

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

FINAL EXAMINATION – April 2021

LAW 372.003
Administrative Law

Alexandra Flynn

EXAM PASSWORD: Lz9DdW
RESUME CODE: B129D1

TOTAL MARKS: 70 or 100

(8:50 AM PDT) **PREPARATION TIME ALLOWED:** 10 MINUTES

(9:00 AM PDT) **WRITING (INCLUSIVE OF READING) TIME ALLOWED:** 3.5 HOURS (2.5 HOURS if you completed the optional assignment)

8:50-9:00 AM Preparation Time (Exam writing not permitted) – This time is given to students to download/print your exam questions once the exam has been made available online on Canvas, to read the Exam Password on this exam coversheet, to enter the Exam Password for the exam in Exemplify, and to progress in Exemplify until you see the **STOP SIGN**, where you will **WAIT until 9:00 AM. DO NOT proceed past the STOP SIGN. DO NOT begin typing your exam answers in Exemplify until 9:00 AM!**

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This is an open book examination, meaning that you can refer to class notes, casebooks and other class readings. The use of library books is not permitted.

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ADMINISTRATIVE LAW FINAL EXAM

Relevant statutory provisions and administrative materials are located in the Appendix. Rely only on the fact pattern in this exam question, including the Appendix, and the materials listed in the course syllabus to answer the following questions. You may assume that I have provided you with all relevant materials. Please use a clear short-form citation when referencing sources (e.g. *Baker*).

Fact pattern for questions 1 and 2

You are a law clerk for Justice Mona Stone of the BC Supreme Court.

Background Facts

This is a petition for judicial review of two decisions of the Passenger Transportation Board (the “Board”), issued December 1, 2020, granting transportation network services (“TNS”) licenses to the respondents, Uber Canada Inc. (“Uber”) and Lyft Canada Inc. (“Lyft”) (collectively, the “Decisions”).

The petitioners are taxi companies based in the City of Vancouver. The respondent board is a tribunal established under the *Passenger Transportation Act*, SBC 2004, c 39 [*PTA*]. The petitioners sought an order quashing the Decisions.

Statutory framework

The *PTA* establishes the regulatory framework for the operation of commercial passenger vehicles in the province of British Columbia. This includes taxis, limousines, inter-city buses, airport shuttles, and other forms of transportation. Authorization is required under the *PTA* to operate a commercial passenger vehicle in British Columbia. There are three types of commercial passenger vehicles under the *PTA*: inter-city buses, general passenger vehicles, and passenger directed vehicles.

The Board is a regulatory licensing body. It has a number of powers, functions, and duties under the *PTA*. The Board is responsible for making decisions relating to special authorizations. In September 2019, the legislature amended the *PTA* to provide for special authorizations relating to TNS, commonly referred to as “ride sharing.” Special authorizations now include authorizations for inter-city buses, passenger directed vehicles, and TNS. Prior to the amendments, TNS were not regulated and could not operate in British Columbia.

The legislative amendments to facilitate the licensing of TNS were a product of extensive public consultation. Two reports were prepared by a committee appointed by the province regarding the introduction of TNS. In June 2019, the Board undertook province-wide consultations with the taxi and TNS industries which focused on operating areas, fleet sizes, and rates. The results of these consultations were set out in an August 1, 2019, report published by the Board entitled “What We Heard: Ride Sharing in BC.” There was extensive debate of the legislation before it was adopted, with a great deal of opposition.

In addition to the sections of the *PTA* noted in the Appendix, Section 26-29 of the *PTA* set out the provisions that govern license applications relating to inter-city buses, passenger directed vehicles, and TNS. A notice of application is published when applications are received by the Board. Any person may, within the time period specified by the Board, make a written

submission to the Board respecting a special authorization application. When the application process is complete, the Board determines whether to approve an application, in whole or in part. In making such a determination, s. 28 requires the Board to make certain considerations and enables it to establish terms and conditions that apply to the special authorization if a license is issued, and some terms are mandated. Mandatory conditions for TNS include the requirement to provide certain personal information and other data.

On January 1, 2020, the Board published an operational policy on the introduction of TNS in British Columbia to guide the Board when making decisions regarding TNS special authorization.

The Applications

On July 1, 2020, Uber and Lyft each separately applied for a passenger transportation license with TNS special authorization enabling them to operate ride hailing services the Lower Mainland, including Vancouver (the “Applications”). The Board received submissions from over 15 submitters (the “Submitters”), including the Vancouver Taxi Association. All of the Submitters opposed the granting of the Applications.

The Board

The nine-member Board is comprised of appointees from the Ministry of the Attorney General (the “AG”), which mandates that the AG seek a “diverse range of industry representatives” in considering its composition. The Board’s Chairperson, Liza Minelli, appointed in September 2019 under section 93 of the *PTA*, was formerly president of a taxi lobby organization, Taxis Forever, in which she gained notoriety in her fierce opposition to introducing Uber and Lyft when she organized a national campaign urging people to chain themselves to taxi stands near city halls. When published, Taxis Forever accused the Board of minimizing the opposition voices in its report, “What We Heard: Ride Sharing in BC.”

