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**THIS EXAMINATION CONSISTS OF 15 PAGES (INCLUDING COVER)
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**THE UNIVERSITY OF BRITISH COLUMBIA
PETER A ALLARD SCHOOL OF LAW**

FINAL EXAMINATION – DECEMBER 2019

**LAW 372
Administrative Law**

**Section 001
Professor Mary Liston**

TOTAL MARKS: 100

*** EXAM-ONLY WRITERS ***

**TIME ALLOWED: 3 HOURS
including reading/review time**

**** COMBINED ASSIGNMENT / EXAM WRITERS ****

**TIME ALLOWED: 2 HOURS
including reading/review time**

- NOTE:**
1. This is an OPEN BOOK examination. You may bring COURSE MATERIALS into the exam such as: the casebook, cases, materials posted on the course website, and your own notes. You may NOT use library books.
 2. The exam is composed of three (3) Parts.

Please turn page ➡

3. Students writing the 100% final option should answer all of the questions in Parts A and B.
4. Students writing the 100% final option should answer only one of the questions in Part C.
- **5. If you have chosen the OPTIONAL ESSAY, answer ONLY the questions which have been indicated in Parts A and B. Do NOT answer any of Part C.**
6. Statutory and other legal materials can be found in Appendix 1.
7. The marks and suggested time for each question are in the margin and you should budget your time accordingly.
8. 30 minutes has been allocated for reading/reviewing out of the total time.
9. Please put your **EXAM CODE** on all booklets used.
10. If you are handwriting, please DOUBLE-SPACE your answers and try to write legibly.

Part A**35 Marks: 55 minutes**

*****If you chose the OPTIONAL ESSAY ASSIGNMENT, answer ONLY Questions 1, 2 and 4 in Part A. You should allocate 45 minutes for this Part.*****

Note: Relevant legal and other materials are found in the Appendix.

Note: The BC ATA does NOT apply in this fact pattern.

In January 2019, the Vancouver Airport Fuel Facilities Corporation (“VAFFCorp,” a company owned by a consortium of commercial airlines that operate out of YVR) proposed a project—the Vancouver Airport Fuel Delivery Project (“Project”)—that involved transporting jet fuel by tanker up the south arm of the Fraser River, and then by pipeline through the City of Richmond to Vancouver International Airport (“YVR”). The south arm of the Fraser River is an important wildlife habitat and recreational area. The marine terminal would be located beside recreational spaces in Richmond. And, the proposed pipeline route would travel straight through several residential areas of Richmond as well as a large entertainment and shopping complex.

The Project raised serious concerns for many residents in Metro Vancouver, and the City of Richmond in particular, and they joined to form an organization to lobby against the Project: VAPOR (“Vancouverites Against the Project Over in Richmond”) with the slogan “Let’s VAPORize this pipeline project!” The group formed in late February 2019. Several members of the group own property or operate businesses adjacent to the pipeline route. Their opposition is based on concerns about the environmental risks posed by the Project, the likelihood of inadequate resources to deal with any disasters, the location of jet fuel close to residential and recreational areas, and the belief that no real need exists to build this terminal at all since the climate crisis requires less jet travel.

As the Project proponent, VAFFCorp was required to participate in an environmental assessment process managed by the Environmental Assessment Office (“EAO”) and its Executive Director (“ED”). The ED establishes the procedures to be followed in the assessment of the project, including public consultation. Following the consultation period, the EAO formally reviews a proposed project and prepares an assessment report for the ED. The ED then provides a recommendation in the assessment report to the Minister of Environment and any other responsible minister(s) whose portfolio(s) is/are affected by the project under review. The process ultimately results in a ministerial decision as to whether an environmental assessment certificate should be issued to allow a project to proceed.

