PROCEDURAL REVIEW

(1) Does a duty of fairness at common law apply in the circumstances? [the "**threshold**" question]
   a. Yes, if it affects rights, privileges, and interes Bill 40ts (*Baker*) — unless it's legislative action; determine by:
      i. the nature of the decision to be made by the administrative body**;**
         - **general**/legislative (*no P.F.*) or **specific**/administrative (*P.F.*)?
         - decisions of a ***preliminary nature*** will not trigger P.F. (overstatement**!** — decision-making = complex & multi-staged; there are NON-FINAL decisions to which P.F. attaches & vice versa)
      ii. the relationship existing between that body and the individual; and
         -*e.g.* employee/employer?; overall context—nature of decision-maker vis a vis the application; was it a Cabinet decision being made (*Inuit*); on what grounds can the decision be made?
      iii. the effect of that decision on the individual's rights (must be significant and important)

(2) If so, is there anything in the statute that modifies or abrogates this duty?
   a. Does the defence of "statutory authorization" apply? *Express or by necessary implication.* (*Kane*)
   b. *E.g.* if statute says, "decision can be made without this procedure." Note difference with: "A is entitled to a written hearing" does not imply that there is no right an oral hearing! Must say akin to: "procedures are exhaustive."
   c. Check *ATA*.

(3) If there is a duty and it is not modified or abrogated by statute, what is the content of the duty of fairness in the circumstances of the case?
   a. [the content question – **now, apply Baker 5 factors**]
   b. Baker provides the **level** of procedural fairness.
   c. …Then (overlapping into 4) determine if **specific level** has been complied with… (e.g. was there a need to have a lawyer? Should there have been cross-examination rights?)

(4) Has the duty of fairness been complied with? [a **factual** question; what happened in terms of "notice" and a "right to be heard" being accorded? Was what was done good enough to meet the duty of fairness that applies in all the circumstances?]

(5) Are there any reasons the court may nonetheless withhold the **remedy**?
   a. even if P.F. was obligated and not accorded, <u>remedies are discretionary</u>. (*Homex* - jerkface)

A. Introduction to Procedures and Sources of Procedural Entitlements

1. IS THE PROCEDURAL SUFFICIENT GIVEN WHAT IS AT STAKE?
2. PF in administrative justice is a variable concept at common law — it is context specific and a highly variable approach
3. <u>Sources of Procedural Entitlements</u>
   a. ***First***, read and re-read the ∫**statute**
      i. Enabling act and/or regulations
      ii. BC ***ATA*** – ONLY IF enabling act provides that a provision within ATA applies that particular procedures
   b. ***Second***, consider ∫**policies & practices** re procedures of d-maker. Were they followed?
   c. ***Third***, ∫**common law procedural obligations** – courts will use CL to breathe PF requirements into administrative d-making process; provided statute is silent; if statute provides clearly provides procedures (expressly or by necc. implication), these abrogate CL obligations unless constitution is engaged.
   d. ***Fourth***, ∫**constitutional provisions** re procedures
      i. S. 7 of the *Charter* — a very high threshold, and not in accordance with PFJS
      ii. Quasi-constitutional rights documents might also be relevant

Policy for Affording Participatory Rights: Purposes, Norms, and Values
1. **Democratic values**: citizens have rights to participate in decision-making and political processes
2. **Legitimacy:** participation increases legitimacy and provides **reconciliation**
3. **Dignity:** participation respects the dignity of persons subject to administrative action, protects **autonomy** interest
4. **Instrumental**
   a. Substantively **more informed** decision-making
   b. **Increased compliance** with the decision
   c. Increased **formal equality** (consistency)
   d. Increased **accountability** and **transparency**

Policy for Limiting Participating Rights
1. If **purely legislative action** (courts can't review – legislative supremacy unless constitutional issues
2. **Policy making in a generalized way by the executive branch** — ideal model of the judicial process is not suited to the varying functions & purposes of administrative d-making

B. Historical Development of the Common Law of Procedural Fairness

1. Common law concept of natural justice →
    a. *audi alteram partem* (hear the other side); which generally entails:
        i. (a) right to **notice**; and
        ii. (b) a right to be **heard**;
    b. *nemo judex in sua causa* (no one should be a judge in his/her own cause); which includes:
        i. (c) **rule against bias**

2. **Early common law:** hearing rights inferred as a matter of justice; when important rights of individual were affected by the decision or action at issue, especially if allegations of "wrongdoing" were at issue. (*Cooper*)
3. **Later common law:** restrictions on access to hearing rights arose in the 20th century (1920-1960). NJ applied only to "judicial" or "quasi-judicial" decisions, where as all public authority decision accorded no hearing rights.
    a. An "all or nothing approach" – NJ did not apply (1) if decision was not a final; (2) involved only privileges (as opposed to rights); and (3) if no superadded duty to act judicially was found in the statute.
    b. **BUT**, English common law began to "undo" the restrictions, creating a general "**duty of fairness**"

Constitutional Basis for Judicial Review

- **Issue**: (1) To what extent does the constitution guarantee the power of s.96 courts to conduct judicial review of the decisions of administrative agencies? (2) To what extent, if any, can a legislature protect its administrative decision-makers from review through the use privative clauses?

Crevier v. Quebec
 	
Quebec statute created Professionals Tribunal and gave it exclusive appellate jurisdiction made by the discipline committees of most self-governing professions. Contained a full privative clause.
Held: clause is constitutional.
	• Superior courts have *inherent jurisdiction* to determine the limits of their own jurisdictions and *core powers* which only they can exercise. The provinces cannot give these powers to tribunals, or they would effectively be creating superior courts;
	• Provinces can only create statutory courts with no inherent jurisdiction – its jurisdiction is confined by statute.
	  ○ Decision appeals to *legislative supremacy*.
	• **Judicial review thus constitutionalized**, guaranteed to the citizenry.
	  ○ The entrenched right to judicial review on "jurisdictional grounds" — includes breaches of PF and substantive review.

Nicholson SCC 1979
 	
PO discharged after 15mo; no reasons; no opp to be heard. Held: (pre-18 mo.: 'duty of fairness' - could only be dismissed for cause; post-18 mo.: full hearing rights (NJ) applies.
	• **Canada adopts "duty of fairness"**
	• Implied that the duty was a "half-way house," lesser than natural justice; NJ would apply in some circumstances and "duty of fairness" in others.
	  a. NJ runs in the judicial and quasi-judicial field;
	  b. A duty of fairness runs in the administrative/executive field.
	• Nicholson entitled to reasons and opportunity to respond.

C. Post-*Nicholson* Development of the Fairness Doctrine

1. Courts eliminate distinction between NJ and a duty of fairness (unless statute says otherwise) (*Martineau*)

Cardinal SCC 1985 Prison riot. Alleged instigators put in solitary confinement by Director pursuant to regulation. Review Board recommends release of prisoners into gen. pop, but Dir decides to keep prisoners in segregation (i) without giving them notice; nor (ii) any opportunity to be heard. Prisoners sought *habeus corpus* and *certiorari*. **Held**: decision invalid.	• Affirms common law principle of a **duty of procedural fairness.** • *General Principle of PF Threshold*: Applies to every public authority making an administrative decision which is (1) not a legislative nature; (2) affects the rights, privileges, and interests of an individual. • *Importance of Context*: not every beach of prisons rules of procedure will bring intervention by courts. The very nature of a prison institution requires officers to make "on the spot" decisions; powers of judicial review must be exercised with constraint; not justified in trivial or merely technical incidents. • **Emergeny Doctrine:** *exception to the threshold that decisions can be made w/o PF in emergency situations if PF is followed after the fact.*
Knight Reappointment; P had ample opportunity to make case why office should be continued;	• **PF** applies to those who hold office at pleasure. ○ **But** content of PF minimal (informal negotiations); afforded sufficient PF. • **Nb.** *Dunsmuir* modifies this decision—no distinction among employees.
Baker	• **MODERN RULE:** The fact that a decision is administrative and affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness.

Procedural Fairness: Threshold, Limitations, and Exceptions

A. The Threshold Test: "Rights, Privileges, and Interests"

- "Rights, Privileges, and Interests" is a broad concept; sufficient in scope to cover most decisions made by public authorities that potentially impact an individual in sufficiently serious ways, even in the absence of a specific rights entitlement (e.g. reputation).
- **Remembe**r: there may be different ways to characterize an interest and its impact. (*Baker*)

Re Webb Webb qualified for housing b/c welfare; had no statutory right to housing. PF still afforded. But, the content of the duty was met – *being made aware* that she was at risk of being evicted. Minimal content of PF satisfied by notice.	• State benefits provided to support disadvantaged individuals ("new property rights") attracted procedural fairness obligations. • *Webb* suggests a distinction regarding PF hearing rights based on whether what is at issue is the loss of an *existing* right, status, or privilege, *versus* a "pure application" for a state benefit to which an individual has no pre-existing right or expectation to receive. o While not firmly established in the case law, this distinction is important in **characterizing** the interest affected. o ***Policy*:** procedures may not have applied to someone who *qualified* housing *versus* someone being deprived of it. • **Nb.** *McInnis* (UK, 73): "forfeiture"–taking away existing right/status=PF; (2) "pure application"–denial of license/benefit=no PF; (3) expectation-likely.

B. Limitations and Exceptions: "Non-Final" Decision-Making (aka "**non-dispositive decision-making**")

- The duty of fairness applies only in contexts in which *decisions* are made. In other words, it does not apply to *purely* investigatory or advisory processes that occur prior to a formal decision. However, procedural fairness may be required at the investigatory stage where reputation is a stake – such as in the context of human rights investigations (*Blencoe*).
- It may also be required where the preliminary stage has *de facto* finality.

- Key Factors:
  - "PROXIMITY TO FINAL DECISION"—interrelationship between various stages of a multi-stage process—**the impact of the preliminary process on the final decision.** (*de facto* finality)
  - **"**EXPOSURE TO HARM"—**immediate impact or effect of the preliminary process on the rights, privileges, interests of person claiming PF**. [*e.g.* immediate effect on reputation interests at nonfinal stages (*Blencoe*)]

- **Nb.** whether deficiencies in an admin d/making process can be "corrected" by according PF at a later administrative stage such as an "internal" appeal varies from case to case on and depends on the particular circumstances. 5 factors to consider (*Taiga*)
  a) The gravity of the error committed at 1st instance;
  b) The likelihood that the prejudicial effects or the error may have permeated the rehearing
  c) The seriousness of the consequences for the individual'
  d) The width of the powers of the appellate body
  e) Whether the appellate decision is reached only on the basis of material before original tribunal or *de novo*

Re Abel 1979 Pysch release. 1st: advisory review board makes non-binding recommendations to final d-maker (Cabinet) re release of NCRMD from psych institution. Hearing held at 1st stage but info ARB relies on not disclosed. PF attaches to non-final decision.	• "PROXIMITY": high degree; ARB recommendation is a *de facto* determination of Cabinet's final decision. Cabinet very unlikely to release without positive recommendation from ARB; because ARB is an expert and close to the decision and the facts. • "POTENTIAL FOR HARM": significant. Liberty interest at stake; person has to stay for another year. • **Held**: ARB ought to have disclosed information to patient unless there is good reason not to (*e.g.* institutional concerns re security, effects on patient)
Irvine SCC 1987 Hearing Officer presides over fact-gathering investigation into anti-competitive trading practices. Statute allows HO to examine witnesses under oath; HO restricts rights of counsel – not allowed to cross-examine witnesses. Does PF apply at this 1st stage?	• "PROXIMITY": low; no findings of fact or recommendations made at 1st stage • "EXPOSURE TO HARM": minimal; very little at stake in the 1st stage, just an inquiry. While inquiries can harm reputations (Blencoe), everything is in private at this stage. • **HELD**: PF required, but minimal; satisfied by right to counsel *simpliciter*. • *Policy:* not wishing to burden investigative process; economic context—trading crimes difficult to investigate; power needs to be balanced between state and corp. lawyers defending these investigations.

