

THIS EXAMINATION CONSISTS OF 12 PAGES (INCLUDING THE APPENDIX).
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER.

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

FINAL EXAMINATION – APRIL 2022

Law 372.003 – Spring 2022
Administrative Law

Alexandra Flynn

TOTAL MARKS:

70 (if you wrote the optional assignment)
100 (if you did not write the optional assignment)

WRITING TIME ALLOWED: 3 HOURS + 30 MINUTES Reading Time
(If you completed the optional assignment, the writing time allowed is
2 HOURS AND FIFTEEN MINUTES + 30 minutes Reading Time)

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.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question.

This exam includes:

- A fact pattern
- Three questions
- An appendix with relevant statutes

GOOD LUCK AND HAVE A WONDERFUL SUMMER!!

ADMINISTRATIVE LAW FINAL EXAM

Relevant statutory provisions and soft law 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

Your firm provides legal advice to the Cariboo Regional Council. A senior lawyer has asked you to assist her in preparing advice to Council members on a number of substantive and procedural issues. She will draw on your analysis when she drafts an opinion letter to Council.

Background Facts

Wizard Lake is an 11-km long, finger-shaped lake in the Cariboo Region of British Columbia. Its south shore is located within the boundaries the Town of Thomas Lake, while its north shore is located within the boundaries of 250 Mile House. Both the Town of Thomas Lake and 250 Mile House are within the Cariboo Regional District. The entirety of Wizard Lake is in the unceded territories of the Thomas First Nation, who have a 20 acre reserve approximately 15 kilometres away from the north shore of Wizard Lake. Wizard Lake is a popular spot for camping, swimming, and fishing, and members of nearby Thomas First Nation regularly fish in Wizard Lake.

Joey Jackfruit owns one of 30 modest, winterized cottages on the south shore of Wizard Lake. Some of the cottagers live in the cottages full-time while others use their cottage for recreational purposes. Near Joey's cottage and several other cottages is a small strip of public land owned by the Cariboo Regional District (the "Land"), a BC regional corporation whose decision-makers are the mayors from the eight municipalities within the regional district (the Cariboo Regional District's decision-makers are not elected directly). Joey and his neighbours have been using the Land for recreational purposes since the cottages were constructed in 1980, keeping items like canoes, picnic tables, and a basketball hoop. The cottage community also hosts an annual week-long "Wizard Lake Clean, Sing and Eat" festival in July, where neighbours from around the lake and nearby communities clean the south shore, play music, and raise funds for the local food bank. The cottagers have constructed a small bandstand on the Land, which the local kids use for fun outside of the festival. There is no other suitable location for the event on the south side of Wizard Lake.

On September 15, 2021, Marty Mushroom, the Chief Administrative Officer of the Cariboo Regional District issued a notice (the "Notice") that the Board was considering an order under s. 285 of BC's *Local Government Act* to dispose of the Land, and that Linda Lemon, a property owner of the north shore of Wizard Lake, would be offered a right of first refusal to purchase the Land to build a restaurant (the "Proposed Orders"). The Notice stated that the Cariboo Regional District and Linda would be partners in the venture in order to improve local tourism, which Marty claimed was suffering as a result of the pandemic. The Notice stated that, if approved, Joey and his neighbours would be required to remove any articles located on the Lands.

Upon receiving the Notice, the cottage owners formed the South Wizard Lake Cottagers Association. They then wrote to Cariboo Regional District Council (the “Council”) requesting that Council not proceed with the Proposed Orders.

On November 2, 2021, the Council held an in-person hearing about the Proposed Orders as part of its regularly scheduled monthly meeting, which lasted approximately an hour and a half. Joey and other cottage owners were invited to attend. At the hearing, the Chief Administrative Officer made a brief presentation about the necessity of the sale of the Land, the advantages of a restaurant on the south side of Wizard Lake, and the plan to use the proceeds from the sale to help to finance a new town arena in the Town of Thomas Lake. Several cottage owners, including Joey, made oral submissions opposing the disposition. They argued that their rights as long-standing cottage owners should be respected and that it was unfair for the Council to now require them to remove structures that had been in place for decades and that this action would displace the beloved Clean, Sing and Eat festival. They also objected to the sale of the Land to Linda without offering the land to the members of the South Wizard Lake Cottagers Association first. Thomas First Nation members were not notified of the Council’s meeting, nor were they present to provide their views about the disposition.

