee to

investigate the complaints to see if the allegations amounted to professional misconduct. At the conclusion of the investigation, the inquiry committee issued a citation against McArthur. The citation stated that McArthur was alleged to have committed professional misconduct by violating her ethical obligations as a naturopath. The citation identified violations of section 4(a) of the Code of Conduct and Ethics. It provided McArthur the date of her disciplinary hearing and directed her to the relevant provisions of the Health Professions Act. The citation was signed by the member appointed to the inquiry committee, Krista Bell.

During this time Bell was posting on the College website and through the College's social media channels warnings and news stories about naturopaths in other jurisdictions who were disciplined for openly supporting the anti-vax movement. McArthur only noticed these posts after-the-fact and so did not raise a concern about them with the College at the time. McArthur estimated that anti-vax posts comprised at least half of all the College's public statements through its website and social media during the timeframe of the investigation. Bell wrote above the link of one article: "Anti-vaxxers are public health terrorists!! Just sayin'...." Other posts stated numerous times that the College was taking a firm stance to prevent the spread of anti-vax information. Several months after the investigation concluded, the World Health Organization identified the anti-vax movement as one of 10 global health threats.

Also, during the time of the investigation into McArthur's practices, the province of BC rolled out a suite of measures to deal with pressing public health issues, namely the opioid crisis and decreasing vaccination rates. One of these measures was a redesign of the Health Professionals Review Tribunal ("the Tribunal"), which the government stated was to ensure more effective discipline of health care professionals such as physicians and naturopaths. The previous review tribunal was dissolved, the legislation was amended to create the new Tribunal, and new members were appointed. While the Tribunal has been constituted and has received a few appeals, it has yet to render its first decision.

McArthur's disciplinary hearing was held before the discipline committee of the College. The discipline committee was comprised of three members of the College: Chairperson Jim Crawford (a law professor who researches health law), Adrianna Dix (a licensed naturopath with a master's degree in health science) and Rachel Evans (a member of the College about whom nothing else is known). McArthur was represented by counsel at the hearing and provided detailed evidence about her naturopathy practice.

The discipline committee issued the following decision:

This is a disciplinary decision about licensed naturopath Jenny McArthur. For the reasons that follow, we find that Ms McArthur has committed professional misconduct in violation of the Code of Conduct and Ethics. We suspend her naturopath license for 3 years. After 3 years, Ms McArthur will be permitted to recertify by successfully completing the licensing examinations.

We have reviewed the extensive evidence brought before the committee by the College and by Ms McArthur. The evidence confirms Ms McArthur's good intentions. She is a conscientious naturopath who cares deeply about the well-being of her patients. It also, however, demonstrates a consistent pattern of conduct: Ms McArthur had developed "tunnel vision" by reading too much anti-vax material to the exclusion of peer-reviewed and credible medical literature. She then consistently and unreservedly relayed this information to her patients putting their unborn babies, and the children of others at risk. In counselling her patients in this way, she did not convey known risks of preventable diseases, such as measles, and did not therefore allow her patients to make an educated choice about their health care.

We find that Ms McArthur has displayed a lack of knowledge, skill or judgment and a disregard for the welfare of the patient, in contravention of section 4(a) of the Code of Conduct, such that her license must be suspended to protect the public. The College has determined in previous hearings (e.g. *Re Collins*, (2009) BCCNP 13) that it will consider the seriousness of the licensee's error in its departure from professional norms, whether the error has occurred once or on multiple occasions, previous complaints or disciplinary proceedings against the licensee, the harm or potential harm that resulted from the error, and any steps that the licensee took to prevent the error from occurring in the first place (e.g. professional development sessions).

On the final consideration, we note that Ms McArthur did take her continuing education seriously but she did not do so in a manner that was consistent with her professional duties. As a committee, we place significant weight on the harm or potential harm that could have resulted from Ms McArthur's sharing of anti-vaccination rhetoric. The resurgence of preventable diseases is no joke and it imposes serious obligations on medical professionals to counter-act this disturbing trend. By perpetuating anti-vax rhetoric, Ms McArthur has undermined the reputation and credibility of the naturopathy profession. Conduct such as hers makes us look like a group of AMATEURS dabbling in VOODOO or a cartel of SNAKE OIL SALESMEN. The public cannot trust naturopaths as legitimate health care professionals, when licensees like Ms McArthur are peddling such illegitimate information. [...]

McArthur fired the lawyer who represented her before the disciplinary committee and has retained your law firm to advise her on available remedies. She is particularly troubled by the comment in the reasons about voodoo, which she perceives as a racially-charged statement. McArthur is African-Canadian, though she admits that, since the hearing was held by teleconference, the committee may not have been aware of her race. Your principal, J. Stacey, has asked you to provide a memo for the McArthur file. She has asked you because you recently handled a file on health care professional misconduct. As a result, you know that the

disciplinary committee correctly stated the test in *Collins* and that this is settled law. Your memo must address:

- (i) The likelihood that a court would hear this matter on judicial review taking into account any relevant threshold questions;

And, assuming a court would hear her case:

- (ii) Whether the conduct of the investigation or the disciplinary committee raise a reasonable apprehension of bias;
- (iii) Whether the discipline committee's decision to suspend McArthur's license was substantively proper.

