

Morgan Blakley's outline of "Administrative Law in Context" by Sossin and Flood 2008.

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Chapter One: Introduction to Administrative Law (AL)

I) How Does Administrative Law Affect People?

- Administrative law is very broad, and affects everything from egg quotas to medical practices

II) The Changing Nature of Administrative Law

- AL governs the relation between the individual and the state.
- Specifically it is about delegated government action; action by cabinet, government departments, municipalities, boards, tribunals, etc
- Boards and tribunals are the focus of AL
 - However, ministerial discretion is also important
- Can also apply to areas outside of delegated governmental action; such as in professional sporting organizations, religious institutions, et cetera
- Statutory interpretation is key in AL

III) More on Boards and Tribunals

- Since the legislatures cannot manage every aspect of every public program, they often delegate various powers to boards and tribunals.
- More and less expertise and independence from political influence
- Boards and tribunals differ by the extent to which they employ processes similar to a court
 - Boards are less court like, tribunals more court like
- Remember parliamentary supremacy: The legislature made a conscious choice to devolve its power to the administrative agency

IV) AL and Constitutional Law

- AL cannot provide a basis to overturn legislation
- In appealing to AL, the applicant is trying to ensure the accountability of state power
 - Fewer remedies in AL than Con law

V) So Where Do We Start

- Historically, courts were hostile towards administrative bodies and constrained them
- AL can be roughly divided into three parts:
 - 1) Procedural Fairness: First, is it an issue the court should review, and if so, did the tribunal use proper procedures in reaching its decision?
 - 2) Substantive Fairness: Pertains to the decision itself – Did the tribunal make an error of the kind of magnitude that the court is willing to get involved in?
 - 3) Remedies and the legitimacy of judicial review

VI) Review for Procedural Fairness:

- Court not interested in the decision. It is only interested in the procedure followed

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- A) Threshold Question
 - Is this the kind of decision that should attract some kind of procedural right?
 - No asking what the right would encompass. Just whether there should be an entitlement to procedural fairness at all.
 - Generally, where legislature delegates power that affects an individual's rights or interests, some basic level of procedural fairness is entitled.
 - Exceptions include: Where the decision is legislative or a policy decision, the decision is preliminary or investigative.
 - Also need to consider the doctrine of legitimate expectations (based on representations made)
- B) The Content of Procedural Fairness
 - If threshold is met, then the court determines the general level of procedural fairness. The SCC in *Baker* identifies five relevant factors:
 - 1) The nature of the decision and the process followed in making it
 - 2) The nature of the statutory scheme
 - 3) The importance of the decision to the individual affected
 - 4) the legitimate expectations of the parties, and
 - 5) the procedure chosen by the tribunal
 - Having regard to the general level of procedural fairness, the court will decide what specific procedures are required. These can include:
 - *Notice* that the decision is going to be made
 - *Disclosure* of the information on which the tribunal will base its decision
 - Opportunity to participate or *make views known*
 - Full hearing similar to a court
 - Opportunity to give evidence and cross-examination
 - Right to counsel
 - Oral or written reasons for its decision
 - In determining what procedures are required, **always look to the statute first**
 - Often lays out what procedures are required. The court sometimes expands on them
 - Also need to look at the tribunal's operating rules.
- C) Bias
 - Real or apparent or perceived?
- D) Independence
 - Related to bias, but refers to a more systemic sense. Do the members of the tribunal have the security (financial or otherwise) to make proper decisions?
- E) Institutional Decision Making
 - Issue of the degree to which boards and tribunals can consult with others whom the affected person will not have the opportunity to present their case to.