C. Limitations and Exceptions: "Legislative and General" Decision-Making

- The rules governing procedural fairness do not apply to a body exercising purely legislative functions (*Re Canada Assistance*)
- Decisions of a legislative and general nature are distinguishable from acts of a more administrative and specific nature. (*Knight*)
    - **Primary Legislation**: Clearly applies; exempt from duty of fairness because of ***separation of powers***.
    - **Cabinet and Ministerial Decisions**: not subject to the legislative exemption *per se*, but easy to characterize these decisions as legislative in nature and thus exempt from the duty of fairness, esp. if broad/policy. (*Inuit Tapirisat*)
        - HOWEVER, reviewable if individualized decision making; *or* if objective standards not followed.
    - **Regulation**: PF is unlikely to attach to subordinate legislation. Even though it is made pursuant to executive authority (and democratic accountability may be minimal), the judiciary is unlikely to intervene.
        - Any "opportunities to be heard in regulation making will from state law, e.g., "notice and comment" provisions in fed. Regulatory regime.
        - HOWEVER, courts did intervene in the passage of a municipal bylaw motivated by an ongoing dispute with an individual (*Homex*)

Inuit Tapirisat SCC 1980 CRTC must determine if rates are just & reasonable, or discriminatory. Inuit intervenes but CRTC accepts rate increase. Enabling act allows a petition to GIC, who "in his discretion," may vary/rescind any decision. Federal cabinet rejects petition w/o allowing Inuit to be heard.	• **Held**: PF common law hearing obligations do not attach to the Cabinet petition (i.e. appeal process). It is a legislative decision "in its purest form." o **Generality**: apples to all rate-setters, not to a specific target o **Historical**: Parliament used to do this, now they've created an agency to do it, & kept a political hand in the process (the GIC petition) if policy changes. o **Nature of the Decision-Maker**: Estey J. Does not want to burden cabinet with hearing reqs. [efficiency] and expressed concern about undermining their public policy making role. ▪ **Criticism**: overstates the difficulties in applying the duty of fairness to Cabinet decisions; the duty of fairness is flexible and its content can be adapted to address the concerns raised by Estey J. • **Nb.:** *Inuit* does not immune all Cabinet decision-making from PF obligations. The fact that it is Cabinet is **not-determinative**. There is still room to infuse PF obligations via the rule of law if: (***1***) the decision applies to an individual rather than generally; (***2***) if there are objective standards for cabinet to follow.
Homex Realty SCC 1980 Developer disputing with municipality over installation of services of land that corp. owned and was selling off. Municipality says cost should not be imposed on general rate-payers. Passes bylaw obliging developer to pay.	• **Held**: Bylaw subject to PF notwithstanding that it is subordinate legislation. • **Estey J**.: property rights being targeted directly, adversely, and specifically. • You have to look beyond the form of a particular act to the substance of the nature of that action (*i.e.* its impact, its purpose). o Even though the form was subordinate legislation, the substance was a specific admin decision targeted at an individual and his property in the way that PF obligations attached. o *i.e.* the municipal action is not, in substance, legislative. • **Remedy:** Homex denied on the basis of misconduct because of his lack of frankness. DICKSON dissented — not enough on facts to deny remedy.
Congregation Jehova v. Lafontaine *(Village)* SCC 2004 Rezoning app. 1st: Denied b/c increased tax for rate payers (cong. exempt). 2nd: Denied app. in commercial use zone, Village gave no reasons. 3rd: "not required to provide you with justification and no intention of giving reasons."	• **Held**: PF required. Failure to give reasons was breach of PF. o Court applies *Baker* factors: "A public body like a municipality is bound by a duty of PF when it makes an admin decision affecting individual rights, privileges or interests." ▪ *Not* a policy decision on general rezoning matters! o ***Policy***: giving reasons serves the values of fair and transparent d/making, reduces chance of arbitrary and capricious decisions, and cultivates the confidence of citizens in public officials.
Cdn. Assoc of Regulated Importers 1993 FCA Minister decision set quota policy for importing eggs & chicks. Benefited big producers but adversely affected limited group of "historical importers" who had viable business from previously unregulated environment.	• FC: PF applies. Limited # with a significant interest in state action which negatively impacts them; not impracticable to give notice and ask for consultation, give them time to be heard. Classifying this as policy doesn't immunize it from judicial review. Action is focused enough on group. • **FCA**: Overturned: PF did not apply — decision is legislative and general and based on broad public policy considerations. No public consultation process has been contemplated by legislation and cannot be imposed on Minister. o No requirement of notice or hearing.

D. Limitations and Exceptions: Public Office Holders and Emergencies

- **The duty does not apply to public office holders employed under K**. The law will not draw a distinction between public officer holders and other employees in dismissal cases. Employment governed by private law contract principles (*Dunsmuir*)
    - **Exceptions**: (***1***) employees not protected by K, or subject to employment at pleasure; (***2***) by necessary implication
- **Emergency**: the duty may be suspended or abridged in the event of an emergency. (*Cardinal*).

E. Extending Fairness Obligations Through the "Legitimate Expectations Doctrine"

- May arise out of conduct such as representations, promises, or undertakings or past practice or current policy of a d-maker.
- A means of extending the application of the duty of fairness, (but in *Baker* the court subsumed the concept within the considerations relevant to determining the content of the duty).
- **Two Forms**
    - Describes a **procedural interest**.
        - A person might be lead to understand that he or she will be afforded a particular **procedural** protection, such as an oral hearing before a decision is made, even though that level of protection would not otherwise be required.
    - More controversially, also describes a **substantive interest**.
        - May arise if a person is led to expect a particular **outcome** from a decision-making process.
        - Analogized to **promissory estoppel**. However, legitimate expectations only affords procedural protections, whereas a successful claim of estoppel can result in the enforcement of substantive promises.
        - While you cannot use the doctrine to *get* the outcome, you can use the legitimate expectation of an outcome to be accorded a higher level of PF.
- **Policy**: public authorities must be entitled to change their minds; they may need to do so to protect the public interest.

- **APPLICATION** (*Mt. Sinai – Binnie dissenting judgement*)
    1) Look for conduct of Representing Power
    2) The presence of promises, or past practices, conduct, or representations
    3) Must be clear, unambiguous, unqualified.
    4) The doctrine is not substantive.

Reference re Canada Assistance Plan SCC 1991 50/50 plan between provs and feds for 22 yrs.	• **Issue:** did feds violate PF by amending plan without consent of provinces, because it violated their legit expectations? • **Sopinka:** no, Parliament (which originally enacted the statute) cannot bind the hands of subsequent legislatures. ○ Crane: decision narrowed to primary legislation making.

Mt. Sinai SCC 2001
 	
Long-term care facility becomes short-term. Agrees to move to Montreal but asks permit is changed to reflect short-term. Hospital moves but gov't refuses to grant new permit.
	• Hospital argues: (***1***) already have *de facto* permission to operate short term, should receive official permission (mandamus); (***2***) legitimate expectation; (***3***) promissory estoppel; (***4***) only reasonable decision is to grant permit.
	• **Majority**: rejects all; said nothing of (2), (3) or Justice Binnie's approach.
	• **Binnie (dissent)**: granted mandamus, exercise of statutory discretion was "patently unreasonable" – only reasonable discretion was to issue permit.
	  ○ **Low evidentiary hurdle** for claim because PF protects fairness
	  ○ Binnie (+McLachlin) left open public estoppel, but reluctant to apply

Mavi SCC, 2011 Binnie – unanimous
 	
Sponsored immigrations receiving social assistance and sponsors in default of their undertakings. Gov't can clawback any money paid to sponsoree as if it were a debt.
	• **Issue**: Does undertaking indicate discretion in the statute to allow for consideration of the sponsor's personal circumstances to defer payment?
	• **Held**: PF attaches to debt collection, but the PF owed is minimal.
	  ○ Rights to notice and an opportunity to be heard, but no reasons need to be given. Thus, legitimate expectations don't help much.
	  ○ BUT: no recourse for appeal; once decision is made it is enforceable as if it were a judgement.

Baker	• Is there a legitimate expectation that the best interests of the child would be a primary consideration for the minister in making discretionary decisions on deportation because of UN Convention? • Circumstances include "promises or regular practices of admin d/makers" (para 26) — part of natural justice procedural fairness, but do not create substantive rights (*Old St. Boniface*)

PROCEDURAL FAIRNESS: CONTENT ("*audi alteram partem*")

Content and Choice of Procedures

Baker

H&C grounds under *IA.*

Notice that decision had exceptional impact on Baker *and her children!*

Re how to decide the content of procedures (paras 23 – 27)

(1) **nature of the decision being made and the process followed in making it**
- considerable-discretion/policy/multiple-factors
- decisions resembling judicial d-making demand more extensive PF

(2) **nature of the statutory scheme**
- if no appeal, more PF
- if preliminary, less PF (unless *de facto* final; *C.f.* "proximity")
- if provision= exception/exemption, less PF (more relaxed)

(3) **importance of the decision to the individual affected**
- key in Baker, overrode other factors (more than individual, + kids)
- content of duty increases in proportion of importance to person it affects
- employ/profession at stake: "high standard of justice required" (*Kane*)

(4) **legitimate expectations**
- in Baker, UN convention
- cannot be used to get a result, but can 'up' the fairness

(5) **take into account and respect the choices of procedure made by agency**
- while not determinative, "important" weight must be given
- process actually adopted and institutional constraints
- deference / expertise / money / time

- The content requirements of the duty of fairness are driven by their particular circumstances. Thus, this list is non-exhaustive.

1. Statutes about Procedures

Administrative Tribunals Act

- **CHECK CRANE OVERVIEW DOCUMENT IF ATA APPLIES**

2. Specific Content Issues – Pre-Hearing Issues: Notice, Discovery, and Disclosure

Notice

- A party whose rights, privileges, or interests are at stake is entitled to participate in the decision-making process that affects them. Notice is the basic starting point
  - **Statute**: Does the notice comply with the requirements of the tribunal's enabling act, policies, rules / any procedural code?
  - **Common Law**: concerns **timeliness** and **sufficiency** of notice.
    - *First*, did the notice provide adequate time to allow the recipient to respond?
    - *Second*, did it provide sufficient information to allow the recipient to make an informed response?
  - **Nb.** Notice is an ongoing duty, arising prior to the decision and continues throughout the process (*is there a change req. more notice?)*
  - **Cases:** (*Webb*—informal notice sufficient)

Disclosure

- Includes duties to provide documents, witness statements, etc.
- **Issue**: not *whether* disclosure req., but ***how much***?
  - The duty of PF generally requires that the decision-maker disclose the information he or she relied upon.
  - **Statute**: Does the disclosure comply with statute, rules, policies?
  - **Common Law**: Individual must have sufficient information to know the case she has to meet in order to make informed submissions (*May*).
- At common law, the degree of disclosure required varies depending on the nature of the tribunal and the nature of the interest affected. (*May*).

2.1. Specific Content Issues at the Hearing Stage

2.1.1. Oral or Written Hearings

- **Generally, oral hearings are seldom required** (*Baker*, *Knight*, *Webb*)
  - Policy: not usually necessary to reach an informed decision; delay; $
- Whether common law will require an oral hearing **depends on the relevant circumstances,** including whether **credibility** is at issue and whether the **impact** of the decision is significant enough to warrant counsel. (*Khan*, *Singh*)
- Can d/makers determine factually disputed evidence w/o hearing from claimant?