You have been provided with all relevant statutory provisions in the Appendix to the exam paper.

**QUESTION 2: 35 MARKS [Recommended time = 80 Minutes]**

Below are three quotes that propose changes that the Supreme Court of Canada (SCC) could make to its approach to substantive review when it rules in the *Vavilov* and *Bell Canada* cases. For this question, you must choose **ONE** quote from the following list. With this quote, address the following four points. Use headings to structure your answer.

- A. Briefly explain in your own words what your selected quote requires of judges who are carrying out judicial review.
- B. What specific challenge or ambiguity in the SCC's approach to substantive review does this quote respond to? Identify the source of this challenge/ambiguity in the caselaw.
- C. Identify one or two judgments (majority, concurrence, or dissent) that we have studied in the course which you think most closely share an understanding of the rule of law contained in your selected quote. Explain this understanding of the rule of law and why it leads to this approach to judicial review.
- D. Imagine the SCC adopts this quote as the law on substantive review. What does this quote require of a judge reviewing the decision of an Aboriginal administrative decision-maker who has applied Indigenous law in their decision (e.g. a decision of the Tsawwassen Judicial Council)? Would a judge applying this law treat an Aboriginal administrative decision-maker any different than a non-Aboriginal tribunal? Explain.

**Quote 1**

Substantive review should not contain categorical standards. Rather, the intensity of review must be on a sliding scale that varies according to the terms of the legislation, the breadth of the discretion granted, the significance of the impact of the decision on the individual, the

nature of the decision-maker and the nature of the decision. Administrators have varying margins of appreciation or ranges of what is acceptable depending on these circumstances. Avoid rigid tests on this. Let reviewing courts stir all these factors into a pot and decide on the intensity, allowing them to express it in general but still helpful terms. What is wrong with contextual approaches anyway? The test for negligence is a contextual approach and no one is calling that law a never-ending construction site; it is reasonably settled in 99.9% of the cases it regulates. Over time, case-by-case, the common law gives a good measure of certainty and predictability.

### **Quote 2**

The significance and the importance of the administrative justice system in the lives of ordinary and regular Canadians cannot be overstated. Many depend on the administrative justice system for the necessities of life. When legal disputes arise and these Canadians make their arguments to a board or tribunal on the legal meanings of the statutory provisions that give rise to their disputes (and their deprivations) they are entitled to a correct interpretation of the various statutory provisions in dispute that will provide them (and the others who come after them) with understanding, transparency, certainty, and predictability. Good government involves delegation of some decision-making to administrative or juridical officials who must interpret correctly the statutory framework in which they operate. When they do not, the courts must act to restate or re-instate the consistent or correct application of the legislation. Accordingly, the judicial role of supplying the correct interpretation of the law can only be overridden by clear statutory language prescribing a standard of review other than correctness.

### **Quote 3**

The Supreme Court of Canada has frequently emphasized that deference is neither submission nor abdication. The decision-maker's articulation of statutory purpose, policy objectives, or values is neither unassailable nor determinative. Respectful attention to a decision-maker's articulation of the policies or values promoted by a given interpretation of the legislative scheme does not relieve a reviewing court from considering the validity of the decision-maker's articulation of statutory purposes, policy context and implications of the intended interpretation in light of additional principles of statutory interpretation and wider norms of the legal system, including domestic and international law. An administrative decision supported by responsive reasons will be unreasonable where it does not advance the purposes and objectives of the statutory regime or is incongruent with the wider set of legal norms governing the field of regulation. In environmental law, for example, these norms include international environmental principles such as the precautionary principle or obligations to future generations.

**\*END OF EXAMINATION\***

**\*\*HAVE A WONDERFUL SUMMER\*\***

**Health Professions Act, RSBC 1999, c 111**

*Part II*

**26** In this Part:

**"College"** includes the College of Physicians and Surgeons, the College of Pharmacists, the College of Dental Surgeons, the College of Midwives, the College of Chiropractors, the College of Naturopathic Physicians;

**"Professional misconduct"** includes sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession;

**"Licensee"** includes any individual licensed to practice as a health care professional covered by this Act [*physicians, chiropractors, midwives, naturopathic physicians, etc.*];

**27** The college must not act against a licensee or an applicant for registration solely on the basis that the person practises a therapy that departs from prevailing medical practice unless it can be demonstrated that the therapy poses a greater risk to patient health or safety than does prevailing medical practice.

**32** (1) A person who wishes to make a complaint against a licensee must deliver the complaint in writing to the College.

(2) If the complaint discloses allegations of matters under 32(3), the College must appoint an inquiry committee to investigate the matters contained in the complaint as soon as possible.

(3) The College may, on its own motion, investigate a licensee regarding any of the following matters:

(a) a contravention of this Act, the regulations or the bylaws;

(a.1) a conviction for an indictable offence;

(b) a failure to comply with a standard, limit or condition imposed under this Act;

(c) professional misconduct or unprofessional conduct;

(d) competence to practise the designated health profession;

(e) a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs his or her ability to practise the designated health profession.