VII) Review for Substantive Error

- Historically, AL focused on procedural review, now courts (slightly) more open to substantive review

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- Two standards:
 - Correctness: Most exacting, is it the decision the court would have made?
 - Reasonableness: Not necessarily the right decision, but one of a range of reasonable decisions
- Presence of a privative clause is one factor affecting degree of judicial scrutiny
- Presence of statutory right of appeal is one factor affecting degree of judicial scrutiny

VIII) Remedies and the Legitimacy of JR

- There are three sources of review power: Original jurisdiction, right of appeal, and most importantly for us, the court's inherent JR jurisdiction.
- A) Original Jurisdiction
 - Ordinary courts have jurisdiction over the decisions of administrative decision makers when that are challenged by way of direct action, by a citizen in contract or tort on the grounds that the state has infringed an individual's private legal right.
- B) Statutory Right of Appeal
 - There is NO general common law right to appeal the substance of a decision. **The right to appeal must be contained in a statute.**
- C) Court's Inherent JR Jurisdiction
 - "inherent jurisdiction" refers to the fact that the jurisdiction of the superior courts is broader than whatever may be conferred by statute.
 - As such superior courts have greater freedom to craft remedies and grant relief than courts created by statute (courts like the federal court)
 - The *Federal Courts Act* assigns most JR authority in relation to federal administrative matters to the Federal Court of Canada.

IX) Remedial Powers

- Four traditional writs: certiorari, prohibition, mandamus, habeas corpus
- Now the courts focus balancing tension between private rights and public interest; instead of on technicalities

X) A Brief History of the Anglo-Canadian Model of JR

- Civil tradition distinguishes courts and administrative review.
- In France, the Conseil D'Etat is the overseeing administrative body. Made up of senior civil servants.
 - Highest court is Cour de Cassation
- Our system focuses on the rule of law and the concomitant right of the citizen to access the regular courts when they have a grievance with the government.
- Famous proponent of rule of law: Dicey
- **Rule of law** requires at a minimum that governmental activity affecting an individual has to be subject to the law.
- Tension: generalist courts reviewing the decisions of expert tribunals
- Often the purpose of establishing the tribunal's is to ensure certainty and expert decisions. Allowing

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general court review undermines this.

- Originally AL used to protect private interests from the growth of the welfare state. Now courts are more deferential to state (as a welfare state)

XI) The Constitutional Right to Review Administrative Decision makers and s. 96 courts

- Not covered elsewhere in the text.
- Can provincial legislatures or federal government exclude all kinds of judicial review regarding decisions made by an administrative body?
- s.96 provides that the appointment of superior court judges is the responsibility of the federal govt
 - Thus, provinces cannot de facto create a court and call it an administrative tribunal to get around it.
 - Court has three part test to determine if a tribunal is acting like a s.96 court:
 - 1) Historical Inquiry: Does the impugned power confers to a body a power exclusively exercised by the superior courts at the time of confederation? (Interpreted broadly to protect the s.96 courts)
 - 2) Is the impugned power judicial or administrative or legislative? Judicial power is one where there is a private dispute between parties, adjudicated through the application of a recognized body of rules, and adjudicated in a manner consistent with fairness and impartiality
 - 3) Has the power in its institutional setting changed its character sufficiently to negate broad conformity with superior, district, or county court jurisdiction? EG Labour board issuing a cease and desist order as opposed to court ordering a mandatory injunction to halt illegal activities (See *Tomko v. Labour Relations Board* UK...reprinted in RSC 1985)
- Leading case on tribunals acting like courts is *Crevier v. Quebec* 1981 SCC
 - Quebec legislation made tribunal to hear appeals from disciplinary committees of most statutory professional bodies in Quebec. Act held that decisions were final, even as regards the tribunal's jurisdiction.
 - Court held that a tribunal could have final decision in all cases but jurisdiction. Therefore Act ultra vires.
 - Court was not entirely clear, and left unclear whether the decision was about:
 - A) preventing the provinces from usurping the federal power to appoint judges to the superior courts; OR
 - B) protecting the individual's right to seek relief from an independent judiciary constituted pursuant to s.96
- Trend since *Crevier* is that, implicit in ss.96-100, there is a constitutional right to seek JR of administrative action on the grounds of jurisdiction or illegality
- In *MacMillan Bloedel Ltd. v. Simpson* 1996 SCC, the SCC held that "the superior courts have a core or inherent jurisdiction which is integral to their operations. The jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution. Without this core jurisdiction, s. 96 could not be said to either ensure uniformity in the judicial system throughout the country or to protect the independence of the judiciary."
- Both *Pushpanathan* and *Baker* limited the ability of claimants to appeal decisions of the Federal Court trial division to the extent that a trial judge must provide leave to appeal on grounds that the

