Federation of Law Societies of Canada
National Committee on Accreditation

Syllabus

Canadian Administrative Law

**(Revised June 2021;
effective for September 2021)**

Candidates are advised that the syllabus may be updated from time-to-time without prior notice.

Candidates are responsible for obtaining the most current syllabus available.

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Canadian Administrative Law

NATURE OF THE COURSE

Administrative Law is the body of law regulating the ways in which government operates. It is about the rules and limits that apply to not only the operations of the Crown, Cabinets, Ministers, government departments, and municipal corporations but also the various administrative tribunals and agencies deployed by governments for the carrying out of governmental functions of all kinds. It is concerned with the procedures by which all these various instruments of government operate, the substantive scope of their mandates, and the remedial structures that exist to ensure that decision-makers of various kinds act in accordance with the rule of law. As well, throughout the materials, candidates are encouraged to reflect upon the divide between public law and private law and, in particular, the circumstances under which governmental authorities of various kinds or in various capacities are subject not to the special regime of Administrative Law principles and remedies but to the private law rules of contract, tort, restitution and the like.

Some regard Administrative Law as simply a subset of Constitutional Law and, to the extent that, for example, the *Canadian Charter of Rights and Freedoms* and other constitutional and quasi-constitutional enactments (such as the *Canadian Bill of Rights*) serve to place limits or constraints on the way in which public decision-makers act, there is overlap between this subject and Constitutional Law. However, Administrative Law is not about the policing of the divide between federal and provincial jurisdiction enshrined in the *Constitution Act,1867* and the other statutes that constitute the Canadian constitution. Nor does it concern itself in detail with the constitutional incidents of the Crown, Parliament and the various legislative assemblies, or the executive branch.

Rather the primary questions considered in this course are:

1. The circumstances under which governmental decision-makers are subject to an obligation of procedural fairness to those affected by their decisions, and, where applicable, the content of that obligation.

2. The extent to which the substantive decisions of administrative decision-makers are subject to merits scrutiny by the courts on the basis of concepts such as error of law, error of fact, and abuse of discretion, and if so, what is the standard of review that reviewing courts bring to bear.

3. The remedial framework within which the superior courts, both federally and provincially, exercise their review powers.

Some of you will bring to this subject some knowledge of Administrative Law acquired during your legal studies in other jurisdictions. Sometimes, that knowledge will be useful even if the applicable case law is different. However, be *very cautious* in the deployment of knowledge gained elsewhere. There are some very distinctive aspects of Canadian public law that do not find analogues or exact parallels in other common law or British Commonwealth jurisdictions.

In answering the examination in this course, you act at your peril if you automatically start applying the principles and the case law from the jurisdiction of your initial legal training.

CASEBOOKS

The assigned material on which candidates will be examined are:

1. Van Harten, Heckman, Mullan and Promislow (**referred to as CB**), Administrative Law: Cases, Text & Materials (Toronto: Emond Montgomery Publications Ltd., 7th ed., 2015),

   and

2. Colleen Flood and Lorne Sossin (**referred to as F&S**), Administrative Law in Context (Toronto, Emond Montgomery, 3rd ed., 2018).

Detailed page assignments are outlined below in the study guide. These page assignments should be taken seriously. Do not assume that you will be able to pass this subject by simply reading one of the supplementary texts from the list below or even notes based on or provided by various courses and websites that offer assistance in preparing for NCA exams.

Knowledge of the assigned readings is essential.

OBJECTIVES

Candidates should master these materials and the principles of Administrative Law embodied in the various segments of the course to the extent necessary to enable them to answer problem-type questions on a three-hour, open book final examination. Samples are available online at the NCA website.

As well as knowledge of the principles and rules of Canadian Administrative Law, candidates are expected to display an aptitude for the application of that knowledge in the context of *specific fact situations*. That will involve an ability to analyse and distil relatively complex facts, to relate the law as identified to the salient facts, and to reason towards a conclusion in the form of advice to a client or the likely judgment of a court confronted by such a problem. Since administrative law usually involves powers bestowed on administrative decision-makers by statute, students will often be required to read and understand statutory provisions provided on the exam that empower administrative actors.

