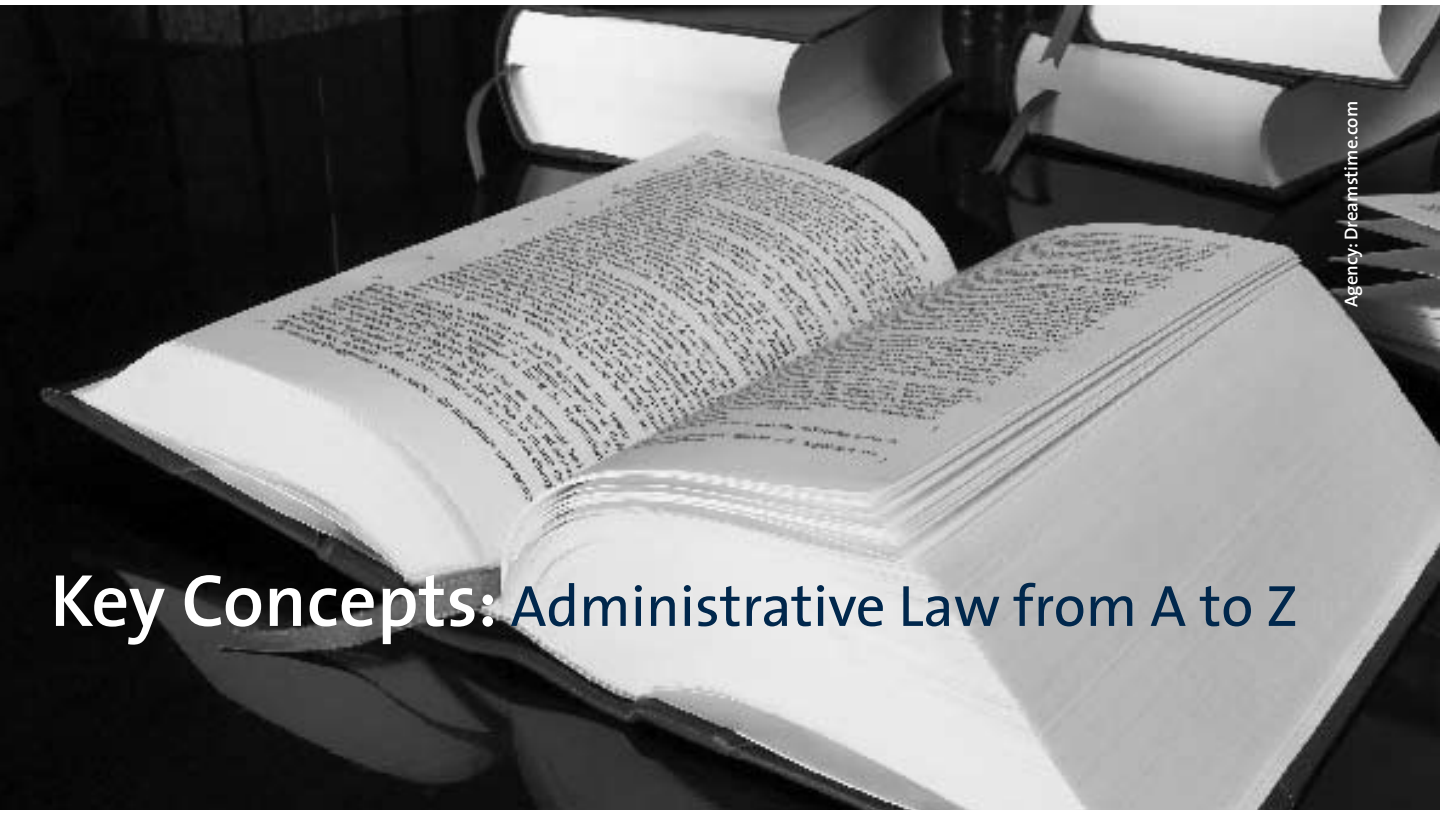

Key Concepts: Administrative Law from A to Z

Peter Bowal and Carlee Campbell

Have you ever wondered how the colossus of government works?