	○ ***Singh***—right to oral hearing for claiming convention refugee status, credibility turned on a "well-founded fear of persecution." ○ ***Baker*—**no right to an oral hearing ○ ***Webb***—no right to an oral hearing for eviction.
Khan Student failed exam; appeals to exam committee, who doesn't **believe** 4th booklet existed. She wants an oral hearing	• **Majority**: right to an oral hearing; committee's reasons stated they didn't believe her, based on *evidence*; i.e., oral hearing required because credibility at stake. ○ **Impact** was serious: delaying or ending her career. • *Dissent* (Finlayson J.): not accusing her of academic dishonesty or any misconduct; more of the same wouldn't have changed the decision.
2.1.2. Right to Counsel **Present at Hearing:** almost always **Participate:** depends (*eg.* crossexamine?) **Paid For:** rarely	**CRITERIA** (*N.B. Ministry of Health*) 1. Seriousness of Impact 2. Complexity — how much could we expect the person to get through the process without the assistance of counsel? 3. Capacity of the Person Affected by Decision *VERSUS:* need for speed, informality, and economy; avoiding cost, delay; (lawyers are expensive, time-consuming, and overly formalizing. *Generally speaking, however, lawyers will not be kicked out of the process too often*. • *Policy FOR:* Present, delineate, and clarify issues in front of the admin d-maker, cut-to-the-chase, & perhaps improve efficiency, know which facts are needed, research law, know which kinds of arguments likely to succeed, understand statute; **ensure rights and interests of client are protected** • *Policy Against* — treats admin like civ pro, advocate for clients best interests with highest procedures. Concern with counsel over-judicializing & over-formalizing process, thus undercutting reasons for the process to begin with. Slows it down and makes it more adversarial.
2.1.3. Disclosure of "Case Against"	• **Right to a decision based on the record (& respond to record)** (*Kane*, *Abel*) • **Def**: the ability to have knowledge of the evidence, the information, on which a particular decision is going to be made, and a fair opportunity to refute, contradict, or add to that information. Includes clarifications; the right to change the record.
Kane SCC 1980 UBC Prof subject to admin process for improper use of computer. President listens to dean who recommends suspension. Kane appeals to Board of Govs; president is a member [bias]. Board holds an oral hearing, *then* has dinner and asks president for clarification of facts against him. **Held**: decision **quashed**.	1. (1) President is both the original decision-maker and appellate level (no bias found); (2) denial of PF because Board heard evidence against Kane and had not disclosed it to him (found violation of PF; quashed). a. **Nb**. high end of spectrum – oral hearing, disciplinary process, wrongdoing is being alleged. b. Fairness is often cited for the point that **when employment is at stake or when employment may be blemished** (which affects reputation or future career) … more P.F. is accorded. c. If the decision is at the lower end of the spectrum (legislative, more fact inquiry, etc.), different norms may apply… • Thus, **generally,** full disclosure of all materials is required.
Re Abel, Charkaoui	• **BUT,** there can be compelling reasons to depart from full disclosure for confidentiality reasons (e.g. informants, national security, and basic kind of privilege claims) Other factors against disclosure include personal safety (*Re Abel*). Every means should be made to disclose — like censoring portions of documents or have security clearance requirements for counsel.
Sriskandarajah	• Procedural fairness does not require the Minister to obtain and disclose every document that may be indirectly connected to the process that ultimately led him to decide to extradite.
2.1.4. Right to Evidence and Cross-Examination	• Usually applies in the context of oral hearings. Generally, parties should be afforded a reasonable opportunity to present their cases. • However, the presence of formal procedures regarding testimony, such as a statutory right to counsel and testimony under oath (*Irvine*), does not necessarily imply the right to **cross-examination.**

Irvine *Combines Investigation*	NO CROSS-EXAMINATION RIGHTS AFFORDED. • **Nb.** preliminary; investigative process; nothing bad could happen to person being investigated; only raw data came out of this, no "fact finding"; in private; other processes with full fairness existed subsequent to this process • **But** when credibility is at stake, cross-examination is likely to be afforded. • **But** for human rights, cross-examination is more likely to be afforded. • **But** when quasi-judicial, … you get the picture. • **Less likely** to arise **for POLICY decisions** *Cross-examination* allows for fact-finding.
ATA	s. 40 — Evidence 40(3) keeps legal privilege s. 38 — Cross-Examination where "reasonably required"

3. Timeliness and Delay

- Typically, administrative decision-makers are not bound to specific statutory duties to hold hearings or make decisions within a prescribed period of time. Nor is there a *Charter* right for an administrative decision to be made within a reasonable time.
- However, under the common law principles of administrative law, a delay in an administrative d-making process can warrant a stay of proceedings if there is proof of "significant prejudice" resulting from what is regarded as an unacceptable delay.
- For this purpose, significant prejudice is caused by actual prejudice or an abuse of process.

Blencoe Human rights investigation. Binnie for Majority considered whether s.7 was triggered (it was not but could have been); he then went on to consider whether a remedy for the delay should be granted under the "ordinary" common law principles of procedural fairness in administrative law. **Remedy**: You may get a stay (majority) or an expedited hearing order (minority). **Held**: no actual prejudice nor abuse of process. No stay granted.	Majority: STAY if: **significant prejudice** = (a) actual prejudice to a fair hearing in an evidentiary sense; (b) delay amounting to an abuse of process. 1. **What Constitutes Actual Prejudice?** "Actual prejudice" occurs when the party's ability to answer the case against him/her, or to have an adequate opportunity to present his/her case, is impaired by delay. For example, witnesses are dead or lost or key documents have been destroyed because of delay. This kind of prejudice has long been recognized as a denial of procedural fairness that can lead to a stay of proceedings. 2. **What Constitutes "Abuse of Process"?** Delay may amount to an abuse of process, even where the fairness of the hearing itself has not been compromised, if (MUST BALANCE ALL 3): ❖ **Length**: the delay is inordinate/unreasonable. Must consider overall context: ○ nature of the case/the various rights at stake [*higher PF means longer case*] ○ level of complexity of facts/issues [complex=delay] ○ purpose and nature of the proceedings ○ compare to other juris. (questionable because suppose entire system is bad) ○ whether applicant contributed to delay (reasonable legal requests) or waived it ❖ **Impact**: causes serious stress (psych harm) & stigma to reputation; **and** ○ actual stress in *Blencoe* tenuous; caused instead from media frenzy ❖ **Disrepute**: brings decision-making body system into disrepute; offends community's sense of decency and fairness. 3. Abuse of process arising from delay **will be rare** – the court must be satisfied that to allow the proceedings to continue would be contrary to the interests of justice and oppressive.

4. Post Hearing Issues: When Is There A Duty To Give Reasons?

- Historically, there was no duty for administrative d-makers to give reasons for their decisions. However, in *Baker*, L'Heureux-Dube held that PF requires, in certain circumstances, a written explanation for a decision. Remedy is to send back for more reasons or a new hearing.

Baker Duty to give reasons; reasons given were inadequate.	1. Some form of reasons is required when: (1) If the particular decision has **"important significance"** for an individual (2) Where there is a **statutory right of appeal** (3) "in other circumstances" – large residual discretion for the courts 2. The requirement of reasons reflects the policy rationales for the duty of fairness / : ○ **Dignitary**: respect for the individual ○ **Instrumental**: accountability; transparency; openness; better decision-making in *substance*; reinforces public confidence; helps with appeals; **3. The duty to give reasons varies according the context.**

Nfld Nurses' Union	• **Courts will not inquire into the adequacy of reasons.** • **Perfection in terms of quality of reasons not required.** • After *Baker*, courts went off searching for sufficiency and adequacy of reasons, saying PF was violated if reasons given were insufficient in terms of their *purposes* — e.g. not giving an appeal court enough information where they can adjudicate the appeal appropriately (*Suresh*) • **Held**: Courts rejected bifurcated approach that inadequate reasons are tantamount to no reasons at all and thus a violation of PF. Abella pointed out that the courts do not look at the adequacy of reasons under PF; we look under SR.
Mavi	• **Held**: **no** duty to give reasons in *Mavi*. No appeal provision; not serious enough to interest.
5. Ethical Advocacy	
177-180	• In administrative advocacy, your requirements as a counselor are the same as they are at court. • Text argues that counsel should take minimal action to assist the unrepresented party to maintain the interest of their client; most significantly, use plain language so that the process is not more difficult for the unrepresented party unfamiliar with the formal language. o Use plain language, but don't represent the other side. o Duties of civility, etc.

Constitutional and Quasi-Constitutional Procedural Protections

While *Re B.C. Motor Vehicles Act* held that the PFJs subsume the duty of procedural fairness, this does not entail that procedural fairness is constitutionalized *per se*. Rather, s. 7 applies only when an individual's right to life, liberty, and security of the person has been infringed. This is a substantially higher threshold for a claimant to prove than simply establishing a right, privilege or interest is affected.

- While the common law does not empower judges to impose procedures in the face of clear statutory language that dictates less (or even no) procedural rights (*Ocean Port*), the *Charter* can **override** statutes ousting, expressly or impliedly, CL-PF rights.
- Doctrines can help you obtain **better rights** than the common law.
- **Judicial economy**: if possible, use common law principles (i.e. statute doesn't oust common law rights, needn't go to *Charter*).

Charter

7, 1, and 52

Framework

1. Does the administrative decision at issue deprive (or threaten to deprive) an individual of his/her interests in "life", "liberty", or "security of the person" (as those concepts have been understood in SCC jurisprudence)? (*Remember you are not easily into s. 7!*)
2. If so, i.e. if "life", "liberty", or "security of the person" is at stake in the decision, is the deprivation in accordance with the principles of fundamental justice [PFJ — *use Baker factors*]
3. If life, liberty or security of the person is at stake in the decision and the deprivation is not in accordance with PFJ (i.e, if s.7 breached) is the denial of PFJ nevertheless a "reasonable limit, prescribed by law, that is demonstrably justified in a free and democratic society" so that it is "saved" under s.1 of the *Charter*?

Liberty	• Freedom from physical restraint (imprisonment, incarceration, detention) e.g. *Charkaouri* – detention by the state triggers s.7 • "Liberty" also protects some narrow realm of "personal autonomy" – freedom to make decisions that are of *fundamental importance* to the individual ("essential life choices") (*Blencoe*, e.g. medical treatment for children and where to reside)

Security of the Person	• Protects physical and psychological integrity of the individual, (*N.B. Minister of Health*)
	  o Freedom from state imposed threats of physical punishment / suffering (as well as from such punishment or suffering itself) (*Singh; Suresh*)
	  o Right to be free from state-imposed psychological harm: state action that, viewed objectively, has a serious and profound negative effect on psychological integrity (*N.B. Minister of Health*)
	  ▪ **Standard**: person of reasonable sensitivity
	  ▪ Must be greater than ordinary stress or anxiety; but need not reach the level of nervous shock; serious distress, stigma, and represents a gross intrusion on a private and intimate sphere (e.g. child protection hearings)
	  ▪ **Sufficient causal connection** (*Blencoe*)
	• Law or state action that creates a risk to health by preventing access to health care can constitute a deprivation of security of the person: *(Insite, Chaoulli*)