SUPPLEMENTARY TEXTS

Candidates wishing to consult texts for further clarification and elaboration of the various principles of Administrative Law are directed to the following:

- Sara Blake, Administrative Law in Canada (Toronto: LexisNexis-Butterworths, 6th ed., 2017).
- David J.M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada (Toronto: Thomson Reuters) (a loose-leaf service).
- David Phillip Jones and Anne S. de Villars, Principles of Administrative Law (Toronto: Carswell, 6th ed., 2014).
- Guy Régimbald, Canadian Administrative Law (Toronto: LexisNexis Canada, 2nd ed., 2015).
- Lorne Sossin and Emily Lawrence, Administrative Law in Practice: Principles and Advocacy (Toronto: Emond Publishing, 2018).

However, please be attentive to the fact that Administrative Law has been in a state of flux and aspects of these supplementary texts may be out of date because of subsequent Supreme Court of Canada cases. Indeed, this is also true of the CB and F&S particularly as a consequence of *Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65 [hereafter *Vavilov*], judgment in which was rendered on December 19, 2019. Not only has it changed the principles under which Canadian courts will determine applications for judicial review and statutory appeals on substantive grounds, but it has also rendered redundant much of the previously assigned material on substantive review. Until such time as there are new editions of the CB and F&S, that judgment will be the primary source for understanding Canadian principles of substantive review.

A WORD OF WARNING
Re Section 11.The Vavilov Tests for Standard of Review Selection and Application

When it comes to an examination, if selecting the **standard of review arises on the facts**, you do need to consider the applicable approach, as formulated in ***Vavilov*** and ***Bell Canada***. The contextual, four-factor standard of review analysis, as refined in *Dunsmuir* and its progeny, is no longer good law and will not serve as the basis of an acceptable response. On the exam, no marks will be awarded for an answer relying on this now-superseded case law.

Subject Matter	CB and F&S Readings (begin at the first heading on the first assigned page and end at the first heading of the last assigned page, if any, unless otherwise instructed)

1. Setting the Stage

CB, Chapter 1; F&S, Chapter 1 (read Part X in the light of *Vavilov*)

One of the most important things to understanding studying administrative law is the "big picture". A failure to do so may result in candidates becoming lost in extraneous details.

The critical idea at the core of that administrative law is this: it is the body of law that governs how people exercising power pursuant to a delegation of power in a statute (or occasionally the royal prerogative) go about their business. In most cases, the people who have this form of power (again, typically given to them by a statute) are members of the executive branch of government, although often at some arm's length from it. In our system, based on the rule of law, we want to make sure that people with this power exercise it properly. Almost all of administrative law is about deciding what we mean by "properly".

CB chapter 1 and F&S chapter 1 provide an excellent overview of why administrative law matters, and also the core elements of administrative law doctrine. In this syllabus, we follow the approach described in the materials in dividing the discipline into three parts:

- procedural fairness (or more generally, procedural expectations that administrative decision-makers must meet);
- substantive constraints (or more generally the sorts of substantive errors administrative decision-makers must avoid); and
- challenging administrative decisions and remedies on judicial review (or more generally, the relief available to a person who wishes to challenge an administrative decision and the procedure to be followed in seeking this relief).

(**One word of warning:** CB, p.22 outlines a high level description of grounds of judicial review in administrative law. It is, of course, correct, but it is very much at the highest level – the actual way in which grounds of review tend to be applied is a little different. For instance, courts speak of procedural fairness and, in the area of substantive review, they talk about errors of law, fact, mixed fact and law, and discretion, and the selection and application of the appropriate standard of review (correctness or reasonableness) to challenges brought on any of those grounds. It is these concepts that are important in putting administrative law into practice.)

PROCEDURAL FAIRNESS MATERIALS	F&S, chapters 5, 6, 7, and 9 (341-58 only)

2. Sources of Procedural Obligations — CB 70-78; 243-246

We begin with procedural obligations that administrative decision-makers must observe in exercising their powers. The starting point is understanding where these come from. As the assigned readings suggest, the answer is: from several places. The assigned readings talk about enabling legislation, delegated legislation, guidelines (although for reasons discussed in the material below, be cautious with these), and the common law. We also include a few pages discussing "general statutes about procedure" – that is, special provincial-level statutes imposing procedural rules on the provincial administrative decision-makers to which they apply.