Following receipt of the Project application, the ED and EAO, along with VAFFCorp, undertook a public consultation process which included these features:

- public web posting of VAFFCorp’s project proposal on February 14, 2019;
- establishing a public comment period that ran from February 25 to April 11, 2019;
- a notice on February 17 with details about an open house on March 7, 2019 with representatives of VAFFCorp and the EAO that would include information displays (eg, proposed pipeline route and other details) and a formal Q&A;
- the notice ran in several local Richmond newspapers but not in any other Metro Vancouver area and not on any other media;
- the open house took place in Richmond from 5:00 to 7:30 pm with a Q&A that was limited to 2 minutes per person and only lasted 40 minutes in total time;

- 100 people attended, including 3 VAPOR members who arrived late after they finished work and were not able to ask questions due to the time restriction;
- no record was made of the comments and questions from this open house;
- the EAO created a tracking table to record all public comments, a summary of which would later be made public along with the assessment report.

On March 28, VAPOR presented their concerns about the project at a City of Richmond Council meeting where they expressed dismay about the short notice, the abbreviated nature of the Q&A, the skimpy information at the open house, and that not enough time had been given for the public to properly comment on the Project. Afterwards, the City of Richmond formally requested an extension of the comment period until the end of June, noting that even the City with all of its resources was hard pressed to review the materials and make comments by the April deadline. In its formal request, the City of Richmond reminded the EAO and the ED that members of the public who have neither the resources nor the expertise couldn't possibly provide meaningful comments within this original time period. In response, the ED agreed to extend the comment period until April 30 and notice of this extension was published in local papers on April 20. The notice stated that the extension was due to requests received "from the public". Two members of VAPOR wrote letters to the ED during the week of April 20 requesting a further extension and reiterating their earlier views, but the ED did not respond and the tracking table only noted that the letters from VAPOR had been received. After receiving no response, VAPOR representatives wrote again on April 29. There was no response to this letter and records show that it was not included in the tracking table. No other opportunity to participate or provide comments arose for VAPOR.

The consultation process closed, having received 350 comments in total, and the EAO worked on its assessment report, which was submitted to the relevant Ministers in November 2019. In its report, the ED recommended that an environmental assessment certificate be approved for VAFFCorp and summarized the public consultation as follows:

The Proponent and the EAO carried out a public consultation program that met all statutory requirements. Key concerns raised and addressed throughout the environmental assessment process included the risks of accidents and spills, the location of the pipeline near the highway, and the health and safety of Richmond residents. The initial consultation was broad and thorough and we heard from as many members of the public as our resources allowed. We provided one extension to the comment period in response to requests from the public, but declined a further request because it was believed to be impracticable and the general public did not express sufficiently strong interest in a further extension.

The summary of the tracking table had not yet been made public.

VAPOR believes that this consultation process was flawed and that they were treated unfairly. VAPOR has come to your law firm—a niche public interest legal society interested in advancing the democratic nature of consultation exercises such as this one. Your principal has asked you to provide advice on the following issues.

1. It has come to your attention that the EAO/ED intends to argue that VAPOR is not entitled to judicial review because the rights of its members have not been affected. In your analysis of the applicable test, explain why the argument made by the EAO/ED will likely fail at judicial review. Consider relevant unwritten principles (eg, access to justice, democracy, rule of law, etc) that you can use to support one argument further justifying VAPOR's access to judicial review. [10 marks]

2. In your opinion, has this environmental assessment process breached the duty to hear the other side and was therefore unfair to VAPOR? [10 marks]
3. If your analysis concludes that the duty to hear the other side was breached, what do you think the appropriate remedy should be? [5 marks]
4. In early December 2019, the ED was interviewed by a reporter from the *Vancouver Sun*. In this interview, the ED noted that various Ministers in Cabinet were concerned that consultation about this Project would be expensive, divisive and politically costly and that the ED should therefore take all necessary efforts to be efficient and economical. The ED then went on to say that these concerns informed the decision to limit participation from members of the public in order to exclude vexatious individuals as well as to “weed out” comments from the more uninformed members of the public. When asked for an example, he mentioned groups such as VAPOR, whose members he considered to be both “busybodies” and “NIMBY”-types [NIMBY means “not in my back yard”].