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issue is certified to be of general importance. TJs do not have to give reasons for refusing leave to appeal for JR and decision is final.

- Could one challenge this limitation using Crevier?

XII) BAKER

- READ AND ANALYSE BAKER, MOST IMPORTANT ADMIN LAW DECISION IN 20YRS
- Woman who overstayed her visa to be deported. Asked minister to be allowed to stay on humanitarian grounds, so she could remain with her Canadian born children and apply for permanent residency. Application denied. Immigration officer wrote up inflammatory notes about her application, and these were taken by SCC to be the reason for the denial.
- Important issues in Baker include: Fairness and Baker's procedural right to partake in the decision making process (right to present her case, have oral hearings, etc.), the duty to give reasons and the scope of that duty, bias, relevanc of intl treaties that are ratified but not yet incorporated into domestic law. In terms of substantive review: New test for determining standard of review for discretionary decisions by minister.
- Questions on page 22-23

XIII) Conclusion

- Court approach to review of administrative decisiosn depends on the type of admin agency, the type of decision, and the impact of the decision. The more court-like and higher impact, the more the tribunal is like a court and must follow more court-like procedures.
- Courts must balance the need to hold tribunals accountable with respect for democratic process: IE the purposes for which legislatures create administrative tribunals.
- Admin decision making and court response is crucial to the effective implementation of public policies.

Done Chapter 1

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Chapter 2: Tools Of The Administrative State And The Regulatory Mix

II) The Tools of Legal Intervention: The Regulatory Mix

- A) From Soft Intervention to the Heaviest Machinery of the State
 - Legal intervention is varied. From criminal sanction to taxation, to sanctioned education
 - Overarching question: What is the best mix of various forms of regulation that will best attain the policy objective?
 - Hood et al define regulation as: "the sustained and focused attempt to alter the behavior of others according to defined standards or purposes with the intention of producing a broadly identified outcome..."
- B) Is Litigation a Tool?
 - Reasons to hesitate at calling litigation a tool:
 - 1) Lawsuits are usually initiated at the behest of private actors (not the govt) *I think that is bullshit...criminal law and administrative actions account for a lot of lawsuits me thinks*
 - But it is not only govt that makes policy
 - 2) Government is often subject to litigation
 - Governments sometimes create rights of action in legislation
 - EG Right to recover costs in treating smokers' health issues
 - What about SLAPPs?
- C) Example of Legal Intervention and of the Regulatory Mix: Suppression of Smoking
 - Range of government regulatory action taken to curb smoking is broad:
 - Educating the public, criminalizing sales to children, legislated advertising restrictions, litigating to compensate for the harm done by the companies/cigarettes
 - Litigation as a tool was also employed by both the state and tobacco companies.
 - Tobacco companies launched successful Charter challenges
 - State created cause of actions to recover costs of health care for smokers

III) The Tools of The Administrative State

- A) Introduction
 - Legislatures who want to regulate a field, often do so through delegation for reasons of expertise, expediency, access, political independence, etc
- B) The Administrative State and Its Many Areas of Regulation
 - There are plenty of administrative actors, from employment through to human rights
- C) Agencies, Government Departments, and Other Institutions
 - 1) Agencies
 - AKA tribunals and commissions
 - Function separately from government and the public service
 - Federal eg: CRTC, Human rights commission
 - Usually possess four characteristics
 - 1) Have some independence from the government department with overall responsibility for the policy area in which they operate
 - This is in terms of appointments and decisions etc