To this list, you must also add the *Charter of Rights and Freedoms* (section 7 is really the only provision that matters for our purposes) and (for federal administrative decision-makers), the *Canadian Bill of Rights*. More on those later.

3. Procedural Obligation Triggers (Knight "Three-Prong" and the Concept of "Legitimate Expectation") — CB 78-97; 101-105; 125-146; 147-174

Delta Air Lines Inc. v. Lukács, 2018 SCC 2

Now that you understand that procedural obligations come from a number of different sources, you need to understand which of these procedural rules applies *where*. We call this the "trigger" (or threshold) – where is a given procedural obligation triggered? Where procedural rules come from legislation (typically, but not always, the legislation that gives the decision-maker his or her powers in the first place), the answer to the trigger question is in the legislation itself. So too with the "general statutes about procedure" – they contain their own triggers. So, you need to be careful to read that legislation if it applies to your decision-maker. (**And a word of warning**: make sure the statute does apply to your decision-maker. **Ask:** could a provincial general procedural statute ever apply to a federal administrative decision-maker?) Also, realise that, even where there is a statutory provision for a hearing, there may be questions as to who is entitled to participate. This is particularly important where the matters in issue are hearings about big projects such as oil and gas pipelines. Here too, the terms of the statutory provisions may be critical, and issues can arise out of sections that give the hearing body discretion as to participatory rights.

We can make more general observations about other sources of procedural obligations. The readings focus in particular on the trigger for common law procedural fairness. Basically, there are two triggers: what we can call the *Knight v. Indian Head* (three-prong) trigger and a concept known as legitimate expectation. Where the requirements of these triggers are met, then procedural

fairness is owed by the administrative decision-maker. What that means in practice is a more complex discussion involving consideration of the content of the procedural fairness. More on that below.

For our purposes here, make sure you understand when common law procedural fairness is triggered. And be sure you focus your attention on the modern rules – there is history in these readings, which should help clarify where the *modern* rule comes from. But history is history, and on the exam you need to understand the rule that applies *now*.

Pay attention to some of the exceptions and constraints on the triggers as well. So, for legitimate expectation, note the courts' views on procedural versus substantive promises. For the *Knight* trigger, the readings talk about final versus preliminary decisions (and the related issue of investigations and recommendations). Note also exceptions to this exception.

We turn to other exceptions to the triggering of procedural fairness in the next section.

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4. Procedural Obligation Triggers (Legislative Decisions & Emergencies) CB 105-125; 146-147

Common law procedural fairness rules may also fail to be triggered where there are emergencies, and also where a decision is said to be of a "legislative" nature. Be wary of the latter; it is a very ambiguous concept. In its clearest form, it means no procedural fairness where an administrative decision-maker is introducing, e.g., a regulation (that is, a form of delegated legislation). But a "legislative decision" means more than this – boiled down to its essence, it can be a decision that is sufficiently general, and not particular to or focused on a reasonably narrow subset of persons. Exactly what this means you need to contemplate in looking at the readings. And you need to appreciate that the general rule – no procedural fairness where decision is legislative in nature – is itself subject to exceptions.

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5. Procedural Obligation Triggers (*Charter* & *Bill of Rights*) CB 175-242

Now we turn to the triggers for another source of procedural obligations: *Charter* s.7 and *Bill of Rights*. A first observation on the *Charter*. This is administrative law, not constitutional or criminal law. It will almost always be wrong in an administrative law exam to discuss *Charter* rights other than section 7 – you are not being examined on s.11 rights or s. 2 or s.15. (Section 11(d) for instance almost never applies to administrative bodies, unless the criteria for its application are met by, for example, the existence of contempt powers).

But with section 7, the situation is different because this provision does impose the requirement to observe "fundamental justice" – a concept with procedural content – on at least some administrative decision-makers. Which ones? Well, those making decisions that go to life, liberty or security of the person. Do *not* make the mistake of assuming that all (or even much) administrative decision-making relates to these interests. But some of it does and you need to understand how and where this trigger works.

The *Canadian Bill of Rights* is similar in many respects, but not all by any measure. Note carefully to whom it applies. Think about whether you ever want to say that a decision-maker exercising power under a provincial statute is subject to the *Bill*. Also look at the triggers for sections 1(a) and 2(e) and note the extent to which they are the same as and differ from *Charter* s.7. Above all, recognize that these two provisions have their own triggers that must be satisfied before they apply at all.

