



NATIONAL COMMITTEE ON ACCREDITATION

SAMPLE EXAMINATION

ADMINISTRATIVE LAW

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Question 1 (25%)

In 1995, Martha Muffin commenced work as a part-time employee with Scones and Cakes Ltd., a bakery operating in Fredericton, New Brunswick, working three days a week. In 1998, the employer made her an offer of full-time employment and she accepted. In March of 2006, because of a downturn in business, the employer was forced to lay off 25% of its staff and Martha was one of those given a layoff notice.

The employment relationship between the employer and its full-time employees is regulated by a collective agreement entered into under the provisions of the New Brunswick Labour Relations Act (“the Act”). Under that collective agreement, it is provided:

136. In any lay off of employees, the employer will observe strictly the principle of seniority.

That means that any lay off will be on the basis that those hired most recently will go before those with longer service.

When she learns of her lay off, Martha is dismayed to also discover that Ralph Biscuit, who started work with the employer in 1997, has not been laid off. When she makes inquiries of the personnel manager of the employer, Martha is told that she has less seniority than Ralph because he started work initially as a full-time employee and she only became a full-time employee in 1998. It was only at that point that she became covered by the collective agreement, its terms explicitly excluding part-time employees.

Martha then took her case to her union representative and the representative filed a grievance on her behalf arguing that the wording of clause 136 made it clear that, for the purposes of seniority, the date that mattered was the date of initial hiring (whether as a part or full-time employee) and not the date on which the employee became otherwise covered by the collective agreement. The employer rejected this grievance and the Union took the matter to arbitration where it was equally unsuccessful. The arbitrator held that the term “employees” in clause 136 meant “employees covered by the collective agreement” and that the principle of seniority applied on the basis of the period during which the employee in question was covered by the collective agreement *i.e.* had been a full-time employee.

The Act provides that every collective agreement shall make provision for “final and binding” arbitration of workplace disputes, and clause 147 of the collective agreement provides that any award made by an arbitrator on a grievance is “final and binding on the parties”. The arbitrator was appointed from a list of arbitrators agreed to by the parties, a list that operated on a rotational basis.

The Union then commenced an application for judicial review in the New Brunswick Court of Queen's Bench. It asserted that the arbitrator had interpreted the collective agreement incorrectly and that the Court should quash the award. In response, the Union argued that the Court had no basis for intervening in the arbitrator's interpretation of the collective agreement, an interpretation that was final and binding. Write the judgment of the Court dealing with the application for judicial review.

Question 2 (25%)

Acting under the Federal Public Works Act, the Governor in Council has promulgated a regulation establishing a fair wages policy for employers who are successful in bids for Government of Canada work. Under this regulation, it is provided that any employer who has twice violated the fair wages policy may be disqualified from bidding for Government of Canada work for a period of two years.

The regulation creates a complaint mechanism whereby employees can lodge a complaint with the Director of the Fair Wages Policy Office that the employer has not been paying a fair wage as provided for in the regulation. The regulation goes on to instruct the Director to investigate any complaint and to report her or his findings to the Minister of Public Works with any recommendation as to sanction. In turn, the Minister is authorized to issue a disqualification notice in the case of a second violation of the Policy.

In March of 2006, the Director received two separate complaints of a violation of the Fair Wage Policy against Magic Construction Ltd., which at that time was engaged in building two ice hockey arenas for the Department of National Defence. On each of those projects, its employees were receiving the same wages.

The Director asked the company for its wages records for each of those projects and, on the basis of those records, concluded that the company in each instance had been paying less than the wages required by the fair wages policy. The Director then made a report to the Minister on each of the complaints, and recommended that the Minister issue a disqualification order on the basis of two violations. The Director sent a copy of this report to Magic Construction Ltd.

At this juncture, the President of Magic Construction Ltd. approaches the senior partner of the law firm at which you are articling. She tells the senior partner that the company now realises that it had indeed been violating the fair wages policy on each of its projects. However, the Director had never given the company a chance to explain its actions and, more particularly, had not alerted it to the fact that its ability to bid on government work was in jeopardy. The President went on to assert that, if given the opportunity, she would have urged the Director that disqualification for two separate violations was only triggered in the case of a further violation after a finding of an initial violation and not in the case of contemporaneous violations resulting from the same company wages scale.

The President also learns that the spouse of one of the complaining employees is one of six staff persons in the office of the Minister of Public Works.

Following the consultation with the President of Magic Construction Ltd., the senior partner asks you to provide him with a memorandum on whether there is any basis for judicial review at this stage on the process. Prepare that memorandum.

Question 3 (25%)

Under the Alberta Dentistry Act, the Society of Dentists regulates the conduct of the profession including the discipline of its members. Complaints of professional misconduct are dealt with by the Dentists Discipline Board, which is comprised of a Chair, and two other members, with provision also made for the Board to be assisted by a lawyer at any hearing. Under the Act, the Chair and the members are required to be dentists and are appointed by the Society's Board of Directors. It is also provided that the Chair is responsible for reviewing complaints and determining whether there is any basis for an investigation by the Society's investigative staff. Following an investigation, the staff determine whether a hearing is justified and, if so, send it on to the Society's "prosecutor" for the formulation of charges and the setting up of a hearing. Under the procedural rules authorized by the Act, there is no provision with respect to whether dentists are entitled to be represented at any hearing. However, the rules provide the Discipline Board with a discretion in matters not covered by the procedural rules "to proceed in a manner which ensures an efficient, fair hearing". Sanctions for professional misconduct range from reprimand, through suspension, to expulsion and there is also provision for a fine of up to \$250,000.

In January of 2006, the Chair of the Discipline Board sends a complaint of professional misconduct against Gerald DeMuth to the Society's investigators and, following an investigation, the matter is sent on to the Society's prosecutor to set up a hearing. At this point, as provided for in the Rules, the Board stages a prehearing conference. At that conference, DeMuth is represented by Harvey Kyoto, a former dentist who has, without protest from the Board, acted for a number of years as an advocate for dentists charged with professional misconduct, including DeMuth himself on one prior occasion. At the prehearing conference, however, the Chair tells DeMuth and Kyoto that henceforth it will allow only lawyers to act as counsel at hearings. Kyoto protests loudly but to no avail. He also alerts the Board to the effect that, on behalf of DeMuth, he wants to argue that the provisions of the Act that authorize the Chair to both direct an investigation and preside at any subsequent hearing are contrary to sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms. The Chair, with the consent of the other two members of the Board, tells Kyoto that neither he nor any lawyer appearing for DeMuth can make that argument as the Board does not have jurisdiction to entertain Charter challenges.

At the conclusion of the prehearing conference, DeMuth and Kyoto approach the senior partner of the law firm at which you are articling and seek his advice on whether they have any basis for challenging by way of judicial review the Board's refusal to allow Kyoto to represent DeMuth and its ruling that it has no jurisdiction to entertain Charter challenges. Thereafter, the senior partner asks you to provide him with a memorandum on those two issues. Prepare that memorandum.

Question 4 (25%)

Once you have completed the memorandum called for in Question 3, the senior partner asks for a follow-up memorandum on whether the Charter (and sections 7 and 11(d)) even apply to the proceedings before the Board and, if the Charter and sections 7 and/or 11(d) are engaged, whether the provisions of the Act with respect to the roles of the Chair constitute a violation. Provide that memorandum.