Council members met again the following day to continue their discussion about the Chief Administrative Officer’s Proposed Orders. Neither the cottage owners nor Thomas First Nation members were notified of this meeting. The Chief Administrative Officer, who typically attends all Council meetings, was present. According to the meeting minutes, which were made publicly available via the Council’s website shortly after the meeting concluded, the Chief Administrative Officer provided Council with the following additional information:

- Linda Lemon had an excellent reputation across the region as a restaurateur and business owner, which was known to Marty Mushroom because they were old friends who had previously worked together;
- While not yet publicly announced, the Province of British Columbia planned to cost share the construction of the arena in Town of Thomas Lake, which would be an excellent investment in regional economic development and would complement existing intergovernmental partnerships;
- The Town of Thomas Lake passed a City Council motion earlier that week supporting the disposition of the Land and the District’s partnership with Linda; and
- Joey Jackfruit wouldn’t have been able to buy any additional property anyway, as Joey was in significant debt as a result of a gambling addiction.

Shortly after the Chief Administrative Officer’s presentation, the Council voted to approve the Proposed Orders in a 5-3 decision, with the Mayor of the Town of Thomas Lake voting in favour. There was no discussion of the matter at the Council meeting and no one raised any procedural issues. The Council’s decision was mailed to each cottage owner along south Wizard Lake, along with an order that the cottage owners must remove all structures from District-owned lands by April 30, 2022. A copy of the meeting minutes, which consisted of a report of the vote, was also included in the package. Thomas First Nation received no notice of Council’s decision.

In mid-December 2021, the South Wizard Lake Cottagers Association wrote to Council to request further reasons for the Council's decision. In its letter, the Association protested that Council had continued its hearing in the cottage owners' absence. It argued that Council had not adequately provided for notice, nor had it ensured that all interested parties had been given an opportunity to be heard. In a letter to the Association dated February 28, 2022, the Council refused the Association's request for further reasons. This letter did not address the Association's concerns about notice or the hearing.

The South Wizard Lake Cottagers Association decided to take their dispute to the media in March 2022. When the Council's decision was reported on a local radio station, members of Thomas First Nation discovered that the cottage owners would be proceeding to remove structures along the south shore of Wizard Lake once the lake thawed. Thomas First Nation leaders immediately wrote to the Council and BC's Minister of Indigenous Relations and Reconciliation. In their letter, they expressed concerns that enforcement of the Council's decision would very likely disturb fish habitat in Wizard Lake and that the debris created by removing the structures in question may run off into Wizard Lake, contaminating the water. Thomas First Nation leaders also objected to the fact that they had not previously received notice of nor had been consulted about Council's decision, noting that they were now considering which legal actions might be necessary to safeguard their rights.

Joey Jackfruit has been on stress leave from his non-unionized work as a high school councillor, which he believes is due to the stress of the disposition of the Lands. He believes that the order will affect his retirement plans due to the reduction in value of the cottages. He is also deeply concerned about what he calls "a groundless claim" that he has a gambling addiction, as the local high school has been known to let non-unionized staff go without explanation. To pass the time, he has searched online for additional material related to the sale to Linda Lemon. It looks like Linda and three out of five Council members are involved in the same amateur hockey league, including the Mayor of Thomas Lake. Joey also found Marty's Facebook post dated November 1, 2021, lamenting that the "lazy Wizard Lake Cottagers" were trespassing on District lands while amateur hockey players had nowhere to go and as Chief Administrative Officer he would stop at nothing to put an end to it.

Question 1 – Standard of review (30 marks)

- a) What is the applicable standard of review in relation to the Orders, including whether sections 58 or 59 of the BC *Administrative Tribunals Act* apply? (10 marks)
- b) Apply the standard of review to the Council's decision. In your answer, explain whether Cariboo Regional Council should have provided robust reasons to the South Wizard Lake Cottagers Association for its decision? (10 marks)
- c) Did Council have a duty to consult with and accommodate the Thomas First Nation? If so, which specific processes should Council have followed to satisfy its duty to consult and accommodate? Do any other actors owe constitutional procedural obligations in this case? (10 marks)

Question 2 – Procedural fairness (40 marks)

- a) Evaluate the common law duty of fairness in this case, including the strength of duty owed to the petitioners? (10 marks)
- b) How strong are the petitioners' arguments that they were denied procedural fairness on the basis of participatory rights? In your answer, explain whether notice was adequately provided. (10 marks)
- c) Are there credible claims of reasonable apprehension of bias? (10 marks)
- d) What is the appropriate remedy? (10 marks)

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.

Option 1:

Over 20 years ago, legal scholar David Dyzenhaus introduced the principle of “deference as respect,” which the Supreme Court of Canada adopted in *Baker v Canada (Minister of Immigration and Citizenship)*. According to Dyzenhaus, when courts review the substance of an administrative decision, they should pay “respectful attention” to the reasons that a decision-maker offers in support of its decision. In Dyzenhaus’ theory, courts should not automatically defer to administrative officials. Rather, if courts are to defer, they must first be satisfied by how an administrative decision-maker has justified a particular outcome to those individuals who are impacted by its decision. In this way, courts ensure that administrative officials exercise public power not only legally, but also legitimately.