Based on their experience in the consultation process, and this new information from the article, VAPOR also believes that the ED was biased against them. Your principal wishes to know whether you think a viable bias claim can be made in these circumstances. [10 marks]

Part B

40 Marks: 65 minutes

*****If you chose the OPTIONAL ESSAY ASSIGNMENT, answer ONLY Questions 1 and 3 in Part B. You should allocate 45 minutes for this Part.*****

Note: Relevant legal and other materials are found in the Appendix.

Note: The BC ATA does NOT apply in this fact pattern.

The village of Skedans faces south onto Skedans Bay on the islands of Haida Gwaii (formerly the Queen Charlotte Islands) and it has been designated a National Historic Site. In the summer of 1912, a young artist named Emily Carr visited the village, which by then had been abandoned for 40 years. While there, she took photographs, made sketches, and created several watercolour paintings, notably one depicting the monumental mortuary poles situated at the entrance of the village. She called this work *Skedans Poles*. As many Canadians know, she subsequently became famous and her art has been recognized as important for Canada generally and for Indigenous peoples specifically because her subject matter often possesses a deep connection to Indigenous cultures. Globally, her work commands top market prices in the world of serious art collectors.

Ever since Emily Carr first sold the watercolour, it has been in the possession of a private collector. This owner, now very senior in years, has begun divesting herself of her large art collection. To do this, she contacted the renowned Hufflepuff Fine Art Gallery and Auction House (“Hufflepuff”). Hufflepuff’s well-regarded art experts examined *Skedans Poles*, determining that it was of fine quality and indicative of Carr’s oeuvre, but could only be considered second rank compared to her more famous and valuable oil paintings. Hufflepuff put *Skedans Poles* up for sale domestically in January 2018 at an initial price of Cdn\$1 million. Despite a national advertising campaign, it didn’t attract a single Canadian

buyer. It was then decided to list the watercolour in the United States, where Northeby's Auction House would include it in at an international auction with an asking price of US\$3 million. The painting was ultimately sold to a non-Canadian private collector for its asking price. This buyer had developed a passion for Canadian art after attending the Museum of Modern Art's well-publicized "Group of Seven" show held in New York in 2016 and that was curated by famous US comedian and Canadian art aficionado Steve Martin.

Because the watercolour is more than 50 years old and worth more than Cdn\$15,000 it cannot automatically leave the country. Under the *Canadian Cultural Property Export Control List*, CRC, c 448 ("Control List"), an object 50 years old or more and made by a person who is no longer living must be placed on a "Control List" of designated cultural property. Cultural objects which are not placed on the Control List are free to leave the country. For items on the Control List, an export permit will be delayed for six months in order to allow an institution or public authority in Canada to make a fair offer to purchase the cultural object, thereby allowing it to remain in this jurisdiction.

In March 2018, Hufflepuff therefore applied to the Department of Canadian Heritage for a cultural property export permit on behalf of the owner. The decision to deny or grant an export permit is made by the Canadian Cultural Property Export Review Board (the "Review Board"), acting under the authority of the *Cultural Property Export and Import Act*, RSC, 1985, c C-51 (the "Act"). In making its decision, the Board must determine whether the cultural property is of "national significance" and "outstanding importance". According to the Act, the Board shall consult with expert examiners (eg, art dealers, art historians, museum curators, anthropologists, archaeologists, art restoration specialists, etc) for advice in order to make its final decision.

