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**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

FINAL EXAMINATION - APRIL 2003

**LAW COURSE #: 372.003
(Administrative Law)**

Professor Pue

MARKS: 100% OF FINAL GRADE
(except where otherwise arranged in accordance with course rules)

TIME ALLOWED: 3 HOURS (inclusive of reading time)

1. This examination is divided into two parts. You may answer 3 **or** 4 questions. You must answer at least one question from each part. All questions answered will be accorded equal weight.
2. Write legibly, and on every other line of your exam booklet.
3. This is an open book examination. You may bring any written, printed, or typed materials into the room with you. Electronic data sources may not be used and electronic equipment should not be brought into the examination room.
4. If you think other facts are needed to answer the questions, indicate the nature of the facts and why you think them relevant.

Part 1: Problems

Q. 1

Saskalta is a common law province in Canada. In April 2003 the Board of Governors for the University of Saskalta voted to increase fees in the University's Masters in Cultural Anthropology (MCA) from \$10,000 p.a. to \$40,000 p.a. The new fees were applied immediately to all incoming students regardless of whether they had applied to be admitted, or accepted offers of admission to the programme before or after the increase was approved by the Board. There was no advance notice that an increase on this scale was contemplated, though boiler-plate language in University publications indicated that "fees are subject to change". In point of fact no previous year-to-year increase at the University had ever exceeded 10%.

The University is established under the Saskalta Universities Act, which includes the following provisions:

Board of governors

Composition of board

19 The board is composed of 15 members, as follows:

- (a) the chancellor;
- (b) the president;
- (d) 8 persons appointed by the Lieutenant Governor in Council, ...

Reappointment or re-election

21 The appointed members of the board are eligible for reappointment and the elected members are eligible for re-election, but those members must not hold office for more than 6 consecutive years.

Removal from office

22 (1) The Lieutenant Governor in Council may, at any time, remove from office an appointed member of the board.

Powers of board

27 (1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.

(2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:

- (a) to make rules for the meetings of the board and its transactions;
- ...
- (m) to set, determine and collect the fees
 - (i) to be paid for instruction, research and all other activities in the university,
 - (ii)
- (x) to make rules consistent with the powers conferred on the board by this Act;
- (y) to do and perform all other matters and things that may be necessary or advisable for carrying out and advancing the purposes of the university ...

One appointed member of the Board of Governors is Jane Phatquat, President of the Montana Global Bank (a major world bank) with head offices in Saskalta.

Prior to the matter coming before the board, the University and Montana Global Bank (MGB) had entered into a financing arrangement (personally arranged between Ms. Phatquat and the President of the University) to assist students who could not afford the increased fees.

The terms were, in comparison to other possible student loan arrangements, generally advantageous to incoming MCA students. The arrangement brought several million dollars of new business - and considerable profit - to MGB.

Ms. Phatquat took part in the Board Meeting that approved the new fees but did not vote on the matter. She did participate in general discussions about fee matters (taking the position that higher fees were a good thing) and answered questions about the special financing arrangement.

Does administrative law provide any possible remedy for students who are upset by the increase in their tuition fees?

Q.2

The Canadian Copyright Board determined that most internet intermediaries do not need to pay royalties for copyright music transmitted on the internet. This outcome rests on their finding that “the typical activities of operators of host servers and Internet access providers do not constitute communication by telecommunication as defined by the Copyright Act.” An industry organization, The Society of Composers, Authors and Music Publishers of Canada (SOCAN), seeks to overturn the Boards’ decision so its members can collect royalties on such transmissions.

Write a brief advising SOCAN of the standard of review it would have to meet in order to successfully challenge this decision.

The Copyright Act provides neither a privative clause nor a right of statutory appeal. Some of the following statutory provisions might be relevant:

Copyright Act, RSC 1985, c. C-42

2. “telecommunication” means any transmission of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, optical or other electromagnetic system;

2.4 (1) For the purposes of communication to the public by telecommunication,

(b) a person whose only act in respect of the communication of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public; ...

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

66. (1) There is hereby established a Board, to be known as the **Copyright Board**, consisting of not more than five members, including a chairman and a vice-chairman, to be appointed by the Governor in Council.

(2) The members of the Board shall be appointed to serve either full-time or part-time.

(3) The chairman must be a judge, either sitting or retired, of a superior, county or district court.