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- 2) They render decisions regarding the area that they regulate that can directly affect persons (They have an adjudicative role regarding disputes in the regulated area)
- 3) They follow more or less uniform decision making process for resolving issues that directly affect people (Procedural fairness stuff)
- 4) They are specialized with regard to the area they regulate
- 2) Cabinet Ministers and Government Departments
 - Legislature can confer powers on cabinet. Often gives cabinet capacity to enact subordinate legislation (Regulations)
 - Sometimes there is a right to appeal directly to cabinet: eg CRTC
 - Can authorize cabinet ministers to perform specific functions
 - Usually made for minister by a delegated person within ministry
- 3) Other Institutions
 - For limited purposes, almost any other institution can be considered an administrative actor
 - EG: Professional bodies like college of physicians and law societies
 - **Key to being considered an administrative actor is the exercise of some statutory power that has sufficient regulatory and public dimensions**
 - EG Lawyers societies regulate its members for the public interest
- D) Tools and Administrative Actors: Some General Points
 - Almost always authorized by statute
 - When is this not the case?
 - Plenty of options: sanctions, taxes, fees, investigation, mediation, etc
- E) The Mix of Tools and Administrative Actors: An Illustration – Regulating Lawyers
 - Law societies have power to regulate their members from enabling statute
 - Can make subordinate legislation
 - Rules of professional conduct
 - Licensing requirements
 - Auditing powers for trust accounts etc
 - Disciplinary actions
 - Proactive: Mandatory CLE
- F) Discretion: The Ubertool
 - Discretion gives regulatory actors flexibility to configure the regulatory program

IV) Tools and the New Governance

- A) Is there a new governance?
 - Government is attacked from the right as being meddling and inefficient.
 - Market is attacked from the left as being insensitive
 - Salamon characterizes the new governance as: a shift in the paradigm of public programs. The new governance is no longer centered on agencies of programs, but rather, on the tools used to realize the goals of the new governance.
 - New governance: The prominence of tools and how they should be employed
 - **Moved from command and control to emphasize and persuade**
 - But don't forget globalization

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- B) The Changing Emphasis: Examples
 - **The Smart Regulation Program**
 - Smart Regulations is ambitious and is based on four principles:
 - 1) Protecting the public interest:
 - 2) Extending the values of canadian democracy
 - Leveraging the best knowledge
 - Promoting effective cooperation, partnership, and processes
- V) Assessing Tools and the Administrative State
- A) Introduction
 - Judicial review is an effective tool for assessing the effects of legal intervention
 - It is also costly and slow
 - B) Five Criteria
 - Salamon suggest five criteria for assessing administrative tools
 - 1) Effectiveness: The extent to which the tool achieves its goal.
 - Hard to gauge
 - 2) Efficiency: Results and costs entailed in their realization
 - Costs to govt and others
 - 3) Equity: Critical for those interested in social justice. Has two meanings:
 - 1) Fairness: Distribution of costs and benefits
 - 2) Redistribution: More contentious
 - 4) Manageability: Focuses on issues of implementation
 - The more convoluted, the more difficult it is to manage
 - 5) Legitimacy and Political Feasibility: If the idiots don't like it, it ain't going anywher

Done Chapter 2

Chapter 3: Dogs and Tails: Remedies in AL

I. Introduction

- Many people do not trust administrative agencies to the degree they trust courts insofar as obedience to the rule of law and basic principles of justice
- Focusing too much on court action misses the creative and varied remedies that tribunals sometimes impose
- There is ongoing dialogue (or a tug of war) between courts and legislatures about the degree of review courts have over tribunals
 - Legislatures use privative clauses and internal appeals to limit court intervention
 - Internal appeal limits recourse to courts because appeal to courts usually requires that applicant first exhausts all other avenues of appeal