The Review Board referred *Skedans Poles* to an expert examiner from the Art Gallery of Upper Canada, Mr. Tom Thompson, who is the Head Curator of that institution. Upon receiving the recommendation from Mr. Thompson that the drawing should be on the Control List, the Review Board denied the permit and informed both the disappointed owner and Hufflepuff Gallery who posted this information their public art blog. The letter from the Review Board stated:

According to our expert examiner, and in our opinion, *Skedans Poles* is a rare watercolour and one of Emily Carr's best. We consider the subject matter to be of national significance and outstanding importance. This piece of art is of museum-quality. If this art were to leave the country, Canada's national heritage would without a doubt be seriously damaged. As a result, the export permit will be delayed so that a Canadian individual or institution can make a fair offer for this wonderful work of art.

The owner and Hufflepuff sought a reconsideration of the decision, which was denied on the basis that the Review Board did not believe it had made any factual errors.

The owner and Hufflepuff then sought judicial review to challenge the Review Board's decision at Federal Court. They argued that the Review Board's interpretation of the terms "national significance" and "outstanding importance" was unreasonable given the advice they had received from their experts. Notably during the proceedings, not only the decision but other relevant documents were examined. One document attracted much scrutiny. The original export permit document was disclosed and it showed that the Board's expert examiner had originally marked "No" to the question of whether the drawing should be on the Control List. It appeared that correction fluid was used to white out the check in the "No" box and, instead, a check appeared in the box marked "Yes." Hufflepuff and the owner therefore also argued that the decision was unreasonable based on this new factual

evidence. Finally, they argued that the outcome was not defensible. When the watercolour was first on the domestic market, no Canadian buyer was interested. As a result, delaying the permit and allowing a Canadian person or institution to bid again at a Canadian fair market price—which may be below what the art commanded in the global market—would be both unjust and unreasonable. To allow this outcome, they stated, would damage the good reputation that Canadian art galleries and auction houses have around the world as this outcome illustrates that Canada freely interferes in property rights and the market.

The reviewing judge, Mr Justice Green, determined that checkbox issue was a mere administrative error. Green J applied the reasonableness standard, noting that he should be deferential to the expert decision-maker, the reasons that were given, and the outcome. He therefore upheld the Review Board's denial of the permit.

The owner and Hufflepuff now seek to appeal the Federal Court decision. You are clerking at the Federal Court of Appeal and your supervising judge has asked for your legal opinion regarding a number of administrative law matters.

1. Apply the *Dunsmuir* two-step test to determine the appropriate standard of review you think this reviewing court should select. Make sure you indicate whether or not you think your supervising judge may be able to disagree with Federal Court and select correctness as the appropriate standard of review. If you conclude that the reasonableness standard is the most appropriate, please make sure you indicate how much deference the Review Board's decision ought to attract. Your supervising judge is again curious about whether or not "disguised correctness" review might be possible. [15 marks]
2. Do you think a reviewing court would conclude that the Review Board's decision was either incorrect or unreasonable? Why or why not? [10 marks]
3. If the Review Board's decision is not upheld, what remedies might be appropriate? [5 marks]

A number of interested parties read Hufflepuff's blog post about the Review Board's decision, including the Council of the Haida Nation. The Council of the Haida Nation had requested that they be allowed to participate in the reconsideration decision. The Council argued that they were directly affected since the subject matter of the watercolour was located squarely within their unceded ancestral territories. Moreover, a potential reversal of the Board's decision would mean a loss of a work of art that they considered to be part of their Indigenous heritage. The Review Board denied their application to participate in the reconsideration decision with very brief reasons stating that the Board did not agree that the Council was directly affected. As a result, the Council of Haida Nation applied for and successfully obtained intervener status at Federal Court of Appeal.

4. Your supervising judge has asked that you provide some guidance about how she should think about the legal framework, principles and practices relating to Indigenous authorities in administrative law. In particular, she would like to know if you think the Review Board's decision to deny the Council's participation in the reconsideration process is legally defensible. Moreover, if the Review Board's decision is quashed following the *Dunsmuir* analysis, and if it also appears that the Review Board's participation decision is unsound, she wants to know whether you think she could order the Review Board to allow the Council of the Haida Nation to participate in a subsequent reconsideration hearing. [10 marks]

PART C**25 Marks: 30 minutes******If you chose the OPTIONAL ESSAY ASSIGNMENT, do NOT answer any question in Part C.****

Write an essay answer addressing **ONE** of the following questions.