Legislation is enacted, followed by technical, detailed regulations. Implementing rules, further policies, manuals and forms follow. Enforcement and administration of the law requires an efficient method of processing countless applications and complaints from citizens. Government decisions in individual cases often can be appealed to officials and boards.

Government regulates our lives and activities in the public interest. We must apply for licences, for example, and continue to meet licensing standards. The government has created a system of adjudication and enforcement of its regulations. This is the administrative process. Usually when one is interacting with the government, one is operating in this administrative domain. *Administration* is the day-to-day operation of government law and policy.

The Supreme Court of Canada described the function of administrative boards in the *Newfoundland Telephone* (1992) case:

> "Administrative Boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy

we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfill are legion."

Over time, numerous rules have developed that apply to how the administrative process should work. This is called "administrative law". This article is a quick tour through some of these essential concepts of administrative law.

Constitutional Law versus Administrative Law

The Constitution of Canada is the highest law of the country. It is the *law for the making of laws*. All law, including those relating to the administrative process, must follow the Constitution. Administrative law is public law which regulates the cabinet and civil service (called the "executive") so they do not exceed their authority or act unfairly when making decisions.

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Subordinate Legislation

Legislation that is made under authority of other legislation. Regulations and bylaws are subordinate legislation to their enabling statutes. The *Residential Tenancies Act*, for example, permits the provincial cabinet to set the interest rate payable and other details on damage deposits.

Jurisdiction

The right of a person or board to hear and decide an issue, including the proper range of decision-making. The Student Finance Board's jurisdiction is student loans and grants, not liquor licences on campus.

Errors in Jurisdiction

Since jurisdiction is the legal power underlying a decision, if the administrator exceeds that power, the decision may be invalidated (quashed) and sent back to the administrator or board to be re-decided on proper principles.

Delegation

The administration of law and government policy is not carried out by the politicians and legislators. The Prime Minister does not issue deportation orders, and the Premier does not issue drivers' licences. The administration of these laws is usually delegated by the legislation to a government department or board.

Quasi-Judicial Decision-Making

Many administrative decisions call for meticulous factual determinations. The interests at stake may be serious. For example, whether one obtains immigration

status to remain and work in Canada, whether one is granted parole from prison, whether a new television station secures a broadcasting licence, whether a licensed restaurant loses its liquor permit, whether a business person is barred for life from trading in shares on the stock exchange and from holding an office or directorship in any corporation, whether one can build a planned building on one's property, whether a physician loses privileges to work in a hospital — these are critical decisions which are likely to influence one's ability to earn a living or deal with one's private property. Quasi-judicial powers are discretionary, almost judicial, in nature. Since they are exercised by administrators, not courtroom judges, they are called "quasi-judicial". The quasi-judicial characterization means the administrative process in which it occurs approximates the formal procedures of courtroom litigation. In other words, if the stakes are higher, the procedural safeguards are more rigorous.

Merely Administrative Acts

Most decisions of civil servants involve no dispute or consideration "on the merits". The renewal of driving, pet and other licences, the admittance of a Canadian citizen back into the country, the registration of interests in a Land Titles Office, the incorporation of a company, the enrollment of a child into a public school and the payment of a fine in traffic court are examples of routine administrative actions. They leave little room for decision-maker discretion or political interference. Once specified determinants are satisfied, for example, for the issuance or renewal of a passport or the application for social services benefits, the government action is routine and virtually certain. Procedural protections for these merely administrative acts are minimal. Otherwise formalities and appeals would paralyze government administration. Only *procedural fairness* is required, loosely meaning the administrator has to follow the rules, demonstrate honesty, and avoid insidious discrimination and malice toward the person. Some believe that natural justice and procedural fairness are merging into a concept known today as "the duty to be fair."