II. Remedial Options at the Tribunal Stage

- Because a tribunal does not have a court's general jurisdictional power, any remedy available MUST be provided for in the enabling statute
- Most tribunals differ in structure and mandate from courts, and thus the remedies are different

A. Statutory Authority

1. Remedial powers for tribunals must derive from statute, so always look there first
2. If a tribunal makes orders that exceed the scope of the enabling statute, its orders will be rendered void
3. Many enabling statutes list available remedies
 1. Professional licensing, revocation, fines, incarceration
4. Some statutes grant broad discretion to craft remedies
5. EG: s. 41(1)(a) of the *Ontario Human Rights Code* gives the tribunal the discretion to order a guilty party to "do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices."
6. Where a tribunal's statute does not specify remedial powers, it has been argued that subject to certain exceptions, a tribunal must as a matter of practical necessity, be able to do the things its statute requires
 1. Orders for money (fines, damages, etc) require express statutory authority
 2. Equitable jurisdiction to impose injunction is lacking, but a statute can allow the tribunal to seek an injunction in court
 3. A tribunal must be a "court of competent jurisdiction" to grant remedies under the Charter

B. Novel Administrative Remedies

1. Policy issues, although not 'remedies' should be kept in mind when dealing with tribunals
 1. Administrative policy instruments can range from formal binding interpretive releases, to informal, non-binding policy guidance.
 2. Tribunals often take a broader perspective on disputes than will courts
 1. Chayes described difference in courts, and this is useful tool for understanding how tribunals take a broader perspective:
 1. Courts used to adjudicate exclusively between two private parties: Find the right,

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- compensate for the right
- 2. Public interest law focuses on broader concerns and fact inquiries can be predictive as opposed to purely retrospective
- 2. Many tribunals are mandated with administering **polycentric** issues.
 - 1. Courts are much more bipolar
 - 2. See *Pushpanathan* 1998 SCC see esp. para 36
 - 3. Implications:
 - 1. Tribunals can remain seized of matters to ensure orders are being complied with
 - 1. See eg: *Ontario (Ministry of Correctional Services) v. Ontario (Human Rights Comm.)* 2001 OCA
 - 2. Tribunals can to a greater degree than courts, try to craft remedies that address underlying or systemic problems
 - 3. More diverse group than courts. Training, background, etc.
 - 1. Sometimes tribunals are composed to represent all interested parties ro compensate for an unsympathetic court
- 3. AL affected by "new public management theory" aka neo-liberalism
 - 1. Establishes mechanisms to hold public bodies ultimately accountable (*Or not*) for their programs, while allowing them to outsource the implementation of those programs.
 - 1. EG: Incorporating private industry standards into the law
 - 2. Giving private bodies enforcement and compliance powers
 - 2. Argument: Privatization v. efficiency etc
- 4. Both tribunal side and policy side administrative functions have been affected by globalization
 - 1. Think of human rights treaties, NAFTA, etc

III. Enforcing tribunal Orders Against Parties

- Once a tribunal order is imposed, and assuming no challenges to it are made, enforcement powers become relevant
- A. The Tribunal Seeks to Enforce Its Order
 - 1. Tribunals can rarely enforce their own orders. It must be express in the statute
 - 2. Remember Constitutional scrutiny: A provincially created tribunal cannot have criminal enforcement powers
 - 3. The *BC Administrative Tribunals Act* has some basic enforcement mechanisms for tribunals
 - 1. s. 18 allows tribunals to schedule hearings, hear applications, etc. and dismiss applications for failing to appear
 - 2. s.31(1)(e) Permits some tribunals to dismiss applications where the applicant fails to comply with an order
 - 3. s,47 Permits some tribunals to order costs, and in some circumstances, order the party to pay the tribunal's actual costs
 - 4. s. 47(2) stipulates that orders for costs, once filed in the court registry have the same effect as a court order for recovery of a debt
 - 4. More commonly, tribunals must make an application in court to enforce an order
 - 1. Some enabling statutes allow tribunals to apply to court for an order compelling compliance
 - 1. The tribunal's order is presumed valid if the party fails to appeal it or the appeal fails