1. **Be it resolved: The Supreme Court of Canada should explicitly declare that fairness is the standard of review for procedural fairness.**

You are a participant in a legal debate on this proposition at the next Canadian Bar Association conference on Administrative Law. As you know, procedural fairness does not require a standard of review analysis. Some jurisprudential confusion exists regarding what the standard is or should be. Some judges say that procedural fairness issues should be reviewed on a traditional “correctness” standard. Others suggest that the appropriate standard is the modern understanding of “fairness” following cases like *Baker* and *Khela*. Drawing on the relevant jurisprudence, content, and class discussions, provide one argument **for** this proposition and one argument **against** it.

2. In a recent article, Mr Justice Stratas of Federal Court of Appeal called the law of substantive review a “never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan.” Drawing on course materials (i.e., textbook, cases, blog posts), why do you think administrative law is so unsettled?

Look at the list below and pick **TWO (2)** possible jurisprudential directions to discuss. Which do you think will meet the legal objectives of making the selection of the standard of review easier, more predictable, and providing a proper balance between respect for the rule of law and for legislative choices?

- Mandate correctness review for *all* questions of law, including interpretive questions in the home statute;
- Impose of a general duty to give reasons on *all* administrative decision-makers;
- Adopt Rothstein J’s argument in *Khosa* that *only* the presence of a privative clause indicates reasonableness review, deference and expertise;
- Use presumptions of expertise and reasonableness over the *Dunsmuir* two-step test.

3. **Be it resolved: The BC Legislature should repeal sections 44 and 45 of the *Administrative Tribunals Act*, which prohibit administrative tribunals from considering constitutional questions, including the Canadian Charter of Rights and Freedoms. Note: Relevant legal materials can be found in the Appendix.**

In order to prepare for this debate, draw on arguments relating to jurisprudential history, simplicity, content of the principles of public law such as democracy and the rule of law, and institutional relations that we have discussed and examined in class. Provide one argument **for** this position and one argument **against** it.

END OF EXAMINATION**Good luck and happy holidays!**

Appendix 1

Statutory Materials: Part A

1. *Environmental Assessment Act, SBC 2004, c 34*

Executive Director determines assessment scope, procedures and methods

11 If the Executive Director makes a determination for a reviewable project, the executive director must also determine by order

- (a) the scope of the required assessment of the reviewable project, and
- (b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application as part of the assessment.

12 The Executive Director's discretion under section 11 includes, but is not limited to, the discretion to specify by order one or more of the following:

- (a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;
- (b) the potential effects to be considered in the assessment, including potential cumulative environmental effects;
- (c) the information required from the proponent;
- (d) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);
- (e) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;
- (f) the opportunities for the persons and organizations specified under paragraph (e), and for the proponent, to provide comments during the assessment of the reviewable project;
- (g) the time limits for steps in the assessment procedure.

13 The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the Executive Director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

2. *Public Consultation Policy Regulation, BC Reg 373/2002*

Duty of Executive Director to consider policy

3 The Executive Director must take into account the general policies respecting public consultation set out in this regulation and ensure that they are reflected in the final assessment.

Public consultation by proponent

- 4** It is a general policy requirement that a proponent who applies for an environmental assessment certificate be required to
- (a) conduct a public consultation program that is acceptable to the Executive Director, and
 - (b) present a summary and evaluation of any public consultation activities that the proponent has already carried out in relation to the reviewable project.