Our textbook contrasts this deferential approach to judicial review with the approach espoused by Albert Venn Dicey whereby common law courts were the chief protectors of individual rights. By closely scrutinizing administrative decisions, courts safeguarded individuals against the arbitrary exercise of executive power. However, as we have also explored, the distinction between deferential review and muscular intervention often blurs when we examine how judges actually review administrative decisions.

Assess whether “deference” or “intervention” best characterize the role that courts play in Canadian administrative law. Please draw from any relevant materials in this course (no external research). Specifically, you should draw on at least three of the following cases to support your argument: *Roncarelli v Duplessis*; *Baker v Canada*; *Dunsmuir v New Brunswick*; *Canada v Vavilov*; *Bell Canada v Canada*; and *Canadian Pacific v Matsqui*. In your essay, clearly explain whether the *Vavilov* framework is more or less deferential than the previous common law approach.

Option 2:

- a) Please set out the jurisprudence of the common law patent unreasonableness standard, including the case(s) in which it emerged, a description of the standard, and the circumstances around which it ceased being used as a standard in common law.
- b) Where and under what circumstances may patent unreasonableness still apply?
- c) The cases, *Guevara v Louie*, 2020 BCSC 380 and *College of New Caledonia v Faculty Association of the College of New Caledonia*, 2020 BCSC 384, each grappled with the impact of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 on section 58 of BC's *Administrative Tribunals Act*. Do these cases conflict with one another or can they be reconciled?

END OF EXAMINATION – APPENDIX STARTS ON NEXT PAGE

APPENDIX: APPLICABLE LAW

Local Government Act, RSBC 2015, c 1

Public notice requirements

50 (1) If this Act requires notice to be given in accordance with this section, the notice must be published in accordance with section 94 [*requirements for public notice*] of the *Community Charter*.

Purposes of regional districts

185 Recognizing that regional districts are an independent, responsible and accountable order of government within their jurisdiction, the purposes of a regional district include

- (a) providing good government for its community,
- (b) providing the services and other things that the board considers are necessary or desirable for all or part of its community,
- (c) providing for stewardship of the public assets of its community, and
- (d) fostering the current and future economic, social and environmental well-being of its community.

Principles for regional district-provincial relations

186 The relationship between regional districts and the Provincial government in relation to this Act is based on the following principles:

- (a) cooperative relations between the Provincial government and regional districts are to be fostered in order to efficiently and effectively meet the needs of the citizens of British Columbia;
- (b) regional districts need the powers that allow them to draw on the resources required to fulfill their responsibilities;
- (c) notice and consultation is needed for Provincial government actions that directly affect regional district interests;
- (d) the Provincial government recognizes that different regional districts and their communities have different needs and circumstances and so may require different approaches;
- (e) the independence of regional districts is balanced by the responsibility of the Provincial government to consider the interests of the citizens of British Columbia generally.

Broad interpretation

187 (1) The powers conferred on regional districts and their boards under this Act must be interpreted broadly in accordance with the purposes of this Act and in accordance with regional district purposes.

(2) If

- (a) an enactment confers a specific power on a regional district or board in relation to a matter, and
- (b) the specific power can be read as coming within a general power conferred under this Act,

the general power must not be interpreted as being limited by that specific power, but that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power.

Board as governing body

194 (1) The governing body of a regional district is its board.

(2) The powers, duties and functions of a regional district are to be exercised and performed by its board unless this or any other Act provides otherwise.

(3) A board, in exercising or performing the powers, duties and functions conferred on it by an enactment, is acting as the governing body of the regional district.

(4) Despite any change in its membership, the board of a regional district is a continuing body and may complete any proceedings started but not completed before the change.

Area of jurisdiction

195 A board may exercise or perform its powers, duties and functions only within the boundaries of the regional district unless authorized under this or another Act.

Procedure bylaws

225 (1) A board must, by bylaw, do the following:

- (a) establish the general procedures to be followed by the board and by board committees in conducting their business, including the manner by which resolutions may be passed and bylaws adopted;
- (b) provide for advance public notice respecting the date, time and place of board and board committee meetings and establish the procedures for giving that notice;
- (c) identify places that are to be public notice posting places for the purposes of the application of section 94 of the *Community Charter*.

Officer positions

- 234** (1) A board
- (a) may, by bylaw, establish officer positions for its regional district, with titles it considers appropriate, and
 - (b) may, by bylaw or resolution, assign powers, duties and functions to those officer positions.

- (2) For certainty,
- (a) a board may assign to an officer position powers, duties and functions in addition to those required or permitted to be assigned by this Act or another enactment, and
 - (b) the same person may be appointed to 2 or more officer positions.