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2. Some statutes allow orders to be registered with the court, sometimes only with leave
5. Once successfully converted into a court order, a tribunal order can be enforced like any court order
 1. Contempt proceedings
 1. Civil contempt:
 2. Criminal contempt: Where the conduct constitutes an intentional act of defiance of the court
 3. In either case the contempt must be "clear and unambiguous"
 1. *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* 1992 scc
 6. Note: legislatures seem content to house tribunal order enforcement in the courts, but still enact privative clauses. This is a means of buttressing tribunals, not allocating scarce judicial resources
- B. A Party Seeks to Enforce a Tribunal's Order
 1. Can bring an order in court against the other party
 2. The party might have to convince a court to intervene if the enabling statute is silent on the issue of private enforcement of a tribunal's order.
 1. Blake suggests that a party's success is affected by how close the order is to something the court would enforce normally
- C. Criminal Prosecution
 1. Many statutes provide quasi-criminal prosecution for disobeying tribunal orders
 1. Quasi-criminal offences can impose fines and imprisonment
 2. eg: *Securities Act* BC fines up to 3 million and jail up to 3 years
 2. Absent other provisions, it is a criminal offence to disobey a lawful order of a federal or provincial tribunal. The CC s. 127(1):
 - Every one who disobeys a tribunal order or a court, except if its for payment of money,is guilty of an indictable offence and can be jailed for up to two years, or
 - punishable on summary conviction
 3. The criminal code provision applies where no other penalty is expressly provided for by law
 1. *Superior courts' own contempt powers do not count as an "other mode of proceeding" for the purposes of 127, unless the contempt powers are laid out in the rules of court
 1. *R. v. Clement* 1981 SCC. **But see** *Telus Communications Inc. v. Telecommunications Workers Union* 2006 BCSC
 3. Most administrative tribunals do not have the ability to make contempt orders on their own. As such, the CC provision should apply where there is no other punishment or mode of proceeding explicitly laid out.
 1. This does not offend constitution: Provincial tribunal makes the order, and the Feds make it a criminal offence to not comply

IV) Challenging Administrative Action

- This section distinguishes between JR and appeals. It also discusses private law remedies that might be available against tribunals

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A. Internal Tribunal Mechanisms

1. All tribunals can fix things like clerical errors or factual errors due to mistake or dishonesty
 1. Called the slip rule
2. Tribunals can also change their mind until the final decision is made
 1. Thus preliminary rulings can be changed. What constitutes a final ruling will be in the statute
3. Some statutes allow tribunals to reconsider or rehear decisions they have already made
 1. Absent such express statutory language, a final decision is final
4. Some tribunals are part of a multi-tiered agency and their enabling statutes might create internal appeal processes
 1. Internal appeals do not preclude appeals to courts
5. Where a statute does not expressly provide for a right of appeal, the only entry to the court is through JR
6. *Act Respecting Administrative Justice* (Quebec)
 1. Creates the Tribunal administratif du Quebec (TAQ), which is a super-tribunal that hears proceedings brought against almost all administrative tribunals and public bodies in the province.
 2. The TAQ has remedial powers including JR-like options and the ability to substitute its own decisions for those of the tribunal (See s. 15)
 3. Appeals from the TAW to the superior courts are limited

B. External Non-Court Mechanisms

1. Extra-legal mechanism can also be used to challenge an administrative action
2. Ombudsman's officesummm seems pointless, do they have any remedial powers?
3. Most statutes give the ombudsman jurisdiction over "administrative matters" and courts have defined this fairly expansively