Giving public notice

- 5** It is a general policy requirement that the Executive director, in making an order under section 11 of the Act, order that public notice be given by the proponent or the Environmental Assessment Office of the following public consultation activities in relation to the assessment of the reviewable project:
- (a) where and when the public may review the proponent's application for an environmental assessment certificate;
 - (b) the purpose and time limit established by the executive director for any formal public comment period;
 - (c) where and when any open house or public meeting, whether organized by the proponent or the Environmental Assessment Office, in respect of the assessment will be held.
- 6** It is a general policy requirement that the Executive Director's order require that public notice be given by newspaper advertisement, open letters or any other manner satisfactory to the Executive Director.
- 7** It is a general policy requirement that public notice of activities referred to in subsection 5 (b) and (c) be given at least 7 days before
- (a) the start of a formal public comment period, or
 - (b) the date on which an open house or public meeting is scheduled.

Access to information

- 8** It is a general policy requirement that the Executive Director, in making an order under section 11 of the Act ensure that the public has access to all the information that can reasonably be provided about the proposed project.

Formal public comment periods

- 9** It is a general policy requirement that at least one formal comment period of between 30 and 75 days be established by the executive director in an order under section 11 of the Act.
- 10** It is a general policy requirement that the Executive Director order one or more further formal comment periods unless satisfied that the period is
- (a) impracticable because of insufficient time, or
 - (b) unnecessary because the public has not demonstrated sufficient interest in the assessment of the reviewable project.

Statutory Materials: Part B

1. *Cultural Property Export and Import Act, RSC, 1985, c C-51*

Designation of expert examiners

- 3 The Minister may designate any resident of Canada or any institution in Canada as an expert examiner for the purposes of this Act.

Export permit where object not included in Control List

- 10 Where the Review Board determines that an object in respect of which an application for an export permit is made is not included in the Control List, the Review Board shall forthwith issue an export permit in respect of the object.

Reference to expert examiner

- 11 Where the Review Board determines that an object in respect of which an application for an export permit is made is or might be included in the Control List, the Review Board shall forthwith refer the application to an expert examiner for consideration.

Determination by expert examiner

- 12 Where an application for an export permit is referred to an expert examiner, the expert examiner shall forthwith determine whether the object in respect of which the application is made is included in the Control List.

Where object not included in Control List

- 13 Where an expert examiner determines that an object that is the subject of an application for an export permit that has been referred is not included in the Control List, the expert examiner shall forthwith in writing advise the Review Board and shall forthwith send a copy of that advice to the Review Board and the Minister.

Where object included in Control List

- 14 Where an expert examiner determines that an object that is the subject of an application for an export permit that has been referred is included in the Control List, the expert examiner shall forthwith further determine
- (a) whether that object is of outstanding importance by reason of its close association with Canadian history or national life, its aesthetic qualities, or its value in the study of the arts or sciences; and
 - (b) whether the object is of such a degree of national significance that its loss to Canada would significantly diminish the national heritage.

Export permit to be issued

- 15 Where an expert examiner determines that an object that is the subject of an application for an export permit that has been referred is not of outstanding significance or does not meet the degree of national importance, the expert examiner shall forthwith in writing advise the Review Board and the Minister.

Export permit not to be issued

- 16 Where an expert examiner determines that an object that is the subject of an application for an export permit that has been referred is of outstanding and meets the degree of national significance, the expert examiner shall forthwith in writing advise the Review Board not to issue an export permit in respect of the object and shall provide the permit officer with the reasons therefor.

Issue of export permit

17 The Review Board shall issue an export permit forthwith where it is advised by an expert examiner to do so.

Notice of refusal

18 Where the Review Board is advised by an expert examiner pursuant not to issue an export permit, the Review Board shall send a written notice of refusal to the applicant, which notice shall include the reasons given by the expert examiner for the refusal.

Alteration of permits by Minister and notice

25 The Minister may amend, suspend, cancel or reinstate any export permit, other than an export permit issued on the direction of the Review Board, and where an export permit is amended, suspended, cancelled or reinstated, the Minister shall forthwith send a written notice to that effect to the person who applied for the permit.