(4) Each member of the Board shall hold office during good behaviour for a term not exceeding five years, but may be removed at any time by the Governor in Council for cause.

68. (1) The Board shall, as soon as practicable, consider a proposed tariff and any objections thereto ...

(2) In examining a proposed tariff for the performance in public or the communication to the public by telecommunication of performer's performances of musical works, or of sound recordings embodying such performer's performances, the Board [shall or may do certain things...]

FEDERAL COURT ACT

18. (1) Subject to section 28, the Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought

(3) On an application for judicial review, the Trial Division may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Part 2: Essays

Q. 3 (answer *either 3A or 3B but not both*)

3A. Professors Bryden and Gunn have said:

“Some commentators maintain that review of the exercise of discretion is just another type of review for jurisdictional error. On that view, a court is justified in correcting an error made by an administrative body in the exercise of a discretion only because the administrative body lost jurisdiction by exercising the discretion in a way that the enabling jurisdiction did not permit. Other commentators resist the need to characterize an erroneous exercise of discretion as jurisdictional before a court is entitled to intervene. Attempting to shoehorn review of discretionary decisions into the jurisdictional review category, they say, risks confusion and may mislead.” (Bryden & Gunn, casebook, p. 358)

Bearing this in mind, consider comments of Mr. Justice Linden in a recent decision of the Federal Court of Appeal (not in your course materials):

“In my opinion, we have almost reached a stage in the development of the law of judicial review of administrative action in Canada when the concept of jurisdiction can safely be abandoned as a useful determinant of the standard of review applicable to a specialist administrative agency's interpretation or application of a provision of its enabling legislation on which the agency based its decision.”

and:

“Before considering the various elements of the pragmatic or functional analysis for determining the standard of review, a reviewing court should not lose sight of the ultimate question that this approach is designed to answer: did Parliament intend the tribunal or the court to determine the disputed issue? The answer to this question, in turn, ultimately depends on whether the court or the administrative agency under review is better placed to decide the issues in dispute...”

Are Mr. Justice Linden's statements accurate and can they be reconciled?

Or

3B. “The Supreme Court of Canada continues to craft a standard of review that will never be definitive. This issue is re-visited at least once a year by the court... However, *Suresh* has the benefit of resolving some confusion created by *Baker* surrounding the standard of review of an exercise of discretion. ... [In *Baker*] ... the Court then went on to confuse matters by applying the ‘pragmatic and functional’ approach and the ‘spectrum’ of standards of review that was developed for review of questions of law to the review of an exercise of discretion. It did this in recognition that there are degrees of discretion.Traditionally the weight to be given to each factor was not reviewable.... This represents a significant departure from the traditional approach to judicial review of discretionary decision making. The *Suresh* decision marks a return to tradition.” (Sara Blake, *Administrative Law Update*, Continuing Legal Education Society of BC, 2002). **Discuss.**

Q.4

Natural Justice in Canada, published in 1981, celebrated the shift from an approach to fair proceedings based on classification of functions (as “administrative”, “executive”, or “quasi-judicial” for example”) to one based on the more open criteria involved in the then-novel doctrine of fairness. The author predicted a rosy future, noting that some decisions

“... have raised concern in some quarters that the traditional protections provided by natural justice are seriously threatened. The argument here is roughly to the effect that once it is held in one context that there has been a fair hearing without notice of the case to be met, it will not be long before the requirement of a reasonable and adequate notice is abandoned altogether. It is true that a judge who is in any case inclined to uphold the decisions of tribunals may grasp at straws to extend the range of circumstances in which natural justice is held to have a minimal content. However, it would be improper to impute such motives to the judiciary.... the very flexibility of the law will encourage the courts to seek to enforce a standard of natural justice which will be fair to complainants and administrators alike. They will be forced to deal openly with the issues that actually influence their decisions, and it will no longer be possible to hide the policy reasons for their holdings behind a terminological smoke-screen or a trite recitation of dicta from cases that may have arisen in very different circumstances. The quality of reasoning employed in natural justice cases will no doubt improve for being exposed to public scrutiny.... The new flexibility will have the very desirable effect of ensuring that the courts openly grapple with the issues which in fact determine the result. Ultimately we will see the development of a truly coherent body of law which will provide prospective guidelines for administrators and persons subject to their powers alike.”

How accurate has this prediction, offered 22 years ago, proved?