Cause	• To satisfy the requirements of s.7 in contexts where the direct deprivation of "life, liberty, and security of the person" will come at the hands of a foreign government, there must be a "sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" *Canada (Khadr*) o **Nb**. such a connection was presumably found in *Singh* who considered the *Charter* although it was not expressed in precisely these terms.
PFJs	• PFJs include procedural fairness (*Singh*). While PFJs are not necessarily identical to PF, the same principles underlie both (*Charkaoui*) • **Procedural PFJs:** Person must have an opportunity to (a) adequately state their case and (b) know the case they must meet; **requirements will vary with context**, *e.g.*, PFJ will not always require an oral hearing unless credibility is at stake. • ***Suresh***: *Baker* factors can be employed to calibrate general level of PF required for PFJ. • ***NB Min of Health***: PFJ = "fair hearing" = opportunity to present one's case effectively – may require a right to be represented by legal counsel if the hearing could not be fair w/o counsel. • ***Charkaoui***: procedures required to meet the demands of PFJ ***depend on the context*****;** the question is whether the process is fundamentally unfair or flawed; a national security context is relevant PFJs, in deciding whether a process is fundamentally unfair/flawed [the "usual" form of procedures must be modified; any state justification of using procedures not in accordance with PFJs must be dealt with under s.1, not under s.7; security concerns can't be used to excuse procedures that do not conform to PFJ; must be justified (if they can be) under s. 1.]

	s.1	• At the s.1 stage the state is faced with attempting to justify procedures that have been found to be contrary to PFJs; *Oakes* test applies (*Charkaoui*, *New Brunswick Minister of Health*) • **Denials of procedural PFJ will be very difficult to justify** (*N.b., Charkaoui*) o Administrative inconvenience [utilitarian] will not be enough (*Singh*) o National security: certain contextual elements are taken into account (*Charkaoui*) o *E.g.* cases of war
Cdn Bill of Rights ss. 1(a) "enjoyment of property" 2(e) procedural safeguards; fair hearing	• Only applies to federal statutes. • 2(e) — broader **threshold** than *Charter* — not necessary to show that LLSP are at stake to obtain the relevant procedural protection. (***Singh***) • Although passed an ordinary statute in 1960, it claims quasi-constitutional status o Where it applies, it provides procedural safeguards that cannot be overridden "unless it is expressly declared" that the statute operates notwithstanding the *Bill of Rights*. o Note that *Singh* was decided 3 v 3 (and 3 for the *Bill of Rights*) o Thus, although *Ocean Port* states that clear statutory requirements oust common law guarantees, this is only applies to provincial jurisdiction—where the CBR rights do not apply! • Also, if you cannot claim a deprivation of LLSP with the *Charter*, you can still claim: "enjoyment of property." o CBR: right not to be deprived of property except by due process of law. (no such right in *Charter*)	
Author-son 0% Statutory bar on interest claims for veterans' pensions mismanaged by gov't.	***Held*** 1. There is no "right to be heard" before the passage of legislation that is protected by ***either*** CBR s.1(a) or 2(e). Neither provision applies to Parliament in legislating. 2. The statutory bar operated automatically. Thus, there was no administrative application of the bar to Authorson's specific case to which due process could attach (i.e. no decision was being made under statutory authority about whether to take away his property rights – statute extinguished the property right). a. But if the state is making a discretionary decision or judgement of some kind with respect to an individual's property (specific case), then due process is required. 3. Key limit on CBR s.1(a): only "declares and recognizes" rights when CBR was enacted. In 1960, Legislature could expropriate without compensation provided that it did so clearly enough. Thus the CBR s.1(a) does not protect the citizen against expropriate of property by clear legislation such as that at issue in this case. **4. Note: this overrode a fiduciary duty!**	
Singh 85% 7 seek refugee status, no opp. oral hearings before d-maker at 1st instance or IAB	• 3 judges decided under Charter s.7, and 3 decided on BofR 2(e). Common Law PF could not imply more procedures than *IA* specified because the statutory procedures have to be construed as exhaustive and precluding additional procedural protections, at both stages of the d-making process. • **Held**: oral hearing req.; credibility at issue – "well-founded fear of persecution." Scheme as it stands does not allow refugee claimant to make an effective challenge to the information or policies, which underlie the Minister's decision to reject his claim. o Where the decision turns on credibility, and the stakes are high, oral hearing very likely required. o *S. 1 failed – no utilitarian argument for administrative efficiency accepted*.	
N.B. (Minister of Health) Child protection proceedings – state wants 6 mo extension. Parent can't get legal aid and couldn't pay for counsel.	**Issue**: If the proceedings had taken place without the parent being represented by counsel, would this have violated *Charter* section 7? Does s.7 require state-funding of counsel in such circumstances? **Outcome**: Yes. The state has a constitutional obligation to provide the appellant with state-funded counsel *in the particular circumstances of this case* [and similar cases] • **Security of the Person**: includes psychological harm if objectively serious and profound effect o cause distress arising from loss of companionship with the child; involve stigmatization as "unfit parent"; threaten loss of status as a parent (loss of identity as a parent); constitute a gross intrusion in a private and intimate sphere (state intrusion and inspection of parent/child relationship) • **PFJ**: Applied [seriousness, complexity, and capacity] test to find that counsel was required. Also, the absence of counsel would have created *an unacceptable risk of error* in determining child's best interests.	
Suresh 75% Tamil Tiger. ***IA*** allows deportation of a Convention Refugee (CR) *even where life or freedom would be threatened*, **IF** the person is (**1**) a member of an	• As s. 7 interests are in jeopardy and procedural protections under s. 7 are triggered – deprivation must be in accordance with PFJ. • PFJ requires a fair process – **content of PFJ is at a minimum the same as that required by common law PF and can be determined through application of the *Baker* factors.** • Application of the *Baker* factors in this case leads to the conclusion that, although S was **not** entitled to a full oral hearing at the Minister's "danger opinion" stage of the process, he was entitled to more procedural fairness than he received in this case (around 75% between none to full oral hearing). o **Disclosure**: S. should have had disclosure (subject to redacted info) of the materials on which the Minister's decision was based, *i.e.*, S should have had access to the IO's memo and an opportunity to respond to the memo through making written submissions to the Minister, before the Minister	

"inadmissible class" ***AND*** (**2**) the Minister is of the **opinion** that the refugee is "danger to the security of Canada." Deportation order.	decided the matter. Minister reads alongside memo. ○ **Duty to Give Reasons**: Minister was also required to give reasons that rationally and articulately explain: (**a**) the finding that S was a danger to the security of Canada; and (**b**) the finding that there are no substantial grounds to believe he will be subject to torture, execution or other cruel and unusual treatment if returned to Sri Lanka. • *Baker* Factors ○ **Nature of Decision**: Minister's decision whether individual is a danger to Canada is somewhat judicial; it is *serious* and *individualized*, but also using considerable *discretion* (international relations, future claims — does not point to either strong/weak procedures); ○ **Nature of Statutory Scheme**: No procedures included in impugned part of the act, although other procedures are included elsewhere. An internal coherence argument indicates that higher procedures are required. ○ **Importance of Rights Affected:** any deportation would have serious impact, particularly in cases of convention refugees and those potentially subject to torture. ○ **Legitimate Expectations:** international agreements state that someone would not be returned to a state where there is a substantial risk of torture. Expectation Suresh would be heard beforehand. ○ **Choice of Procedures:** *some* need to defer to choice of procedures of Minister; discretionary decision-making, so courts will not implement a full judicial process, but procedures have to be fair! • Outcome: Matter remitted to be reheard and re-decided in accordance with court decision.
Charkaoui 95% Ministers issued security certificates against *Charkaoui* (permanent resident) and Harkat and Almrei (Convention Refugees) deeming them to be "threats to national security" and all three were detained pending completion of the proceedings for their removal from Canada	• Issuance of a security certificate enables **immediate detention** and could lead to deportation. Pursuant to s. 80 *IRPA,* certificates are reviewed by FC to determine if certificates are **reasonable**. • Claim: "reasonableness review process violated s. 7 because of "**secrecy**" of the process. ○ ***in camera* and *ex parte* proceedings**: named person and his counsel are not allowed to be present if disclosure would be injurious to security interests of Canada or others ○ Judge relies on Crown to assess reasonableness of certificates then provides named person with a summary of the "case against," BUT without disclosing sensitive (national security) information. ○ If the certificates are found to be reasonable, the decision is not reviewable and the certificate becomes a removal order from Canada (and potentially subject them to harm if returned to a state where they could be persecuted or tortured) • **PFJs**: procedure not in accordance with PFJs; the interests at stake are VERY serious and a very high level of PF is calibrated into the PFJs because of the non-disclosure of information. This deprivation is not a "reasonable limit" (s.1) because there were less intrusive means available. • **What is a fair judicial process when <u>loss of liberty</u> is at issue?** (*core ideas that vary with context*) (i) right to a hearing (ii) right to be heard by a fair and impartial decision-maker (iii) decision based on facts and law (iv) right to know case against one and right to answer that case ["informed participation"] • Process failed on **iii** and **iv**; individual could not bring case against, i.e., not all relevant decision-making aspects were not before the judge. Reliability is also an issue, for the other side does not get to test the information in cross-examination; judges bound by what Crown brings forward to them. It is **neither** a *full* inquisitorial process nor an adversarial process. Thus the decisions is not necessarily based on facts. How can one meet a case one does not know?

REMEDIES

Federal Courts Act and *Judicial Review Procedures Act*

525 – 539 – Federal Courts role in Admin Law
When it comes to remedies in federal decision-making, FCA applies. JRPA might apply.

FCA	s. 1 s. 18-28
JRPA	**S.2**: Application for judicial review. An application for judicial review is sufficient if it sets out the ground on which relief is sought and the nature of the relief sought. Relief remains discretionary • Browse generally

Remedial Issues in Judicial Review

Certiorari	quashes or sets aside a decision
Prohibition	prohibits decision-maker from proceeding
Mandamus	requires performance of a public mandatory duty (*Insite*)
Habeus Corpous	determines lawfulness of detentions (e.g. immigration, prison, extradition, mental health)
Other Remedies	(equitable; developed in private law context that could be invoked in public law context)
Declarations	to declare rights
Injunctions	to restrain conduct

REMEDYING PROCEDURAL FAIRNESS DEFICIENCIES WITHIN THE ADMINISTRATIVE SYSTEM

- If an administrative d/maker contravenes PF, and the breach can be "corrected" within the administrative system itself, an application for judicial review based on the initial procedural deficiency may be denied. It depends on the circumstances.
- In determining if a fair procedure was followed, the courts will examine the entire administrative proceeding in **all** its stages (*Irvine*). Deficiencies or irregularities at one stage can sometimes be corrected "within the system" if the aggrieved party is given a full and fair hearing at a later stage:
  (1) **During a proceeding**: a tribunal can sometimes correct its own deficiencies. E.g., if adequate notice or "the case to be met" has not been given, the tribunal may be able to adjourn until proper notice / fuller information is provided.
  (2) **Reconsideration**: Where a tribunal has breached PF, & has express jurisdiction to reconsider the matter, it may be able to correct its procedural errors. (**Nb.** however, it is unlikely that a power to reconsider can be implied. Without an express power, a tribunal that has held a hearing and made a final decision is normally *functus officio*.)
  (3) **Internal Review**: Where a statute provides that an initial administrative decision can be reheard by or appealed to a 2nd administrative d/maker (ian "internal" administrative review or internal appeal process) and a fair procedure is followed in the 2nd administrative proceeding, this *may* remedy any denials of PF that may have occurred in the original decision, ***depending on all the circumstances of the case***.
- Whether it will do so or not will depend largely on whether or not the person appealing would be somehow **prejudiced** at the 2nd proceeding because of the denial of PF in the 1st proceeding in a way that **cannot be corrected** at the 2nd proceeding. Colloquially speaking, we must ask how much "enduring negative baggage" or adverse inference would necessarily be carried over from the original process into the 2nd process, thus making the 2nd process unable to "cure" the defects in the original.
  - *E.g.,* where the 2nd admin hearing or appeal is a full new hearing on the merits (*i.e.* a "trial *de novo*") it should normally be able to "cure" any procedural defects in the 1st proceeding provided that it holds a fairly conducted hearing *de novo*. Where this is the case, an application for JR based on a breach of PF in the 1st proceeding will unlikely succeed.
  - However, if the 2nd proceeding must be conducted "**on the record**" of the 1st proceeding, without a new hearing process, and if the "record" is **deficient** because of the original breach of PF, the 2nd proceeding will likely not be sufficient to correct the original deficiency, with the result that an application for JR based on a breach of PF in the 1st proceeding will likely succeed.
- **Taiga**: "*one should review the proceedings before the initial tribunal and the appellate tribunal, and determine whether the procedure as a whole satisfies the requirements of fairness."* The Court further stated factors to consider include:
  (i) the gravity of the error committed at 1st instance,
  (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing,
  (iii) the seriousness of the consequences for the individual,
  (iv) the width of the powers of the appellate body; and
  (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.