No export permit for two years

26 No export permit shall be issued under this Act in respect of an object where the object is included in the Control List, during a period of two years from the date on which a notice of refusal was sent in respect of that object.

Export or attempt to export

40 No person shall export or attempt to export from Canada any object included in the Control List except under the authority of and in accordance with a permit issued under this Act.

Review Board established

48 (1) There is hereby established a board to be known as the Canadian Cultural Property Export Review Board, consisting of a Chairperson and not more than nine other members appointed by the Governor in Council on the recommendation of the Minister.

(2) The Chairperson and one other member shall be chosen generally from among residents of Canada, and

(a) up to four other members shall be chosen from among residents of Canada who are or have been officers, members or employees of art galleries, museums, archives, libraries or other collecting institutions in Canada; and

(b) up to four other members shall be chosen from among residents of Canada who are or have been dealers in or collectors of art, antiques or other objects that form part of the national heritage.

Availability of reconsideration

65 The Review Board may only reconsideration a decision if a factual error has been made.

Exclusion from participation in Review Board processes

67 The Review Board may exclude any person not directly interested in a matter being heard before it from the hearing unless, where the matter is in respect of an object in respect of which an application for an export permit has been made. This applies to both original and reconsideration hearings.

2. ***Canadian Cultural Property Export Control List, CRC, c 448 ~***
An Order Establishing a Canadian Cultural Property Export Control List

Application

1. This Order applies only to an object that is 50 or more years old and was made by a natural person who is no longer living.

...

GROUP V Objects of Fine Art

12. An object of fine art that is made within or outside the territory that is now Canada by a person who at any time ordinarily resided in the territory that is now Canada and that
- (a) in the case of drawing or print, has a fair market value in Canada of \$15,000 or more ...

3. ***Federal Courts Act, RSC 1985, c. F-7***

Powers of Federal Court

- 18.1(3) On an application for judicial review, the Federal Court may
- (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
- (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

- 18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way that was contrary to law.

Statutory Materials: Part C

1. *Administrative Tribunals Act, SBC 2004, c. 45*

Tribunal without jurisdiction over constitutional questions

44.(1) The tribunal does not have jurisdiction over constitutional questions.

Note: Tribunals without jurisdiction over constitutional questions include (but are not limited to):

- Agricultural Land Commission;
- Building Code Appeal Board;
- Community Care and Assisted Living Appeal Board;
- Employment and Assistance Appeal Tribunal;
- Financial Services Tribunal;
- Forest Appeals Commission;
- Hospital Appeal Board;
- Mental Health Review Board;
- Oil and Gas Appeal Tribunal;
- Safety Standards Appeal Board;
- Utilities Commission.

Note that the Human Rights Tribunal has not adopted s.44 and can therefore hear constitutional questions that do not involve the *Canadian Charter of Rights and Freedoms*.

Tribunal without jurisdiction over *Canadian Charter of Rights and Freedoms* issues

Note: Tribunals without *Charter* jurisdiction are:

- Employment Standards Tribunal;
- Farm Industry Review Board;
- Human Rights Tribunal;
- Workers Compensation Appeal Tribunal.

45.(1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.

(1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

(2) If a constitutional question, other than one relating to the *Canadian Charter of Rights and Freedoms*, is raised by a party in a tribunal proceeding

- (a) on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case, or
- (b) on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

- (3) The stated case must
 - (a) be prepared by the tribunal,
 - (b) be in writing,
 - (c) be filed with the court registry, and
 - (d) include a statement of the facts and relevant evidence.
- (4) Subject to the direction of the court, the tribunal must
 - (a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,
 - (b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and
 - (c) decide the application in accordance with the opinion.
- (5) A stated case must be brought on for hearing as soon as practicable.
- (6) Subject to subsection (7), the court must hear and determine the stated case and give its decision as soon as practicable.
- (7) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.