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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – DECEMBER 2021

LAW 372.002
Administrative Law

Adjunct Professor Pulleyblank

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS
and 15 minutes reading time

- NOTE:
1. This is an open book examination, and candidates may refer to any course material, including their text book, cases, and notes.

THIS EXAMINATION CONSISTS OF 1 QUESTION

LAW 372.002 – Exam

QUESTION 1 – 100 Marks

Relevant statutory provisions are referenced in the exam. Rely only on the fact pattern in this exam question and the materials listed in the course syllabus to answer the following prompt. 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*) I have taken some license with the statutory regime, so please do not import any outside knowledge of the statute at issue.

Fact Pattern

You are a lawyer who specializes in administrative law. One day another lawyer, Ms. Ally Post, comes into your office, distraught, as she has just been suspended from the practice of law by a discipline committee of the Law Society of British Columbia.

Ms. Post, who does not herself identify as Indigenous, practices predominantly in the area of Aboriginal Law. She is counsel on a lengthy land claim being brought on behalf of the Kwantlen First Nation. One day, in order to show her support for residential school survivors, she decided to not wear her robes to court, but to instead wear an orange shirt. The trial judge, Stickles J., immediately demanded that she change back into her robes, and refused to proceed with the trial until she did so. She reluctantly changed, and continued on with the trial.

That evening she had three glasses of an Okanagan Pinot Noir, and took to Twitter. Specifically, she tweeted:

The BC Supreme Court showed again today that First Nations will not be made welcome. #nooarngheshirtforyou

The next morning Ms. Post received a call from Mr. Costello of the Vancouver Sun, who had heard about the orange shirt incident and saw the tweet, and wanted to write a story. He and Ms. Post had a brief telephone interview, where Ms. Post reiterated what had happened and expressed her concerns with ongoing barriers to access to the Courts for Indigenous groups.

The next day a story by Mr. Costello ran in the Sun. Under the headline “Judge Nixes Residential School Tribute” he wrote:

BC Supreme Court Judge Marvin Stickles quickly shut down a tribute to residential school survivors in his courtroom Tuesday. When local attorney Ally Post decided to replace her standard robes with an orange shirt, Judge Stickles immediately demanded that she change, refusing to proceed with the Kwantlen First Nations’ Aboriginal title trial until she did so.

Ms. Post indicated ongoing frustration with the Court system in general, and with Judge Stickles in particular. She suggested that he was a part of the problem, not the solution, and demonstrated a “colonial mindset that adheres to tradition even when it is a barrier to reconciliation”

Ms. Post, upon reading the newspaper article, was horrified, feeling that it was a misleading account of what she had said. She emailed Mr. Costello the next day seeking to clarify, but he never wrote back.

Several months later Ms. Post learned that the Law Society had commenced an investigation of her conduct in relation to the orange shirt, the tweet, and the newspaper article. She attended for an interview with Mr. Wells, staff lawyer with the Law Society. She told him that while she remembers talking about a colonial mindset and tradition getting in the way of reconciliation, she is sure she never called Judge Stickles “part of the problem”, nor did she think she expressed frustration with him in particular. She told Mr. Wells that she had emailed Mr. Costello.

Several days later she received an order from the Law Society demanding that she turn over all of her emails with Mr. Costello or with anyone else relating to the orange shirt incident. She felt that this was an absurd request, but nevertheless turned them over.

The Law Society subsequently issued a citation stating that Ms. Post engaged in professional misconduct. The Citation provided:

On May 2, in the course of representing the Kwantlen First Nation in British Columbia Supreme Court, you did engage in professional misconduct by:

- A. Failing to demonstrate a courteous and respectful attitude to the Court, in particular by failing to adhere to proper dress requirements;
- B. Disparaging a Judge of the British Columbia Supreme Court through social media; and
- C. Making disparaging remarks about a Judge of the British Columbia Supreme Court to a newspaper reporter, which comments were subsequently published.

Ms. Post represented herself at the discipline hearing, which was an adversarial process with the Law Society represented by two counsel.

At the hearing Ms. Post gave oral evidence, explaining that she had merely intended to show solidarity with residential school survivors by wearing an orange shirt, and had meant no disrespect to the Court. She explained how she had felt personally deeply touched by the stories of the remains found at the Kamloops Residential School, and she felt compelled to show her support for her clients (who include residential school survivors and their descendants). She explained that her tweet was an attempt to call attention to the need to ensure that courts are welcoming to all, and expressed her strongly held conviction that court-room traditions should not be a barrier to accessibility for vulnerable groups.

She also gave evidence that, while she may have said the passage in quotes, she is sure that she never called Justice Stickles “part of the problem”, or even spoke about him directly to Mr. Costello. The Law Society elected not to cross examine Ms. Post.

In response to Ms. Post’s evidence, the Law Society led an affidavit of Mr. Costello that stated that his “reporting was true and accurate”. Ms. Post had not seen the affidavit before the Law Society led it into evidence, as they explained Mr. Costello was in Rome on assignment and they had only received the document couriered from an Italian notary that day.

Ms. Post asked to cross examine Mr. Costello on his affidavit, but the request was denied by the panel who found that it was not necessary and that to permit cross examination would unduly delay the resolution of the hearing, given that Mr. Costello was not due to return to Canada for 6 months.