C. Using the Courts: Statutory Appeals

1. Downside of using courts to challenge administrative action: Courts might be reluctant to embrace novel remedies.
2. Upside: Where the legislature tries to exceed the rule of law and fuck people over
3. Two primary methods to access courts to challenge tribunal actions: Appeal and JR
 1. Appeal is the norm, JR is the exception
 2. The scope of appeal is confined to that granted by the statute
 1. As such, it is easier to predict the outcome of an appeal (than outcome of JR)
4. *Is an Appeal Available?*
 1. To determine if an appeal to the courts is available:
 1. Does the tribunal's enabling statute provide for a right of appeal?
 1. Courts have no inherent appellate jurisdiction of administrative tribunals.
 1. *Medora v. Dental Society* 1984 NBCA
 2. Right to appeal MUST be contained in enabling statute
 3. Cannot generally appeal interlocutory orders (evidentiary issues, bias, jurisdiction, procedure, etc). The appeal must be on the merit of the decision
 4. Usually a statute will set out the court to which an appeal will go. Rarely is there an appeal to cabinet.
 2. What is the scope of available appeal?
 1. Determined entirely by the enabling statute

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2. Varies enormously from tribunal to tribunal
3. Even where scope of appeal is broad, courts will show some deference to tribunal's findings of fact
3. Is an appeal available as of right? Or is leave required? If leave is required, who may grant it?
 1. *Where leave is required, sometimes the original decision maker, and sometimes the appellate body, decides whether leave will be given*
 1. EG: Appeal to FCA from JR by FC on immigration matters, requires the FC judge to certify that "a serious question of general importance" is involved.
 1. *Immigration and Refugee Protection Act*
4. Is a stay of Proceedings automatic, or must one apply for it?
 1. Rules vary by jurisdiction and even by tribunal
 2. Unless a statute specifically excludes it, the superior court that is the tribunal's designated appellate court has the inherent authority to grant a stay.
 1. BC's ATA does exclude it
 3. The policy issues about staying of orders surround efficiency concerns and due process; tribunal expertise and judicial oversight; and legislative comfort with granting tribunals broad autonomy

D. Using the Courts: Judicial Review

- This is the tail that sometimes wags the dog.
 - It is different from appeals and complex. At its root, JR is about the court's jurisdiction to check executive action in the interest of the rule of law
 - JR is review of actions beyond what the executive provides for in statutes. As such only in JR will the court investigate a tribunal's procedural fairness or allegations of bias
 - Court try to balance JR/rule of law values with deference to executive/democracy
 - JR is fundamentally discretionary
 - Court can refuse to grant a remedy
 - *Domtar Inc. v. Quebec*
 - SCC refused to intervene in conflict of interpretation between two tribunals. SCC said that rule of law cannot always solely determine the correct course of action in AL.
 - "For the purposes of judicial review, the principle of the rule of law must be qualified."
 - Shows how context specific and difficult JR is
 - Parties considering challenging a tribunal order must be aware of the relevant statute's provisions, in addition to the provisions of the tribunal's own enabling statute.
 - **Key statutes:** *Federal Courts Act, BC Judicial Review Procedure Act, BC Administrative Tribunals Act, and The Rules of Court*
 - Despite reform, the prerogative writs continue to haunt JR
 - Keep in mind: Roots of judicial review in the prerogative writs; statutory reform; discretionary grounds on which courts have refused to grant a remedy in JR
1. *Is Judicial Review Available?*
 - 1) A key threshold question is whether the tribunal whose action is being challenged is a

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public body. JR checks executive action, therefore only public bodies can be subject to JR