The "Exhaustion" Principle Supports "Internal Self-Correction"

- JR is considered to be a *discretionary* remedy and, in an application for JR, a court may refuse to grant a remedy on a number of grounds even where all the necessary criteria for a remedy are otherwise present.
- E.g., courts often require applicants for JR to "**exhaust**" internal appeal or other review remedies before seeking JR and this practice gives the administrative system an opportunity to "self-correct" its own errors or otherwise resolve the problem without the need to resort to the courts.
- In other words, JR tends to be regarded as a **last resort** and if an "**adequate alternate remedy**" is available, a court will typically require applicant to use that remedy before seeking judicial review.

THE DISCRETIONARY NATURE OF JUDICIAL REVIEW REMEDIES

- There is "no right to a remedy" in JR proceedings; remedial relief is discretionary.
- ***JRPA*** (s.8 B.C.): where a court had discretion to refuse relief on any ground prior to *Act*, it continues to have such discretion.

A Mootness And Hypothetical Questions

- Courts may exercise their discretion to refuse relief if the issue is, or has become, hypothetical or moot. (*N.B. v. J.G.*)
- However, the mootness rationale may not be applied where there is a public interest in having a court rule on an important matter, particularly if the problem complained about is likely to recur and the court is otherwise in a position to issue a decision.

B Delay in Bringing the Application for Judicial Review

- A remedy may be denied if there has been an unreasonable delay in **bringing the application for judicial review** and others would be prejudiced by allowing the application to proceed.
    - Prejudice could arise (1) by detrimental reliance by a party on the admin decision at issue; or (2) because of difficulties in mounting a defence to a JR application because of time between decision and application for JR.
- ***Federal Courts Act*** (**ss.18.1 (2)**): JR applications must be brought within **30 days** of the decision issued by a federal board, commission, or tribunal, **but the court has discretion** under that provision to extend the time for bringing an application.
- ***ATA*** **(B.C.)** (s.57 – **nb.** only if ATA applies): JR applications of a final decision of a tribunal must be commenced within **60 days** of decision, but also enables the court to extend the time if satisfied "that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay".
- **IF** s.57 of the ATA or the enabling Act does not set a specific time limit → s.11 of B.C.'s ***JRPA*** applies.
    - JRPA (s.11): an application for judicial review is not barred by passage of time unless an enactment otherwise provides and the court considers that substantial prejudice or hardship will result to any person affected by delay.
    - However, this absence of a general time bar in the *JRPA* would not prevent the court from exercising its overriding discretion to refuse relief on the grounds of unreasonable delay.
- **Nb.**: *Alberta' Teacher's Association* dealt with a delay! Upholds ability to do this.

C Misconduct Of The Applicant (The "Clean Hands" Issue)

- The misconduct of an applicant (who seeks relief without "clean hands") may provide grounds on which to deny relief as a matter of discretion, although this will be rare. (*Homex* – applicant's misconduct in dealings and attempts to evade responsibility.)

D Waiver

- A party who has knowledge of all the facts, and of his or her legal rights in the matter, may waive a breach of PF, including a right to complain about bias or lack of independence.
    - A waiver may be **express** and sometimes can be **implied**, depending on all the circumstances.
    - A mere failure to object will not readily be construed as a waiver but it could be so construed in cases where a party is represented by counsel and the right to object was clear.
    - Where an objection has been made and maintained before the administrative body, a party's continued participation in the proceedings will not thereafter be construed as a waiver. In fact, the party may be obliged to continue, given the court's reluctance to entertain "premature" applications.

E Prematurity *most important* (AAR)

- JR is typically viewed as a remedy of last resort; a court may refuse to grant relief where a tribunal has not yet completed its proceedings. This practice avoids fragmentation and protraction of administrative processes.
    - Accordingly, applications for JR brought prior to, or in the midst of, administrative proceedings will usually be discouraged and relief may be denied on the ground of prematurity.
    - However, no categorical rule can be stated.
    - Some of the advantages that inhere when courts deny relief on the grounds of prematurity include:
        - where the issue relates to PF, the alleged "defect" in the process may sometimes be remedied by the tribunal prior to the end of proceedings;

- a party that seeks to complain about the process in the midst of the proceeding may ultimately succeed on the merits, and no longer wish to complain;
- courts can consider all issues arising from the admin proceeding together, after the proceeding has been completed, and on the basis of a full record of the proceedings, rather than on a piecemeal basis and an incomplete record. May also sharpen the focus of the admin law issues.

F **Adequate Alternate Remedy** (*Harlekin* and *Matsqui*)

- Closely related to prematurity — the applicant has available to him or her adequate alternate avenues of possible relief that should be exhausted first, before the application for judicial review will be entertained.
  - For example, where there is a right of appeal or review available that could correct the very situation the applicant for JR seeks to complain about, the applicant may be required to first exhaust that avenue before seeking JR.
  - The right of appeal/review may be "internal" to the overall admin scheme or it could be an "external" appeal such as a right of appeal to a court; the general rule is that an applicant for JR must exhaust all such rights of appeal or review before seeking JR provided that the appeal/review rights amount to "an adequate alternate remedy."
  - ***Federal Courts Act* (s. 18.5)**: where an appeal lies from a decision of a federal board, commission or tribunal to the Federal Court, the S.C.C., the Court Martial Appeal Court, the Tax Court, the Governor in Council, or Treasury Board, the appeal must be pursued rather than judicial review to the extent that the appeal can cover the applicant's grounds of attack.
- **Internal**: More difficult questions arise when the question is whether an applicant for JR should be required to first exhaust administrative appeals or review remedies found **within** the administrative scheme before seeking judicial review. Requiring an applicant to do so has a number of possible advantages similar to those outlined above in relation to prematurity. These include the following possibilities.

  (1) The internal appeal might resolve the matter in a way that obviates the need for JR by correcting or curing a procedural error at first instance:
  (a) if an internal appeal amounts to a "hearing de novo" that is separate and independent from the first proceeding, so that it provides a "fresh start", and the appellant does not bear any negative burden because of the findings and decision made in the initial proceedings [i.e. no "negative baggage" is carried over from the initial proceeding] a breach of fairness at the first proceeding can likely be corrected by according full fairness in the administrative appeal;
  (b) if the internal appeal body is empowered to review for errors of law made at first instance, since a failure to accord procedural fairness is an error of law, the internal appeal tribunal would likely have jurisdiction to find that the first instance tribunal made such an error and may be able to then remit the matter to that body for a rehearing that will accord fairness;
  (2) the internal appeal might obviate the need for JR by resolving the substantive issue in favour of the applicant;
  (3) decisions reached by internal appeal body may assist the court in its review function if and when the matter ultimately goes to JR, e.g. by providing the court with the benefit of the internal appellate body's expertise on the matter, as well as a complete record.

- **To determine if an internal appeal or review mechanism is "an adequate alternative forum" courts examine the nature of the internal appeal forum/processes and take into account factors such as:**
  - the nature of the internal appeal body, its powers and processes: can the internal appeal forum resolve and correct the very matter that the applicant seeks to complain about?
  - the convenience of the alternate forum: how convenient is the alternate forum in terms of its costs and expeditiousness, as opposed to a judicial review application?
  - the procedures and capacities of the other body: Will the alternate forum operate with procedural fairness and without bias? Is the alternate forum sufficiently independent?

- Remember also that it is difficult to be categorical in regard to AAR: **the nature of the interests at stake must always be taken into account, along with the extent to which such interests might be seen to be immediately and irreparably prejudiced by the initial decision in relation to which procedural fairness has been denied.** (*Zahab*)

G **Balance of Convenience**:

In a recent decision, *Mining Watch Canada v. Canada (Fisheries and Oceans)* 2010 SCC 2 another factor was added to the list of considerations on which the court's discretion about granting a remedy should be exercised. The Court noted at para 52 that the exercise of discretion to refuse relief when an applicant is otherwise entitled to a remedy should be exercised with care and that "balance of convenience" considerations are involved, including whether to grant or deny the remedy being sought would have a disproportionate impact on the parties or interests of third parties.

1. **Judicial review in the courts is seen as a last resort kind of remedy**
   a. Can be denied on **PREMATURITY,** i.e. if there are adequate alternate remedies
      i. If the matter can be resolved in other forums, the court would prefer that to happen
         1. Prematurity saves the court from having to adjudicate the case
         2. It avoids bifurcation
         3. Allows the court to deal with it at the end of the day on the basis of that record
         4. Sometimes the issues will just go away; for example, people win the case substantively
      ii. Adequate alternative remedies should be exhausted first
      iii. If there is an appeal to courts from an administrative tribunal, that will generally been seen as an AAR.

2. When will an internal administrative remedy be seen as an AAR?

a. WILL THE AAR cure the problem?

i. If it does/could, you the internal admin review will be an AAR.

1. **Judicial economy**: if exhausting AAR's will provide them with the substantive remedy they are looking for, there is no need for judicial review
2. **Avoids bifurcation**, to allow the legislation to be fulfilled, allowing the case to proceed with a **complete record** if it does make its way to the courts.

b. Considerations include:

i. JURISDICTION
ii. CONVENIENCE (Time)
iii. COST AND EXPEDITIOUSNESS
iv. PROCEDURES

1. **Composition:** if international admin review is composed in such a way to *give* a good AAR.
2. Will the internal admin review act in a procedural fair matter?
3. Will it be unduly burdened by the previous decision?
4. Will the negative baggage of the previous decision affect it?
5. Will the appeal body be sufficiently independent (i.e. from the executive branch or from the first branch of decision-making).

Harlekin Student required to discontinued studies. Unclear whether b/c of grades or conduct. Student appeals faculty decision to university council committee. Breach of PF claimed; only heard from university and not from student. Student immediately seeks JR review rather than going to the 2nd level – a senate committee.	• **Issue:** Should student be granted JR or should they use their discretionary remedial power to deny the remedy on the grounds that the student should have exhausted the internal process first? • **Majority (Beetz):** Senate Committee is an AAR. Writ of certioriari denied. Student should have gone back to exhaust appeal. o First, Student held that because there was a breach of PF – failure to respect the principle *audo alteram partem*, it was a jurisdictional error and the writ should issue as a right *ex debito justitiae.* **Held**: JR was not a right. The writs have been and remain discretionary and there are recognized grounds on which they can be reviewed. They are not issued as a matter of right but as a matter of grace — there is just a strong presumption, but there are grounds on which discretion can deny the remedy (such as an AAR) o Second, as the first decision was a breach of PF (jurisdiction), the decision was a nullity, and there thus *nothing* to appeal. **Held**: The body started out with jurisdiction and then made an error with respect to how they exercised that jurisdiction. It was an abuse or excess of jurisdiction. The decision is just *voidable* at the instance of the aggrieved party; and until it is voided, it is still there. Thus, there is something that can be appealed. o Third, it was not an AAR. ▪ To determine this (a la *TAIGA*), you have to look at the (1) **procedures** of the internal admin appeal body; (2) the **composition** of the internal admin appeal body; (3) the **powers** of the body; and (4) the **costs and expeditiousness** of it. ▪ Is it an appeal based solely on the record or it it a trial *de novo*, that is, if it has jurisdiction to start at a *tabula rasa*, so that no negative baggage is brought in, then that is a strong indictor of an AAR. ▪ Will the body follow fair procedures themselves? ▪ Will they be laboring under a bias or lack of independence issue? o Beetz looks at all this and it is unclear whether this body has a whole wrath of procedural rules, and by the time it made its way to the SCC, it indicated it would do a trial *de novo*; however, at the time, the by-laws were silent — Beetz said the body would have and could have conducted itself as a trial *de novo* — an appeal can mean either an appeal on the record or a trial de novo kind of appeal. Thus, negative burdens were not at issue. As for the composition issue, was the senate body as well-qualified to do the matter – the comparison body with respect to composition should be with respect to the body that can determine the matters. With respect to costs, the internal admin review is generally cheaper. Beetz criticizes his 'preference for external forums'; less costly to the public. • **Dissent**: Dickson strongly dissented. o Senate appeal is not an AAR. Senate committee is less qualified in its composition than the Council, and we do not know how that appeal would unfold – we do not know if they are going to hear it *de novo* – we are not sure if they can hear it *de novo* – so he was not prepared to breathe it into the statute that it was an appeal de novo, usually an appeal is an appeal on the record.