The Hearing

The Board considered the matter using only written documentation and did not permit any of the Submitters to appear in person, despite their request to the Chairperson, and without considering these requests in its reasons. During the closed hearing of Uber and Lyft’s submissions on November 1, 2020, for which notice was properly provided, the Board decided to contact the lawyers acting for Lyft and Uber to clarify the evidence related to the impact of TNS in other Canadian cities, and specifically the impact of TNS on the taxi industry. During their phone call with the lawyers, which lasted 35 minutes and included questions from Board members (the “Call”), Lyft and Uber realized that due to an articling student oversight, a study referenced in their written materials had not been provided and immediately sent it to the Board for their review. The Board did not advise the Submitters about the Call.

The Board considered the Applications pursuant to the *PTA*, specifically, the three considerations set out in s. 28(1):

- a) whether there is a public need for the service the applicant proposes to provide under any special authorization;
- b) whether the applicant is a fit and proper person to provide that service and is capable of providing that service; and
- c) whether the application, if granted, would promote sound economic conditions in the

passenger transportation business in British Columbia.

On October 15, 2020, when asked about the review, Liza Minelli was quoted as stating, “There will never be an Uber picking me up under my watch” in the *Vancouver Sun*. On November 15, the Chairperson stated, “I’ll never lift up Lyft” during a CBC Radio interview, where general Board matters were discussed. During the CBC interview, the Chairperson also referenced the Call, including a statement that, “The article sent over by Lyft and Uber seems really poorly researched. Many of us on the Board thought so.”

The Decisions

The Board granted the licenses to Lyft and Uber on December 1, 2020. The Decisions were identical, with a 5-4 vote in granting the licenses. In addition, the Board made 5-4 decisions for each of Lyft and Uber to review the licenses on September 1, 2021 to consider adjusting the licenses’ terms and conditions following the collection of data by the Board.

In making the Decisions, the Board determined as follows in writing:

- Uber and Lyft had established there is a public need for the service, including evidence from other Canadian cities that there are clientele needs for ride sharing that the taxi industry does not address and the conclusion that TNS are different from taxis.
- That in considering sound economic conditions in the passenger transportation industry in British Columbia, the economic needs of the passenger transportation business overall weigh more heavily than the economic and financial interests of any particular applicant.
- The Submitters referred to a number of factors to argue that the Applications do not promote sound economic conditions in the passenger transportation business in British Columbia. The factors referred to by the Submitters included concern regarding fleet sizes, rates, predatory pricing and the need for a level playing field; the economic impact on taxis; the impact on transit ridership; increased congestion; increased greenhouse gas emissions; increased fatalities and accidents; treatment of TNS drivers; and wheelchair accessibility. The Board considered these factors in the Decisions.
- That while there are potential risks of an unlimited fleet size, there is no empirically substantiated basis for capping fleet size at this time, as well as the requirement that TNS drivers have a Class 4 driver license which would likely result in a slower ramp-up of operations.
- That by not setting an initial fleet size and waiting to accumulate data, supply and demand can be balanced with the goal of meeting public need for service, providing sound economic conditions, and addressing environmental concerns.
- That many of the factors identified by the Submitters were based on experience with TNS in other jurisdictions either generally or specifically as they relate to Uber or Lyft.
- That the legislative framework in place in British Columbia differs from other jurisdictions and that the Decisions took into account experiences in those jurisdictions and the lessons learned.

The Chairperson voted against the granting of the licenses and was in favour of the one-year review of the licenses.

On April 1, 2021, Liza Minelli was terminated from the role of Chairperson.

Question 1 – Standard of review (40 marks)

- a) What is the applicable standard of review?
- b) Do sections 58 or 59 of the BC *Administrative Tribunals Act* apply? Why or why not?
- c) Apply the standard of review to the Board's decision.
- d) What is the appropriate remedy?

Question 2 – Procedural fairness (30 marks)

- a) Assuming that the common law duty of fairness applies, what is the strength of duty owed to the petitioners?
- b) How strong are the petitioners' arguments that they were denied procedural fairness on the basis of participatory rights?
- c) Are there credible claims of reasonable apprehension of bias or lack of independence (select ONE of reasonable apprehension of bias or independence)?

Question 3 – Critical analysis of administrative law (30 marks)

If you completed the optional assignment worth 30%, do not complete the following question

Otherwise, please select one of the following two questions to complete.

Question 1:

- a) **Summarize the facts and issues in *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34 [Coldwater].**
- b) Drawing from *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 and *Coldwater*, explain in plain language how *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 modifies the approach to judicial review in relation to the duty to consult.
- c) Based on the material we reviewed in class, do you think that the duty to consult is rightly framed as a form of procedural fairness? Please explain with reference to applicable case law.

Question 2:

Courts have engaged with the question of “jurisdiction” in *Crevier v. AG (Québec) et al*, [1981] 2 SCR 220, *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, *Weld v. Ottawa Public Library*, 2019 ONSC 5358, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101, among many other cases. After summarizing the meaning of the term “jurisdiction” in the cases cited above, together with an additional case of your choice from the cases we reviewed this semester, explain the evolution of the term over the past four decades and its meaning now.