Ms. Post made extensive legal submissions covering a variety of topics, including arguing that the statute authorizing the search was unconstitutional as it violated her s. 8 rights, and should be given no force or effect.

The Panel issued its reasons within a month. They found:

The Panel finds that Ms. Post engaged in professional misconduct in relation to her activities in relation to her representation of Kwantlen First Nations before the British Columbia Supreme Court. Ms. Post arrived at Court in improper attire, thereby failing to show to the Court the courteous and respectful attitude to the Court demanded of her by s. 2.1-2(b) of the Canons of Legal Ethics.

The Panel finds that Ms. Post has offered no explanation for her failure to wear her court robes to Court, which she admitted she knows is expected of members of the bar of British Columbia when appearing at a trial.

Further, the Panel finds that Ms. Post made improper comments about a member of the judiciary on social media. The Panel is particularly troubled by the use of the “hashtag” #noorangeshirtforyou, as it plainly is intended to call to mind the “Soup Nazi” character from the popular television show Seinfeld. Comparing a judge to a Nazi is a decidedly serious matter, and a clear breach of professional obligations.

We conclude that Ms. Post also made improper comments to a member of the media. We have considered and we reject Ms. Post’s evidence that she did not call Judge Stickles “part of the problem”. Rather, we prefer the evidence of Mr. Costello that his reporting was accurate. Further, from a review of past news articles, it is clear that Ms. Post has made disparaging remarks about members of the judiciary at other times in the past. This conduct offends her obligations pursuant to 2.1-2(a) and 2.1-2(b) of the Canons of Legal Ethics.

We have considered Ms. Post's argument that the search power invoked by the Law Society violates s. 8 of the *Charter*. However, as Ms. Post should know, we are the Law Society, not a Court, and it is not our place to analyze the constitutionality of legislation. Her ignorance on the matter raises grave concerns about her competency.

Given the seriousness of the conduct, and given the recent direction of the Benchers of the Law Society that disrespect for the judiciary must be met with suspensions in all cases, we suspend Ms. Post from the practice of law for a period of three months.

Ms. Post advises you that she has no idea what other "disparaging remarks" the Law Society is referring to, and that this did not come up in her hearing. She did however worry that the Bencher's announced "crackdown" on lawyers taking "shots" at the judiciary would come up. This was something that several benchers mentioned in an interview with Lawyers Weekly, and apparently resulted in a memo going to all discipline committees directing that they exercise their discretion to impose significant punishment for any undue criticism of the judiciary.

Ms. Post cannot stand to be suspended from her practice for three months, as she is scheduled to continue the Kwantlen trial shortly and needs to work extremely hard to prepare finish that proceeding.

The Legislation

After speaking with Ms. Post you look at the applicable statute, which is the *Legal Professions Act*. This statute creates the Law Society, and has as one of its objects "establishing standards and programs for ...professional responsibility and competence of lawyers". The *Legal Professions Act* has recently been significantly amended, apparently in response to the *Vavilov* decision.¹

Section 11 of the *Legal Professions Act* empowers the benchers to "make rules for the governing of the society, lawyers, law firms, articulated students and applicants, and for the carrying out of this Act."

Section 36 of the *Legal Professions Act* empowers the benchers to create a discipline committee and delegate to it powers provided by the Act. That same section also empowers the benchers to "authorize an investigation of the ... records... of a lawyer or law firm if there is reason to believe that the lawyer or law firm may have committed any misconduct..."

Section 38 of the *Legal Professions Act* requires that discipline hearings must be conducted before a panel, and requires the panel to give written reasons for any

¹¹ This is me taking license, as I have changed the actual Legal Professions Act in order to fit the needs of this exam.

determination about the conduct of a lawyer. If a determination is made that a lawyer has committed professional misconduct, it is empowered to suspend a lawyer “for a specified period of time”.

While there used to be an internal appeal mechanism, this has been rescinded in the latest amendments. Now the discipline committee decision is the final level of review.

Similarly, there is no longer a statutory appeal mechanism. Instead, the new section 40.1 sets out that:

The benchers have exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Benchers on them is final and conclusive and is not open to question or review in any court.

No provisions of the *Administrative Tribunals Act* apply to the Law Society.

Finally, pursuant to their power under s. 11 of the *Act*, the Benchers have adopted as rules governing the conduct of lawyers the “Code of Professional Conduct for British Columbia”. This includes s. 2.1-2, which states:

2.1-2 To courts and tribunals

(a) A lawyer’s conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

(b) Judges, not being free to defend themselves, are entitled to receive the support of the legal profession against unjust criticism and complaint. Whenever there is proper ground for serious complaint against a judicial officer, it is proper for a lawyer to submit the grievance to the appropriate authorities.

Ms. Post would like advice on whether there are any steps she may be able to take to avoid being suspended from the practice of law. She would like you to prepare a memo setting out what her legal options are, on what bases the decision of the Law Society might be vulnerable, as well as your opinion on the likelihood of success (explaining how the Court is likely to evaluate her case). If there is more information that you need, note what information you would do further research on or ask Ms. Post about in order to assist her. Advise what remedies might be available to Ms. Post.

END OF EXAMINATION