	○ Thus he was not prepared to read it in a way that it was an AAR. "You can't pretend the student would start with as fair a chance before the Senate as he would before the Council dynamic of **ascending rigidity*** – extra onus on the student to show that the lower decision was wrong; less qualified body; voluntary members. • **Upshot.** Majority: these are discretionary remedies which must be exercised judicially.
Matsqui	• AAR was inadequate; 3 judges because it wasn't an AAR, and 2 because the AAR was insufficiently independent
N.B. v. J.G.	• Discretionary remedy not withheld on account of mootness; significant and broad issue.
Homex	• Remedy denied because of clean hands issue.

REMEDIES: THE **FUTILITY** ISSUE

Except for a very minor exception, courts will not listen to litigants if they claim that: "yes there was a breach of PF, but we would have made the exact same decision as there is nothing they could have said or could have been done that would changed their mind." Thus, the courts must not speculate what the outcome what have been.

MOBIL OIL — Exception – **as a matter of law** there was only one outcome possible in the case.
Legal futility thus can be a grounds to deny a remedy of breach of PF

The "*Mobil Oil*" Exception for Cases of Clear "Legal Futility":
In Mobil Oil, the Court held that a breach of the procedural fairness justice had occurred. However, in the exceptional circumstances of the case, the Court refused to grant a remedy because, as a matter of law, it was absolutely clear that only one decision could ultimately be made. It was therefore nonsensical to compel a hearing of the matter. The decision-maker in question would be bound in law to reach a particular outcome. A re-hearing would be absolutely and obviously futile.

- Where there is a breach of procedural fairness the S.C.C. has typically held that an individual is entitled to a remedy regardless of whether it appears to the reviewing court to be virtually certain that the substantive decision would have been the same, even if procedural fairness had been accorded. (*Mobil Oil*)
- In other words, *in the absence of any of the traditional grounds on which the court might to refuse to exercise its discretion to grant a remedy* (i.e. those outlined in Part B*)* a remedy should follow a breach of procedural fairness without regard to any perceived "futility" in holding another hearing. That is, "speculation" by the reviewing court as to the ultimate outcome is forbidden; a breach of the rules of natural justice or procedural fairness cannot be overlooked on the basis that the reviewing court (or appellate tribunal) is of the view the result would have been the same even if no breach had occurred.
- This approach makes sense because a breach of procedural fairness usually means, in the case of a breach of audi alteram partem, that not all the information has been heard by the decision-maker, or, in the case of bias, that the information has not been heard by a sufficiently impartial decision-maker. The "strict" approach also protects other interests that are at stake when procedural fairness is denied, including the "participatory" rights of the person who is the subject of the decision.
- A case that illustrates this principle is *Cardinal v. Kent Institution* [1985] 2 S.C.R. 643 in which some prisoners had been segregated from the rest of the prison population after an alleged hostage-taking. The Segregation Review Board recommended the segregation should end, but the Director decided to continue it without hearing from the prisoners. It was held that the Director's decision breached procedural fairness. However, prison officials then argued that no remedy should be granted because the breach did not matter: the prisoners had not been prejudiced by the breach because the Director would have decided to continue the segregation even if he **had** heard from the prisoners. The S.C.C. rejected this argument, holding that once a breach of procedural fairness is found, the court should *not* consider whether the result would have been the same even if a procedurally fair process had occurred. Le Dain J. stated:

  > *"I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing."*

- Similarly, in *Lakeside Hutterite Colony v. Hofer* [1992] 3 S.C.R. 165*:* (a domestic tribunal case) no notice/hearing was provided of a meeting regarding the expulsion of the plaintiff Hutterites from their colony on the grounds that their behavior was deemed to be inconsistent with the Hutterite way of life. The Colony argued that the decision would have been the same anyway, because there was nothing the plaintiffs could have said that would have changed the colony's judgment. However, the S.C.C. (per Gonthier J.) said:

  > *"…natural justice requires procedural fairness no matter how obvious the decision to be made may be. It does not matter whether it is utterly obvious that [the plaintiffs] would be expelled. Natural justice requires that they be given notice of a meeting to consider the matter and opportunity to make representations concerning it. This may not change anything but this is what the law requires."*

- See also the discussion of the *Cardinal* decision in *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)* 2010 BCCA 97.

THE RULE AGAINST BIAS ("*nemo judex in causa propria sua debet esse*")

General Principles and the Basic Test for Reasonable Apprehension of Bias

- The rule against bias derives from the 2nd limb of natural justice — *nemo judex in causa propria sua debet esse*, or that no one should be a judge in his her own cause. The rule reflects the idea that justice requires decisions to be made by an impartial, unbiased, neutral, and disinterested d/maker. Canadian jurisprudence incorporates the rule against bias in PF (*Baker*, *Imperial*)
- However, as with other PF obligations, the rule varies in its application, depending on the context of the decision in any given case. Given the range of decision-makers in the realm of administrative law, from judicial-like tribunals who adjudicate labour grievances to minister's who perform policy-making discretionary functions, a contextual approach is always required.

- **RAOB Test:** Absence of Actual Bias Not Enough. There must also be no appearance of bias.
- RAOB exists if a reasonable person, well-informed about all the facts concerning the decision-maker, viewed realistically and practically, would conclude the decision-maker may be influenced (even if subconsciously) to favour or dis-favour one side over the other because of some kind of interest or prejudice in the outcome. [*disinterest in outcome; amenable to persuasion*]
    - **Two-Fold Objective Element**: **(1)** person considering the alleged bias must be reasonable; and **(2)** the apprehension of bias must also be reasonable in the circumstances of the case. (*R. v. S.*)
        - Must be informed of all relevant circumstances (includes importance of integrity); and
        - Not have a "very sensitive or scrupulous conscience"
    - The grounds must be **"substantial"** and allegations of bias should not be made lightly. Mere suspicion not enough.
    - Does not encompass pre-dispositions or attitudes (values, beliefs, etc). Instead, seeks to identify **specific** situations that are unacceptable in a particular context. What is ***disqualifying*** bias depends on circumstances.

- **Direct "Pecuniary Interest" Test**
    - Any direct personal pecuniary interest is sufficient to automatically disqualify a decision-maker. Bias is presumed.
        - **Direct**: must be (**1**) sufficiently certain; (**2**) not too remote; and (**3**) not contingent (*Energy Probe*)
            - *E.g.* d/maker awards K to company he owners, increasing value of shares.
            - *Not direct*: d/maker on regulatory board owns shares in company that might benefit from relicenses decision.
    - However, if a financial interest is **indirect**, the RAOB test applies (*Pearlman*).

- **"Relaxed Test" for Bias**
    - **Closed Mind Test**: Where it is alleged that such d-makers have pre-judged a matter, or have an inappropriate level of predisposition towards an issue, the test is where they have kept an **open mind** and remain "amenable to persuasion." They must not have a closed mind.
        - Can apply to elected decision-makers such as municipal counselors (*OSBRA*, *Save Richmond*)
        - Can apply to members of policy-oriented boards in relation to comments that members make **prior** to a hearing (particularly if such members are expected to be representative of certain interests), but members must abide by normal (RAOB) standard once hearing actually commences (*Newfoundland Telephone*).

Policy

1. **Fosters public confidence** in administrative justice by promoting the legitimacy and acceptability of decisions.
2. **Promotes substantive fairness**: decisions made by unbiased d/makers are more likely to be fair and "correct."
3. **Supports participatory procedural rights**: right to be heard and to have reasonable opportunity to participate.

- **Rule of Law & Equality**: citizens want to be governed by known laws, duly enacted by elected governments, and applied even-handedly so like cases are treated similarly, without favoritism and without discrimination.

Remedy

- Bias, where it is found to exist, disqualifies a decision-maker and causes a loss of jurisdiction. The decision can be **quashed** upon judicial review and sent for re-hearing by a non-biased decision-maker.
- **Nb.** If a complaint is made *before* a decision is made, it can be the basis for an order of **prohibition.** However, courts may refuse to entertain the matter until after the tribunal has made a final decision on the merits of the case (application **premature**)

Procedure

- Party should raise the matter with the d/maker and ask the d/maker to disqualify himself. D/maker then recuses or refuses to recuse. If d/maker does not disqualify himself, party alleging bias can: (a) seek JR immediately but might be met with the problem of prematurity; court might refuse until d/maker makes a final decision OR (b) continue in the proceeding, while continuing to maintain the bias objection, and seek JR after final decision if grounds to complain remain.

Defences to Bias Allegation and Exceptions to Disqualification

1. **Statutory Authority:** if expressly or necessarily impliedly authorizes d-maker to decide a matter, despite what might otherwise be seen as a disqualifying bias, the statute governs and statutory authorization is a compete defence. (*Brousseau*).
    - *Charter* or *CBR can* strike down provision authorizing the allegedly biased d/maker to decide. (*Quebec Inc.*)
2. **Necessity:** d/maker is *only possible* d/maker who could be authorized to decide; or there'd be a failure of justice.
3. **Waiver:** parties who know about bias can waive it expressly or impliedly. Implied waiver can only occur if person about bias and knew they could object to it, but nevertheless elected to proceed without making an objection.

Individual Bias Issues

1. Pecuniary or Other Material Interests in the Outcome

- A pecuniary or material interest arises where a d/maker has an economic interest in the outcome of the decision and thereby stands to benefit or lose from the decision in a material sense.

Imperial Oil
 	
Polluter-pay scheme. Minister orders *Imperial* to pay, but previously supervised decontamination site, failed, and damages claimed against Crown by current owners.
	• QCA finds bias but does not disqualify because of *necessity*.
	• **SCC**: **No** conflict of interest and no need to rely on defences.
	  o The **context** of the decision and the Minister's obligations regarding partiality cannot be compared with that of a judge, nor with an administrative d/maker who has adjudicative functions.
	  o It is a discretionary, ministerial decision implementing legislative environmental policy and protecting the public interest.