6. Procedural Obligation Triggers (Constitutional Duty to Consult and Accommodate Indigenous Peoples)

CB 593-628; F&S 116-23

Canada's indigenous peoples have special, constitutionally protected rights to consultation before decisions (such as the location of oil and gas pipelines) are taken that affect their indigenous rights and claims. The duty is one that is owed by the Crown. However, the Crown may rely on agencies and tribunals to fulfill that obligation. Where relevant to their proceedings, agencies and tribunals may also have an obligation to assess whether the Crown has already fulfilled those responsibilities. There is a growing body of law elaborating the circumstances under which the duty to consult is triggered, the appropriate venues for both consultation and dealing with issues of consultation, the scope or intensity of any consultation, and the remedial consequences of a failure to consult. Beyond that lie many unresolved substantive issues as to when and, in what form, the outcome of consultation generates a right to accommodation. This last question is beyond the scope of this course. However, the assigned materials should be read as a primer on the procedural aspects of the duty to consult and accommodate and provide you with the knowledge required to address these questions when they surface across a broad range of decision-making powers and functionaries.

7. Content of Procedural Obligations (Right to be Heard)

CB 31-47 (first half of the *Baker* case dealing with procedural fairness); 247-251; 267-270; 278-294; 299-404; 411-438

We turn now to this question: if procedural obligations are triggered, what does the decision-maker have to do? Or more concretely, what is the content of these procedural obligations?

If your procedural obligation comes from a statute – the enabling Act or one of the special legislated procedural codes discussed at CB 72-78, the answer to this

question is: “whatever the statute says is the content is the content”. (However, there may be occasions in which you will have to determine whether the statute is a “complete code” or leaves room for common law supplementation.)

Life is more complex if your trigger is the common law, *Charter* or *Bill of Rights*. While there are some differences, generally speaking, the content where these sources apply boils down to two broad classes of procedural rules: a right to be heard and a right to an unbiased and independent decision-maker.

Within these two classes, there are many details, and you still need to understand “what does it mean in practice to have a right to be heard and what does it mean in practice to have a right to an unbiased decision-maker”.

The basic issue is this: the precise content of procedural rules coming from the common law, *Charter* or *Bill of Rights* varies from case to case according to the circumstances. Certainly, with respect to the right to be heard, you must start with the *Baker* considerations: *Baker* gives you a (non-exclusive) list of considerations that tell you at least something about content. Specifically, the *Baker* test suggests whether the content will be robust or not. (It actually tells you a little bit more if your trigger is legitimate expectations: with legitimate expectations, the content of the procedural obligation is generally what was promised in the procedural promise that gave rise to the legitimate expectation in the first place. If the promise was substantive, you will not be able to enforce it directly, but at the very least, it may lead to enhanced or more procedural fairness.)

Of course, one can’t stop at an outcome that just says “robust or lots of procedural fairness, or not”. That’s not enough. One has to unpack that concept and focus on specific procedural entitlements: how much notice; what sort of hearing; how much disclosure, etc., etc. So the readings review a series of procedural entitlements and propose some lessons on when these particular procedural entitlements might exist and to what degree. Be attentive to this jurisprudence.

A word of warning: when it comes to an examination, you do need to explore which procedural entitlements are owed and whether they have been met, but if you pay no heed to the sorts of circumstances that give rise to these specific entitlements, you may end up with an implausible laundry list of procedural rules that you say should apply when they really don’t. An uncritical laundry list is not satisfactory analysis and does not generate more marks.

8. Content of Procedural Obligations (Unbiased and Independent Decision-maker) CB 439-496.

The second broad class of procedural obligations associated with the common law, *Charter* s.7 and the *Bill of Rights* is the right to an unbiased decision maker.

Here the material deals with bias stemming from individual conduct (attitudinal bias or prejudgment; pecuniary interests; past conduct etc.). Here too there are tests for exactly what rule barring bias applies to a given administrative decision-maker. There is not just one universal standard, especially when it comes to alleged prejudgment or attitudinal bias. These readings will help you understand what the tests are and where they apply.