Chief administrative officer

- 235** One of the officer positions established under section 234 may be assigned the chief administrative responsibility, which includes the following powers, duties and functions:
- (a) overall management of the administrative operations of the regional district;
 - (b) ensuring that the policies and directions of the board are implemented;
 - (c) advising and informing the board on the operation and affairs of the regional district.

Disposition of land and improvements

- 285** (1) Subject to subsection (2), if a board intends to dispose of land or improvements, it must make the land or improvements available to the public for acquisition.

- (2) The requirement under subsection (1) does not apply if the disposition is
- (a) to a not-for-profit corporation,
 - (b) to a public authority,
 - (c) to a person who, as part of the consideration for the disposition, will exchange land or an improvement with the regional district,
 - (d) to a person under a partnering agreement that has been the subject of a process involving the solicitation of competitive proposals, or
 - (e) a disposition of land to an owner of adjoining land for the purpose of consolidating the lands.

Notice of proposed disposition

- 286** (1) A board intending to dispose of land or improvements must publish notice of its intention in accordance with section 94 [*requirements for public notice*] of the *Community Charter* and subsection (2) or (3) of this section, as applicable.

- (2) If the disposition is a disposition referred to in section 285 (2), the notice must include
- (a) a description of the land or improvements,
 - (b) the person or public authority who is to acquire the property under the proposed disposition,

- (c) the nature and, if applicable, the term of the proposed disposition, and
- (d) the consideration to be received by the regional district for the disposition.

- (3) For all other dispositions, the notice must include
- (a) a description of the land or improvements,
 - (b) the nature and, if applicable, the term of the proposed disposition, and
 - (c) the process by which the land or improvements may be acquired.

Use of money from sale of land or improvements

287 (1) Subject to subsections (2) and (3), all money received by a regional district from the sale of land or improvements must be placed to the credit of a reserve fund.

(2) If, after money is received under subsection (1), a debt incurred by the regional district for the purchase or management of the land or improvements remains, there must be set aside all or part of the proceeds of the disposition, as required to repay the debt as it matures together with interest.

(3) Except as required by subsection (2), in the case of a sale of park land, a regional park or a regional trail, the proceeds of the disposition must be placed to the credit of a reserve fund established for the purpose of acquiring park lands.

Court application to set aside bylaw or other instrument

623 (1) An application to the Supreme Court to set aside a municipal bylaw or another municipal instrument may be made by

- (a) an elector of the municipality, or
- (b) a person interested in the bylaw, order or resolution, as applicable.

(2) On an application under subsection (1), the Supreme Court may

- (a) set aside all or part of the municipal instrument for illegality, and
- (b) award costs for or against the municipality according to the result of the application.

Community Charter, SBC 2003 c 26

Requirements for public notice

94 (1) If this or another Act requires notice to be given or published in accordance with this section, the notice must be published

- (a) in accordance with section 94.1, and
- (b) by posting the notice in the public notice posting places.

(2) A council may provide any additional notice respecting a matter that it considers appropriate, including by the internet or other electronic means.

Default publication requirements

- 94.1** (1) A notice must be published
- (a) in a newspaper that is distributed at least weekly
 - (i) in the area affected by the subject matter of the notice, and
 - (ii) if the area affected is not in the municipality, also in the municipality, and
 - (b) unless this or another Act provides otherwise, once each week for 2 consecutive weeks.

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Application for judicial review

- 2** (1) An application for judicial review must be brought by way of a petition proceeding.
- (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

Power to set aside decision

7 If an applicant is entitled to a declaration that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may set aside the decision instead of making a declaration.

No writ to issue

- 12** (1) No writ of mandamus, prohibition or certiorari may be issued.
- (2) An application for relief in the nature of mandamus, prohibition or certiorari, must be treated as an application for judicial review under section 2.

Greater Cariboo Regional District Bylaw Number 1205, 2014

Special meetings – calling and conduct

3.3 A special meeting shall be called by the Corporate Officer on the request of the Chair or any two members, by notice mailed to each member at least five days before the date of the meeting to the address given by each member to the Corporate Officer for that purpose.

3.4 The notice shall state the general purpose of the meeting and the day, hour and place of the meeting.

3.5 The notice of any special meeting may be waived by a unanimous vote of the Board or committee, as the context requires.

3.6 In an emergency, notice of a special meeting may be given with the consent of the Chair and two members, less than five days before the date of the meeting, and notice of the meeting does not need to be given in writing.

Special meeting - advance public notice

3.7 At least one working day before a special meeting the Corporate Officer must give advance public notice of the day, hour and place of the meeting by way of a notice posted at the posting place.

3.8 Section 3.7 does not apply when notice to the members has been waived under section 3.5 or given under section 3.6 and it is otherwise impractical to provide the advance public notice under section 3.7.

3.9 Notices of special meetings must be made through: direct publication in any local community newspaper; posting on the District website; and media release.