Pearlman RAOB Claim: members of disciplinary hearing had pecuniary interest of Law Society hearing, for statute enabled the ordering of costs against individual, or Law Society fees go up.	• **No** pecuniary interest: (i) Law Society simply recouping expenses so **no profit**; (ii) interests of the sitting members are too **remote** and **communal**; (iii) *any* peer disciplinary process will result in this issue, but peers are best situated to assess what conduct is unbecoming of their peers. o **Exception**: [***Moskalyk***]: a pharmacist was going to be disciplined by a competing pharmacist living in the same small town. RAOB.
Matsqui Band members sat on the panel, and so they benefitted from the taxes.	• **No** pecuniary interest; no RAOB; ANY municipal scheme benefits from people paying taxes — it is part of self-government. The interest is communal. **Note context.**

2. Personal or Business Relationships with those Involved in the Dispute

- RAOB may be found where a d/maker has a relationship with parties involved in the dispute. Involvement may be past or present, and the relationship may be direct or indirect so long as the d/maker has a relationship with those who have an interest in the outcome in the sense that they may either gain a benefit or suffer a detriment as a result of the particular decision.

Bennett and Doman Doman investigated for insider trading; one member is director of rival company. Argues RAOB because member's company stands to benefit if Doman is penalized, for he might lose ability to run his company.	• **Held**: RAOB found. • While there was a weak evidentiary basis and the claim was speculative in nature, the *facts* of bias are relevant but not determinative. • Instead, it is the **perception** of bias that ultimately matters. • "Would a reasonable person think it just that a person sit on a panel evaluating the conduct of someone who is part of the same industry where that individual might be barred?" Reasonable person is a mythical creature!
Marques v. Dyler JR of decision to certify union b/c 1 panelist previously member of law firm acting for union. Employer raises RAOB.	• **No** RAOB found**.** • *Proximity*: no involvement with the case at the time they were at the firm; *Time:* one year had passed since board member with firm; *Context:* labour relations is a small community; there will naturally be connections from the past. *Tripartite*: neutral member + 2 wingers.

3. Prior Knowledge or Involvement of Decision Maker at Earlier Stages

- RAOB may be found where there is prior involvement of the d/maker with the specific case or issue before them.
  (a) **Re-hearings**: d-maker has already heard matter and now has to rehear it after a successful application of JR. Generally, if a decision must go back to same d/maker, perhaps for reasons of necessity or efficiency, there is no RAOB; however, RAOB may be found in very specific contexts, such as involving clear findings of **credibility.** (*BCNU*: "relatively rare")
  (b) **Prior involvement** of d/maker with specific subject matter before the tribunal, **where the prior involvement occurred before the d/maker was a member of the tribunal** ("private life"; "worked on the file"). (*Committee*, *Wewaykum*)
  (c) **Overlapping functions**: prior invovlment of d/maker within the specific subject matter *within the tribunal*, before the matter gets to an adjudicative hearing stage. Same person participates in investigation also appoints d-maker or makes decision.

Committee for Justice and Liberty
 	
Pipeline company applies to National Energy Board (1974), which Crowe is Chair & CEO. Crowe previously involved in study group with corporation in 1972.
	• **Held**: RAOB found. 5v4 split.
	  o Majority applied a strict standard, did not discuss context. Crowe may have prejudged the matter.
	  ▪ Invoked policy rationale of **public confidence**;
	  ▪ Crowe didn't *need* to sit on this panel.
	  o **Dissent**: but *experts* must sit on these energy boards, and are the regulated one day and the regulator the next. No RAOB; there should have been a lesser standard as the National Energy Board makes policy decisions, not adjudicative decisions.

Wewaykum Indian Band
 	
Band sues Crown; Binnie (and rest of court) dismisses lawsuit and writes reasons, but FOI request reveals that Binnie involved in case from 82 to 86 with DOJ. Binnie doesn't remember.
	• **Held**: No RAOB.
	• Distinguishable from *Committee*. Different kind of involvement and history:
	  ○ **Strong Presumption of Judicial Impartiality**: taking oath, guaranteed status, salary, and independence. Binnie takes oath not to be biased; Even if he was, it was a unanimous judgement.
	  ○ **Nature of Involvement and Recency**: involvement limited, merely supervisory and administrative. While role was more than *pro forma*: never counsel, didn't plan litigation strategy, involved in broad policy approach to case rather than specific facts. **15 years**!

Brousseau **(overlapping functions)** Chair of Securities Commission asks workers to investigate, then holds hearing and sits on it.	• **Held:** statutory authorization defence. **No** ROAB. Statute by necessary implication allowed Chair to do all these things; complete defence. • **Policy:** perceived problem of pre-judgement; the decider will begin shaping the outcome of the decision too soon. **Context**: economic crime!
Quebec Inc. **(overlapping functions)**	• Same lawyer shouldn't be advising in investigations, pre-hearing issues, issues at hearing, and [**policy writing**].
4. Attitudinal Predispositions (Pre-Judgment) & Different Standards for Different Contexts	
• (*Baker*)	
Gale Adjudicator on HRT also a complainant in a systemic sex discrimination case (1 of 2 parties on record). Case not settled; still in books. Appt'd to hear similar complaint. Asked to be withdrawn from the 1st after 2nd hearing commences.	• **Held**: RAOB found. Court disqualifies her. • She is in a position to author a precedent in her own cause. ○ Larger issue: when should an individual person be disqualified because of what they had written in their prior life? (*e.g.* academic writing, policy writing). • **Factors**: how close relationship of what is written to specific case, time (long time ago?); ***policy*** *counterargument:* expertise.

Old St. Boniface
 	
Big condo being built. Counselor supports development at committee. Election. Sits on committee for rezoning hearing.
	• **Issue**: can RAOB preclude this because of attitudinal predisposition?
	• **Sopinka** (majority): Municipal counselors, in cases of attitudinal bias and pre-judgement, will not be disqualified (RAOB) unless there is evidence of having a closed mind (relaxed test).
	  ○ "An expression of final opinion that cannot be dislodged."
	  ○ Must be amenable to persuasion; representations mustn't be futile.
	  ○ Decision made by elected people; not judicial/quasi-judicial.
	  ○ We also value what elected officials tell us what they are thinking and stick to it.
	• **Nb.** Legislative end of the spectrum; policy.

Save Richmond Farmland Society
 	
Counselor took a very early position that farmland should be rezoned from agricultural to residential. Ran on this platform. Took no financial interest. Talking a lot in the media that he would make this decision.
	• **Sopinka** (majority): same as above.
	• **LaForest** (concurring): Not possible to raise a bias claim in the context of electoral municipal politics.
	  ○ Preferable to leave no room at all for RAOB claims or there will be a lot of needless and frivolous claims.
	  ○ It will only lead to posturing and lip service to the ideal.
	• But if LaForest is correct, why bother with the hearing? Hearing provided for by statute – legislature must intend for it have to some effect. Serves salutary purpose of *reminding* counselors they are obligated to listen, and circumstances may change, or new information may come to light.

Newfoundland Telephone
 	
Telephone company has monopoly on telephone services. Policy-oriented board. Wells, consumer advocate and municipal counselor, appointed to board. Says he will play an adversarial role and champion of consumer rights against big salary and big expense plans, passed on to rate-payers.
	• **Held**: while decision is at legislative end of spectrum: RAOB found.
	  ○ **A bifurcated approach for policy-oriented d/making boards.**
	  ▪ In the pre-hearing approach, the closed mind test applies; must show they are amenable to persuasion
	  ▪ Once hearing begins, the regular ROAB test applies, a greater degree of discretion is required. **Nb.** the test is flexible; the board is policy oriented and not adjudicative.
	  ○ **Criticism**: does a bifurcated standard really make sense? This posturing may be a bad thing; it is better to say that they can just say what they are thinking so that you can try to persuade them in one direction over the other.

Chretien	• It is not the role of decision-makers to be active participants in the media. "Let the decision speak for itself."

Statutory Authorization Defence (and Use of Rights Document to Override Defence)	
Brousseau	• **Nb. statutory authorization often plays a role with overlapping functions issue.** • While there is a RAOB, it is defended by statute.
CUPE v. Ontario (Minister of Labour)	• **Statutory authorization defence is a complete defence.**
MacBain Same CRHC which investigates complaints also appoints Tribunal members who hear and decides complain. CRHC selects from long list of potential tribunal members (at least 100 name); then, CRHC lawyers prosecute case. Commission essentially appoints their own adjudicator.	• **RAOB authorized by statute but violates the CBR!** • To summarize on the CBR issue, the FCA concluded that *CBR* s.2(e) was triggered because what was at issue in the case was the "*determination*" of MacBain's statutory "*obligation*" not to discriminate. The Court then went on to hold that the process provided by the *Canadian Human Rights Act* (*CHRA*) for dealing with complaints (i.e. the provision of the *CHRA* that allowed the Chief Commissioner to appoint the members of the Tribunal that would hear the case) was not in accordance with the principles of fundamental justice. Having thus found a contravention of *CBR* s.2(e), Justice Heald held the infringing provisions of the *CHRA* to be inoperative in MacBain's case. In other words, the *CBR* was used in this case to "trump" the defence of "statutory authorization" that would otherwise have held sway.

Procedural Fairness and Tribunal Independence

INDEPENDENCE applies only if an adjudicative body SETTLES DISPUTES of the RIGHTS OF PARTIES (*Matsqui*)

- Tribunal independence is necessary to ensure the impartiality and the appearance of impartiality in administrative decision-making (*Quebec Inc*., *Bell Canada*). Tribunal independence demands independence of the decision-making agency as a whole from the undue political influence of the executive. Such independence is closely related with the concepts underpinning judicial independence. Tribunal independence ensures that the status of the d/maker rests on objective conditions and guarantees that allow the d/maker to freely exercise their judgement.
- However, there are some significant points of disjuncture between tribunal and judicial independence. First, tribunals are an extension of the executive, whereas the judiciary is a separate branch of government. The constitutional guarantees of independence that apply to the judiciary do not apply to tribunals (*Ocean Port*). Second, determining the appropriate degree and kind of independence in the context of tribunals often leads to a "clash between the day-to-day realities of the work of administrative tribunals and judicial understandings of how the administrative state should work" (Jacobs).

POLICY

- promotes public confidence in the justice system
- promotes perceived legitimacy of d/making
- especially important if the decision/maker routinely decides cases involving the Crown
- concern is that the administrative tribunal, if not sufficiently at arm's length from the government, may reasonably appear to litigants and to the public to be biased in favour of making decisions that will please the government so that tribunal members can keep their jobs, earn more money, etc.

POTENTIAL SOURCES OF INDEPENDENCE FOR TRIBUNALS

(1) **Constitutional and Quasi-Constitutional Sources**
   a. *Charter* s.7 – where it applies to the decision-making of admin tribunals (also *Charter* s.11(d) in certain rare cases)
   b. *CBR* s.1(a) and s. 2 (e) – where it applies to federal administrative d/making
   c. *Quebec Charter of Rights and Freedoms* (s.23)
   d. *Alberta Bill of Rights* s.1(a) – where it applies

(2) **Legislation** (statutes and regulations may provide statutory guarantees) e.g. ***ATA* ss.2-10**

(3) **Common law of Procedural Fairness** (will include independence requirements for some administrative decision-makers and will apply if not overridden by express statutory provisions that displace the common law) per *Matsqui*

ONGOING ISSUE AND DEBATE: notwithstanding *Ocean Port,* does the "unwritten constitutional guarantee" of judicial independence flowing from the preamble to the *Constitution Act 1867* as found in the *PEI Reference re Provincial Court Judges* (*R. v. Campbell*) SCC 1997 apply to some administrative tribunals? (attempts continue to restrict/distinguish *Ocean Port* … **no luck so far**!)

LEGAL TEST FOR INSTITUTIONAL INDEPENDENCE

- To determine if there is sufficient institutional independence, the court must assess the relationship between the administrative institution and the executive branch in light of the 3 *Valente* criteria:
  (1) security of tenure
  (2) financial security
  (3) admin arrangements closely related to judicial functions (assignment of cases, management of court lists, scheduling of cases etc.)
- **TEST: is there a "reasonable apprehension of lack of sufficient independence" in light of these three factors?**
  - Would a reasonably informed member of the public have a reasonable apprehension of a lack of sufficient independence? [thus giving rise to a reasonable apprehension of an insufficient level of impartiality]
    Nb. In cases like *Quebec Inc.*, through what lens do we determine whether those criteria exist or not?
    Nb. a key question is how/on what basis/at what point should we assess the independence criteria? See the debate in *Matsqui* on this issue between Sopinka J and Lamer CJ.
    Nb. this is not *judicial* independence! These criteria, as applied to admin d/makers, **must be applied flexibly**.