(4) For clarity, professional misconduct and competence to practise are to be determined with reference to the relevant Code of Conduct issued by the College to which the licensee is registered.

(5) The inquiry committee must request the licensee who is the subject of an investigation under this section to provide it with any information regarding the matter that the licensee believes should be considered by the inquiry committee.

(6) After considering any information provided by the licensee, the inquiry committee may

(a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,

- (b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the licensee,
- (c) act under section 34.

**34** (1) In relation to a matter investigated under section 32, the inquiry committee may request in writing that the licensee do one or more of the following:

- (a) undertake not to repeat the conduct to which the matter relates; or
  - (b) undertake to take educational courses specified by the inquiry committee.
- (2) direct the Registrar of the College to issue a citation that
- (a) names the affected licensee as respondent,
  - (b) describes the nature of the complaint or other matter that is to be the subject of the hearing,
  - (c) specifies the date, time and place of the hearing, and
  - (d) advises the respondent (licensee) that the discipline committee is entitled to proceed with the hearing in his or her absence.

**38** (1) The discipline committee must hear and determine a matter set for hearing by citation issued under section 34(2).

(2) The respondent and the college may appear as parties and with legal counsel at a hearing of the discipline committee.

(3) A complainant may be represented by legal counsel, at the complainant's cost, when the complainant is giving evidence at a hearing of the discipline committee.

**39** (1) On completion of a hearing, the discipline committee may, by order, dismiss the matter or determine that the respondent

- (a) has committed professional misconduct or unprofessional conduct,
  - (b) has incompetently practised the designated health profession, or [...]
- (2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:
- (a) reprimand the respondent;
  - (b) impose limits or conditions on the respondent's practice of the designated health profession;
  - (c) suspend the respondent's license;
  - (d) cancel the respondent's license; [...]

(3) Except as permitted by other sections of this Act, all factual, policy and discretionary determinations made by a disciplinary committee are final, conclusive and binding.

#### *Part IV*

66 In this Part:

**“Tribunal”** means the Health Professions Review Tribunal established in this Part;



- 67** (1) The Health Professions Review Tribunal is established consisting of the members appointed by the Lieutenant Governor in Council on the advice of the Colleges.
- (2) Each College must nominate from its membership three individuals to serve as members of the Tribunals and the Lieutenant Governor in Council must appoint one of these three nominees from each college.
- (3) The Lieutenant Governor in Council must appoint a chair of the Tribunal who is a member or former member of the Law Society of British Columbia or a law society of another province of Canada.
- (4) The Lieutenant Governor in Council must appoint one lay member who is not a member or licensee of a health care profession in British Columbia or any other jurisdiction;
- (5) All members of the Tribunal serve for a term of two years.
- (6) Salaries for members of the Tribunal will be set by regulation.<sup>1</sup>

**68** The following provisions of the *Administrative Tribunals Act* apply to the Tribunal:

- (a) Part 8 [*Immunities*];
- (b) section 60 (1) (g) to (i) and (2) [*power to make regulations*].

**69** (1) The tribunal has the following powers and duties:

[...]

- (c) on application by a complainant or licensee to review a disciplinary committee decision made under section 39 and uphold that decision or cancel the decision and send it back to the committee for reconsideration with direction.

(2) In exercising its powers and performing its duties under subsection (1) (d), the review board may consult with colleges, licensees, members of health profession associations and any other persons that the review board considers necessary or appropriate.

## **Code of Conduct and Ethics (College of Naturopathic Doctors, 2019)**

### **4. Respect for the Patient**

- a. In the professional care of a patient, displaying a lack of knowledge, skill or judgment or disregard for the welfare of the patient of a nature or to an extent that demonstrates that the member is unable to continue to practice or that the member's practice should be restricted

### ***Administrative Tribunals Act, SBC 2004, c 45***

**55** (1) A tribunal member, a person acting on behalf of or under the direction of a tribunal member or a person who conducts a facilitated settlement process on behalf of or under the direction of the tribunal must not be required to testify or produce evidence in any proceeding,

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<sup>1</sup> No such regulations have yet been issued.

other than a criminal proceeding, about records or information obtained in the discharge of the member's or person's duties.

(2) Despite subsection (1), the court may require the tribunal to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

**56** (1) In this section, "**decision maker**" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a facilitated settlement process.

(2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the tribunal or the government because of anything done or omitted

(a) in the performance or intended performance of any duty under an enactment governing an application, or

(b) in the exercise or intended exercise of any power under an enactment governing an application.

(3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

**60** (1) The Lieutenant Governor in Council may make regulations as follows:

(g) prescribing the form, manner and timing of reports to the minister responsible for the tribunal;

(h) prescribing information that must be included in reports to the minister responsible for the tribunal;

(i) prescribing information the tribunal must make public.

(2) The Lieutenant Governor in Council may make different regulations under subsection (1) for different tribunals.