Congratulations on finishing Administrative Law! Have a great summer!

Appendix: Applicable law

Passenger Transportation Act, SBC 2004, c. 39

"passenger directed vehicle" means the following:

- (a) a commercial passenger vehicle, when the vehicle is operated to or from locations determined by or on behalf of the passengers, but does not include
 - (i) a commercial passenger vehicle that can accommodate more than the prescribed number of persons, or
 - (ii) a commercial passenger vehicle excluded by regulation;
- (b) a prescribed commercial passenger vehicle;

28 (1) The board may approve, in whole or in part, an application forwarded to it under section 26 (1) after considering whether

- (a) there is a public need for the service the applicant proposes to provide under any special authorization,
- (b) the applicant is a fit and proper person to provide that service and is capable of providing that service, and
- (c) the application, if granted, would promote sound economic conditions in the passenger transportation business in British Columbia.

(2) If the board approves an application for a licence, the board must specify the special authorizations that should be included in the licence, if issued.

(3) The board may establish terms and conditions that apply to a special authorization included in a licence, if issued, including, without limitation, terms and conditions respecting any of the following:

- (a) equipment or technology that must be installed, used or carried on or in motor vehicles operated under the authorization and the inspection, testing, adjustment, display and use of that equipment or technology;
- (b) if the licence is to include an inter-city bus authorization, routes and minimum route frequencies;
- (c) if the licence is to include a passenger directed vehicle authorization,
 - (i) the methods by which motor vehicles may be hailed under the authorization, which methods may include
 - (A) booking the motor vehicle in advance,
 - (B) hailing the motor vehicle from the street,
 - (C) hailing the motor vehicle through a dispatcher, or
 - (D) any other hailing method, other than hailing through the use of transportation network services,
 - (ii) information that must be displayed (or carried on or in the motor vehicles, including information the board considers necessary to promote passenger safety and consumer protection,
 - (iii) fleet size, and
 - (iv) the geographic area in which motor vehicles may be operated under the authorization;
- (d) if the licence is to include a transportation network services authorization,

- (i) information that must be displayed or carried on or in the motor vehicles or made available to passengers through the use of the licensee's online platform, or both, including information referred to in paragraph (c) (ii)
 - (ii) fleet size, and
 - (iii) the geographic area in which motor vehicles may be operated under the authorization.
- (4) The board must establish as a term or condition of a special authorization that each motor vehicle operated under the authorization must display, at the times and in the form and manner required by the registrar, a vehicle identifier that is
- (a) issued to the licensee by the registrar, or
 - (b) authorized by the registrar to be issued by the licensee.
- (5) The board must establish as a term or condition of a passenger directed vehicle authorization or transportation network services authorization that the licensee must provide to the registrar any information, including personal information, and data that the registrar or the board may require, including, without limitation, information and data respecting
- (a) the motor vehicles, and the drivers of those motor vehicles, operated under the authorization,
 - (b) the availability of the motor vehicles, at given points in time, for hailing by methods permitted under the authorization, and
 - (c) trips taken by passengers transported in accessible passenger directed vehicles or trips taken by passengers transported in non-accessible passenger directed vehicles, or both, including
 - (i) trip rates,
 - (ii) wait times,
 - (iii) pick-up times and locations, and
 - (iv) drop-off times and locations.
- (6) The board must establish as a term or condition of a transportation network services authorization that motor vehicles may be hailed under the authorization only through the use of the transportation network services approved under that authorization.
- (7) The board must notify the registrar and the applicant of
- (a) a decision under subsection (1) approving or refusing to approve an application for a licence, and
 - (b) if the application is approved, the terms and conditions established in respect of each authorization to be included in the licence, if issued.

62 (1) An application to the Supreme Court to set aside a decision may be made by any party directly impacted.

93 (1) The Board consists of not more than nine permanent members to be appointed by the Attorney General.

(2) The Attorney General shall designate one of the permanent members to hold office as Chairperson.

(3) Each permanent member holds office for a term not exceeding five years and may be removed at any time by the Attorney General.

(4) The Chairperson is paid an annual stipend as per the regulations and has supervision over and direction of the work of the members and officers and employees of the Board.

Passenger Transportation Act Operational Policy

1. The Board as an administrative tribunal operates less formally and more expeditiously than courts of law. Accordingly, the *Passenger Transportation Act* requires the Board to deal with proceedings before it informally, quickly and fairly. The Attorney General has issued these guidelines to explain what the Board does to make its proceedings efficient but still fair.
2. The guidelines apply to most cases heard by the Board. However, in compelling or exceptional circumstances, members will use their discretion not to apply some guidelines or to apply them less strictly.
3. The Board has the lawful authority to control its process and to set its own procedures, as long as the principles of natural justice and fairness are followed.
4. The Board will normally have written hearings whereby participants will send materials to the Board for consideration in advance of the hearing.
5. The Board will notify the parties to an application as to the date upon which it will consider the application.
6. A party who wishes to make an application to change the date or procedures of a proceeding must do so by way of an application to the Chairperson of the Board.

Administrative Tribunals Act, SBC 2004, c 45 [ATA]

58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
 - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.