DIFFICULTIES AND RESTRICTIONS

- **Conceptual Issues:** the application of the *Valente* criteria varies and is restricted in the administrative context:
  a. Application: the principle of independence *cannot* be applied to all admin d/makers – only applies to certain kinds of tribunals: those that are most court-like and have adjudicative functions (*Matsqui*)
  b. Flexibility: where the principle of independence has been employed, it must be employed with flexibility to take account of the administrative context: *"... the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite level of institutional independence (i.e. security of tenure, financial security, and administrative control) will depend on* ***the nature of the tribunal, the interests at stake, and other indices of independence*** *such as oaths of office."* [per Lamer CJC in *Matsqui*]
- **Statutory Authorization**: where arrangements for tenure, remuneration, and independence are expressly dealt with in a statute, "statutory authorization" provides a complete defence to any purported "lack of independence" based on common law PF, unless a quasi/constitutional guarantee that can override the statute is applicable (*Ocean Port*)

- **Constitution**: the principle of independence is at its strongest where a constitutional or quasi-constitutional guarantee of an independent tribunal is applicable. Compare with *Ocean Port* (no rights doc)

POLICY PROBLEMS OF APPLYING CONCEPTS OF JUDICIAL INDEPENDENCE TO ADMINISTRATIVE TRIBUNALS

1. not all administrative bodies are intended to be independent or at arm's length from gov't control - how do we decide which should and which should not be required to be more or less independent from government control? What are the criteria that should be applied in this regard?
2. even if we deal with the "diversity problem" noted above and determine that only "adjudicative" or "judicial/quasi-judicial" d/makers should have independence, what do we do with bodies who have BOTH this function and other regulatory/policy-making functions?
3. accountability to the public may be reduced or even lost the more that an admin body is independent from control by the exec branch – what kinds of accountability should administrative tribunals have and how should we establish such accountability?

Matsqui

Multi-level d/making processes for tax assessment set up by Indian bands as part of self-government initiatives – *Canada Pacific* bypasses processes to seek JR of an assessment decision.

Issue: (**1**) whether the band's review/appeal processes were adequate alternate remedies that should have been exhausted first, before JR was sought; or (**2**) whether the processes were NOT AAR, because they lacked sufficient independence from the bands who appointed them.

Held: Ultimately 5v4 held that it was not an AAR; CP can go directly to JR. Insufficient objective guarantees. Rejects operational reality approach; one can't be sure the process will operate.

"OPERATION REALITY" ***vs.*** **"OBJECTIVE GUARANTEES" question**
Sopinka (dissent) *vs.* Lamer (majority)

Operational Reality (Sopinka, dissent) — more weight given to **self-government** context.

- No problem with jurisdiction and independence; AAR must be exhausted first.
- *Wait and see* (re Sopinka) how process operates on the ground rather than look to objective guarantees in the bylaws / the provisions / the rules setting up the bodies. It is premature to say these bodies will be insufficiently independent; no evidence yet.
- Even if on the face things, there is no security of tenure within the objective rules of the schemes, independence might nonetheless arise from the *terms of appointment* of the people who are appointed. Thus, if they are in fact appointed for a specific period and cannot be removed without cause, that appears to be good enough.

➢ **Nb.**: There is an enhanced need for independence in this context; because generally the appeal body will be pitted against parties like CP. This principle would also apply when one of the parties is the GOVERNMENT. There need for independence is ENHANCED — an **arm's length relationship is required**

QUASI-CONSTITUTIONAL GUARANTEES

Quebec Inc.

Lamer [objective guarantee]: Possible for Regie lawyers to file complaints, present complaints to the Regie (panel hearing the case), and assist the adjudicators in drafting the reasons for the decision.

Higher end PF – loss of revenue. Quebec Charter guarantees full hearing in front of an impartial tribunal. S.23 applies whenever there is a determination of any rights/obligations or the merits of any charges. Thus, there is a quasi-constitutional guarantee here.

- **HELD: institutional impartiality issues**: the potentially overlapping functions of the Regie's lawyers and its Directors gave rise to a RAOB at an institutional level.
  - While there was **no evidence** this was the case, Lamer wants guarantees. He wants rules written down somewhere.
  - Recall: there is a quasi-constitutional document to justify this!
- **HELD: on institutional independence**: *the Valente* criteria were used (flexibly) to measure independence and the Regie was found to be sufficiently independent
  - **re security of tenure**:
    - **Elements**
      - [FIXED TERM, yes; AT PLEASURE, no]: short period of time (can be limited to particular subject matter) is okay.
      - [TERMINATION only by CAUSE]: okay, so long as cause being reviewable by external body
    - **Held:** a fixed term appointment is O.K. as long as it is not at pleasure and the d/maker is dismissible during the term only for cause, with the existence of cause being subject to an independent review process at which the person dismissed has a right to be heard
  - **re financial security:** no argument here
  - **re Institutional Independence in admin matters:** the challenge was based on the various points of contact between the Regie and the Minister including:
    (1) annual report obligiation
    (2) Min can require Chair to provide info re Regie's activities
    (3) Min must approve internal rules and regs passed by Regie
    (4) Min evaluates performance of Chair
    (5) Min supervises the police force that Regie uses for investigations
    (6) Minister could initiate a cancellation process

	• **HELD**: all of this is O.K. for this kind of tribunal – doesn't raise a reasonable apprehension of lack of institutional independence- *merely the kind of supervision that you would expect a Minister to have over an admin agency* ➢ **Nb.** given that this agency is at the high end of the spectrum, the decision on [institutional independence in admin matters] indicates the courts will have a fairly high degree of tolerance for this kind of administrative supervision over such tribunals • If this were a court, none of these things could be done at all. This is thus a compromise – this an executive branch, and making these boards accountable and efficient is important. So this is not problematic… • ***Policy***: how independent should we make this body? You set up perhaps some mechanisms rather than direct Ministerial evaluation of the performance of the Board. Perhaps some other independent Board that evaluates multiple boards. Note, however, as per *Quebec Inc*., impartiality can be assessed on an institutional or structural basis – the way in which a decision-making system is structured and how it routinely operates can give rise to a disqualifying RAOB at an institutional level – **the test for bias in such cases is whether the a well-informed person, viewing the matter realistically and practically, and having thought the matter through, would have a RAOB in a substantial number of cases because of the way in which the d/making process has been structured: Quebec Inc.**
Ocean Port Hotel Branch suspends license of Ocean Port for 2 days over weekend. Ocean Port argues that the Liquor Appeal Board was not sufficiently independent because the legislation that created the Liquor Appeal Board said that the members were appointed **at pleasure.** Branch relies on *Quebec Inc*. (but perhaps forgets the quasi-constitutional protection) BCCA relied on *Quebec Inc*. in determining that the BC Liquor Appeal Board (LAB) was required by law to independent and that it lacked independence b/c the members were appointed "at pleasure." Statute expressly provided for such "at pleasure" appointments but this was overlooked!	• SCC overturned the BCCA decision on the basis of "**statutory authorization**" distinguishing *Quebec Inc* on the basis that s.23 of the *Quebec Charter* provided a quasi-constitutional guarantee of independence in that case whereas no such guarantees exist in B.C. • Statute prevails over procedural fairness protections of independence! • SCC held that, in the absence of constitutional requirements, the degree of independence to be accorded to a tribunal is something for the legislature to determine. • If STATUTE is SILENT, courts will imply independence into the tribune, presuming that it was intended by the statute. HOWEVER, where there is express language, the courts will not act. • This is because administrative tribunals are not constitutionally distinct from the executive and are created for the purpose of implementing government policy. The Court therefore found that it was the role of legislative bodies to determine the composition and structure of administrative tribunals**,** subject to the limited exceptions hwere tribunals may attract Charter requirements for independence. • Further, the rationale for locating a constitutional guarantee of independence in the preamble to the Constitution Act, 1867 will not extend, as a matter of principle, to administrative tribunals. o ***Many have tried to distinguish Ocean Port*** **(***McKenzie—when the administrative tribunal has powers taken directly from the judiciary****), but McLachlin is clear!*** *Admin tribunals of the exec branch are policy things!* • Are administrative decision-makers ***policy things*** or ***adjudicative things***? o Can *Ocean Port* be distinguished? Pending case determining whether Saskatchewan Labour Relations Board is sufficiently independent… o Why are the courts invested in drawing such a firm line between courts and tribunals? It is a difficult line to draw once you start to draw it!
Administrative Tribunals Act	ss.1-10 (see Crane)

SUBSTANTIVE REVIEW

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PRE-*DUNSMUIR*: Tracing the Development of SOR Law

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- **DISCRETION**
  - Pre-*Baker*, discretionary decisions were reviewed on two bases: (*Roncarelli*)
    - **Genuine Exercise**: This was an infrequent and fact-based inquiry. Issue include:
      - **Rule against sub-delegation**: The empowered party must be the one to use the power
      - **Rule against abdication**: No one can dictate the empowered party's exercises of power
      - **Rule against fettering**: The empowered party must fully exercise their discretion; they must not fetter the discretion with **blind adherence** to an internal policy.
    - **Legality**: Proper authorization of the discretion. The courts would ensure that:
      - The power was exercised for **proper purposes**
      - The decision was not made on the basis of **irrelevant or extraneous considerations**
      - All **relevant considerations** were taking into account (*i.e.* all the considerations **required** by the statute, implicitly or explicitly)
      - The discretion was not exercised in **bad faith**, **arbitrarily** or **capriciously**.
  - **Example**: Premier of Quebec gets liquor board to revoke π's licence because π's a Jehovah's Witness. Errors: improper purpose, irrelevant consideration, bad faith, dictation. (*Roncarelli*)
  - Pre-*Dunsmuir*, discretionary and non-discret. decisions were reviewed on the P&F approach (*Baker*)
    - Today, it's really just a very, very deferential **reasonableness** standard.
- A discretionary decision is only **reviewable** (and then only on a reasonableness SOR) if: (*Suresh*)
  - It was made **arbitrarily** or in **bad faith**
  - It **cannot be supported** on the evidence
  - The tribunal **failed to consider the appropriate factors**
    - The Court will not reweigh factors if the decision was discretionary. (*Suresh*)
      - *Baker* breaks this, but *Suresh* explains this away as a "special case", claiming that *Baker* just found some implicit primary factors that weren't considered (*Suresh*)
    - **Example**: Immigration board considered each factor required by statute. Court refused to re-weight; no factors were missed, so the decision is not reviewable. (*Khosa*)
    - **Example**: Statute requires Minister to appoint a person to a labour arbitration panel who he thinks is "qualified to act". Court finds that the statute **implicitly requires** consideration of the person's qualifications, as well as the acceptability of the person to the parties. Unreas.(*CUPE*)
    - **Example:** Convention refugee applies for landed immigrant status, statement issued that he is a member of a inadmissible class (by statute deportation if ALSO found to be a danger to the security of Canada), s.7 triggered for procedural fairness (*Suresh)*
- **Unreviewable** discretionary powers:
  - Exercise of the Crown prerogative for the purpose of national security was unreviewable (*CCSU*)
  - **Later**: Crown prerogative to advise the Queen on conferral of honours was reviewable (*Black*)
    - The source of the power (legislative vs. prerog.) doesn't matter – subject matter does.
    -