The materials also deal with "independence" or institutional bias. **A word of warning:** Do not rush to the assumption that independence rules flow from all instances where procedural entitlements might be owed. It would be wrong, for example, to urge that where a statute creates an administrative regime that you think is insufficiently independent, common law procedural fairness can be used to attack this arrangement. Be attentive to the discussion at 493-495. The common law cannot prevail over a statute. There, your independence argument would have to be based on a s.7 *Charter* or *Bill of Rights* source, assuming these are even triggered.

9. Content of Procedural Obligations (Issues arising from institutional decision-making) CB 497-539; 540-543; 550-574.

In this part, we deal with an area that has elements of both the right to be heard and the right to an unbiased decision-maker: institutional decision-making. You need to understand the concept of subdelegation. The delegatus non potest delegare concept sounds like a pretty potent bar on an administrative decision-maker sub-delegating powers to another actor, but there are so many circumstances where sub-delegation is permissible that, really, sub-delegation tends to be important only when certain functions are sub-delegated that offend procedural rules. The concept of "he or she who hears" is an example, tied to the right to be heard. This is an issue that becomes complicated when large, multi-member boards are asked to make decisions that are consistent when they hear similar cases, but in panels with less than full membership.

Another issue for these big boards, when they try to make consistent decisions, is when and where bias concepts are offended.

Yet another issue raised by these materials is if these big boards can use guidelines to try to standardize decisions. If they do, do they wrongly "fetter

their discretion"? (But note that fettering of discretion is a substantive review issue, and so is really governed by the considerations discussed in the next section.)

SUBSTANTIVE REVIEW MATERIALS	F&S, chapters 11and 13

10. Backdrop to the Standard of Review Analysis

CB 629-631; 652-654; 660-671

We shift to the second major issue area in administrative law: review on "substantive" grounds. Basically, substantive errors are errors of fact, mixed fact and law, law (including statutory interpretation), or discretion, although these are sometimes labelled in different ways.

In this part, you'll soon learn that it is not simply enough to look at a decision and determine whether it reflects an error of fact (a misapprehension of the facts), of discretion (a wrong choice or outcome) or of law (a misapprehension of the law). That is because substantive errors are all subject to what is known as the "standard of review" As a starting point, the reviewing or appellate court must first determine which of two standards of review (correctness or reasonableness) governs before evaluating the merits of the grounds of review. Thereafter, the merits are assessed by reference to the test established by the SCC for either correctness or reasonableness.

Notice that we do not mention standard of review in our discussion of procedural entitlements. That is because procedural fairness does not require this "standard of review analysis" – it is usually assessed on a "correctness" standard, with any question of deference left to tests such as that set out in *Baker*. So please do not confuse the approach you apply for "substantive review", using a standard of review test, with that which you apply for "procedural review", where you do not employ this same test.

In these background readings, you are introduced to the concept of a privative clause. Once you understand it – and the courts' efforts to get around such clauses – you'll understand at least part of the initial impetus for standard of review analyses. Then, there is some history looking at failed precursors to the standard of review analysis.

11. The *Vavilov* Tests for Standard of Review Selection and Application

At this point *Vavilov* takes over. Understand it. In particular, understand the way in which the majority modifies the process of standard of review selection that had emerged out of the previous leading case of *Dunsmuir* and its progeny. Even more importantly, understand *Vavilov*'s elaboration of how to conduct reasonableness review, the now predominant standard on applications for judicial review, as opposed to statutory appeals.

Majority judgment in *Vavilov*

CB 877-890

As part of comprehending the changes and elaborations wrought by *Vavilov*, pay attention to the exceptional circumstances when correctness, not reasonableness, is the standard on applications for judicial review. Make sure you can identify the characteristics of those exceptions. Also appreciate the reasons why the Court rejected previous case law which accepted that reasonableness was the presumptive standard of review even for matters on which the legislature had provided for appeal rights.

ET v. Hamilton-Wentworth District School Board, 2017 ONCA 893

Also pay attention to the 2012 wrinkle introduced by the SCC in *Doré*, a wrinkle to which the majority paid little attention in *Vavilov* (see para. 57). *Doré* looks at what standard of review is applied to an exercise of discretion by an administrative decision maker who is considering a *Charter* right in making their discretionary decision. Short answer: "reasonableness". Longer answer: But it may be a different kind of reasonableness review and reasonableness may not be the standard applied to all decision-makers. Reflect on how, if at all, the *Doré* approach has been interpreted and/or modified by subsequent case law such as *ET* and *Trinity Western University*, and implicitly, if at all, by *Vavilov*.