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Ministerial Decisions

Often the last legal resort in exceptional cases, where the cabinet minister of a government department, if the legislation permits, may serve as the final decision-maker. The minister may freely apply political criteria in a broad, sometimes compassionate, discretionary decision.

Standing (*locus standi*)

To obtain a legal remedy before a government official, a board or a court, one must be personally affected and have an interest in the outcome.

Exhaustion of Remedies

One must follow the orderly progression of decision-making set out in the applicable legislation. Access to appeals and judicial review will depend on having previously submitted the matter to all lower and alternate levels of adjudication.

Judicial Review

Review of an official's or board's decision by a court. The law courts enjoy the inherent power to review the legality of administrative actions. That is because courts exist to interpret legislation, including the delegation of legislative power to administrators. They have also long used the prerogative remedies to exercise supervisory jurisdiction over lower courts and other tribunals. The applicant usually asks for one of the Latin "prerogative writs" described in the box below (because they were traditionally a form of royal prerogative). They were used to control the servants of the Crown. All these remedies are within the discretion of the reviewing judge.

Certiorari: an order striking out or cancelling the administrative decision, usually on some finding of legal or jurisdictional error. "Errors of law on the face of the record" and "patently unreasonable" decisions are reversed by *certiorari*, which is the most common remedy sought in administrative law.

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Mandamus: a positive direction to a public official to perform a statutory, non-discretionary, duty owed to the applicant. This remedy applies where an official or board refuses to make a decision on an application for a building permit, for example.

Prohibition: orders an administrator not to commit a certain error, such as a procedure for which it has no jurisdiction. Prohibition is forward looking and preventative.

Habeas Corpus: requires the state to justify its physical detention of the applicant. It is rare, although significant, in detentions of immigrants, prisoners, children, and mentally incapacitated persons. If detention cannot be justified, the individual must be released.

Quo Warranto: even more rare, this remedy determines the right of someone to occupy a position or office. It prevents unlawful exercise of authority.

Privative Clause

A clause in regulatory legislation prohibiting review of decisions by courts. A primary goal of the administrative process is quick, efficient, and specialized decision-making in millions of interactions with government. If these decisions could be appealed to court, the administrative system would be redundant and courts would grind to a halt under the load. Most administrative decisions cannot be reviewed

by a court unless there is an error shown. Privative clauses do not completely exclude judicial review, especially in jurisdiction issues. The courts maintain ultimate authority over the administration of justice and choose to intervene where appropriate, despite privative clauses.

Natural Justice

The administrator or board must reach a decision with procedural fairness, especially where the stakes are high for the person subject to the process. Historically, natural justice meant that a person must know the case being made against him or her and be given an opportunity to answer it, and the decision-maker must be unbiased. The concept today is expansive, and includes rules about the right to a lawyer, notice of the hearing, disclosure in advance, participation in the hearing (e.g., cross-examination of witnesses), evidence, and reasons for decisions.

Decision-Maker Bias

It is a breach of natural justice for an administrator or board member to be biased by relationship, economic interest, or personal conduct in the hearing. Since "justice must not only be done, but must be seen to be done," an objective "reasonable apprehension of bias" will invalidate a decision.

Abuse of Administrative Discretion

Regulatory legislation entrusts administrators with wide latitude and discretion to make important decisions affecting many people. Will the pilot lose her flying licence? Or the power plant its licence to operate? This discretion is necessary for the administrative process to function, since rarely do two cases present identical circumstances. However, this discretion is circumscribed and reversible errors found where the discretion was exercised with improper intention, in bad faith or malice, on irrelevant considerations, on ignoring relevant matters, on inadequate material (such as no evidence), or on an erroneous interpretation of procedure or the law. Individual cases should be approached with an open mind, properly informed.

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The Correctness Standard

In the absence of a privative clause, the standard for judicial review of jurisdiction is one of correctness. That is to say, a judge can decide whether the decision was correctly made. However, there is a tendency for judges to defer to expert administrators. Facts determined by an administrator are rarely disturbed by a reviewing judge.

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