Law Society of British Columbia v. Trinity Western University, 2018 SCC 32, [2018] 2 SCR 293, Headnote & paras. 57-59; 79-105; 111-119; 143-150; 166-208; 302-314

Once you have determined the appropriate standard of review (correctness or unreasonableness), you may also be required to apply that standard to a substantive ruling or decision. For this, you should be familiar with the standards and tests that the SCC has identified for conducting this exercise and be able to deploy them appropriately. In particular, continue to reflect on the SCC's elaboration in *Vavilov* of the context sensitive nature of reasonableness scrutiny and how the Court went on to determine that the decision under review was unreasonable. What role does the obligation to give reasons for a decision, and any reasons that are given, play in the determination of whether a decision is unreasonable? Consider also the companion judgment in *Bell Canada* where the SCC applying *Vavilov* deploys the standard of correctness in a case which commenced by way of a statutory appeal from a tribunal's determinations of questions of law involving statutory interpretation. Appreciate what correctness review involves in both this setting and also those now infrequent situations where correctness will be the standard of review on applications for judicial review.

Bell Canada v. Canada (Attorney General), 2019 SCC 66

A word of warning: when it comes to an examination, if selecting the standard of review arises on the facts, you do need to consider the applicable approach, as formulated in *Vavilov* and *Bell Canada*. The contextual, four-factor standard of review analysis, as refined in *Dunsmuir* and its progeny, is no longer good law and will not serve as the basis of an acceptable response. On the exam, no marks will be awarded for an answer relying on this now-superseded case law.

CHALLENGING ADMINISTRATIVE DECISIONS

12. Venue and Basic Procedure for Judicial Review

F&S, ch. 15;
CB 997-1038;
958-972

Now that you understand the law, it is time to understand how one goes about challenging an administrative decision.

In some cases, there may be what is known as a "statutory right of appeal" or "administrative appeal" – there may be a statute out there (often the enabling statute) that allows someone to appeal the decision of the decision-maker, sometimes to a court and sometimes to another administrative decision-maker. If there is such a statutory right to appeal, one generally must "exhaust" it before turning to judicial review, for reasons that are part of later readings. The rules governing these statutory appeals will be governed by the statute itself. As you have already seen in reading *Vavilov*, correctness will normally be the appropriate standard for reviewing questions of law on a statutory appeal. To what extent does this make pursuing a statutory right of appeal more attractive than applying for judicial review?

Remember: Judicial review is different – do not confuse the two. Judicial review is part of the inherent powers of superior courts to review the exercise of powers by executive branch officials.

Today, this form of relief is generally codified or provided for in primary legislation or Rules of Court. This section concentrates on one of the issues associated with judicial review: standing, or the question of who gets to bring a judicial review application. It also deals with venue: which court one goes to.

13. Remedies

F&S, ch. 2 (59-85 only)
CB 973-993;
1045-1107;
1109-1141;
1176-1185.

Vavilov, paras. 149-52

This last part looks at the relief that can be provided on judicial review and also through separate and different legal proceedings. It focuses on: the sorts of remedies available on judicial review; the fact that the award of remedies on judicial review is discretionary and may be denied on some of the grounds discussed in the materials; and, the fact that there are civil remedies that may overlap with the sorts of errors that give rise to judicial review, but that these are governed by their own rules and procedures. Among the issues that arise on applications for judicial review is that of when a finding of reviewable error should result in a setting aside and remission back to the decision-maker as opposed to a mere setting aside. Often wrapped up in this is a consideration of the circumstances in which a court should simply step into the shoes of the decision-maker and determine the substantive issue rather than sending it back for further consideration. Vavilov provides guidance.

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Online Resources

The majority of case law and legislative resources needed by NCA students are available on CanLII, the free legal information resource funded by the Federation of Law Societies of Canada (**www.canlii.org**). That includes all decisions of the Supreme Court of Canada, and all federal, provincial, territorial and appellate courts.

Your registration fee also includes free access to the Quicklaw resources of Lexis Nexis. Your ID and password will be arranged and emailed to your email address on file a few weeks after the end of the registration session.

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