- Stock exchanges operate by agreement between its members, but has a clear public function
 - Their authority to act derives from member agreement, not from statute or regulation
 - What about corporations incorporated under the Canada Business Corporations Act?
 - Statutorily created, but quintessential private bodies
 - Also need to distinguish between govt qua govt and govt qua private contractor. Generally, a private party will have trouble seeking JR of a govt decision not to award it a particular contract
 - See the **Improper purpose doctrine**: *Shell Canada Products Ltd. v. Vancouver (City)* 1994 SCC
 - **Factors to consider in determining whether a body is public or private:**
 - Tribunal's functions, duties, source of its power, funding
 - Does govt directly or indirectly control the body
 - Would govt have to occupy the field if the public body was not performing the function
 - If public body is part of the machinery of govt, it will be subject to public law
- 2) Also need to determine if the party has standing to challenge the public body's action
- It is a straightforward question for individuals party to an administrative action, but more complicated for parties that have only a collateral interest in the issue
 - Public interest standing is covered on its own in chapter 15
- 3) The party must also determine to which court s/he should apply for JR
- Provincial superior courts and Federal courts have JR jurisdiction
 - This is not normally set out in a tribunal's enabling statute
 - Usually the choice of court is determined by whether the source of the impugned power is provincial or federal
 - Some exceptions: Provincial superior courts have concurrent or exclusive jurisdiction over some matters because of the Constitution and the Federal Courts Act. Particularly, provincial superior courts have concurrent jurisdiction where Charter issues are raised in attacks on federal legislative regimes. *Reza v. Canada* 1994 SCC
- 4) Ensure that no deadlines have been missed
- Federal court act time limit is 30 days from the time the decision or order is first communicated. BC is 60 days.
 - Check all applicable statutes including: the tribunal's enabling statute; global procedural and judicial review acts; and rules of court.
 - Courts often have statutory power to extend time limits where:
 - Reasonable explanation for delay
 - No substantial prejudice or hardship would result
 - Where party can demonstrate prima facie grounds for relief

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- 5) Final Threshold matter: Party must demonstrate she has exhausted all other adequate means of ensuring recourse for challenging the tribunal's decision
 - Some factors may render an alternative form or review inadequate. For example, **appeal mechanisms provided by statute will be inadequate where:**
 - the appellate tribunal lacks statutory authority over, or is not willing to address, the issue the appellant raises;
 - *Canadian Pacific Ltd. v. Matsqui Indian Band* 1985 SCC
 - the appellate tribunal does not have statutory authority to grant the remedy the appellant requests;
 - *Evershed v. Ontario* 1985 OCA
 - the appeal must be based on the record before the original tribunal, but that record does not include evidence relevant to the applicant,
 - *V.S.R. Investments Ltd. v. Laczko* 1983 ODC
 - the appeal must be based on the record before the original tribunal includes evidentiary errors that the appellate tribunal lacks authority to correct
 - *Cimolai v. Children's and Women's Health Centre* 2003 BCCA
 - the alternative procedure is too inefficient or costly
 - *Harelkin v. University of Regina* 1979 SCC but contra *Cimolai*
 - An alternative form of appeal will not be inadequate:
 - Based only on unproven allegations that the appellate tribunal will suffer from the same errors (*Harelkin*) or biases (*Turnbull v. Canadian Institute of Actuaries* 1995 FCA? But contra *Batorski v. Moody* 1983 ODC
 - Where there are only allegations that original tribunal lacked jurisdiction
 - *Bayne v. Saskatchewan Water Corp.* 1990 SCA
 - In the context of Aboriginal self-government, lacking indicia of institutional independence is not sufficient without concrete evidence of a lack of independence in practice. **Indicia of institutional independence:**
 - lack security of tenure, not paid, appointed by interested party,
 - *Matsqui*
 - *It should be noted that because JR is a discretionary remedy, a court has substantial freedom to exercise its discretion and grant JR even where an apparently adequate alternative remedy exists. The opposite also applies.
 - Several provinces have legislated in this area: Federal Courts Act stipulates that JR is not available if an appeal is allowed to the federal court
 - Ontario and PEI have legislation allowing JR notwithstanding a right of appeal
 - Does not affect the discretion to not grant discretion.
 - Courts are reluctant to grant where appeal is available

○

E. Remedies on JR

- Have their roots in the prerogative writs
 - The writs have been modified by statute in many provinces
 - Unlike an appeal, an application for JR does not automatically stay the enforcement of

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the underlying tribunal order

- The legislative decision to make stays automatic for many appeals but not for JR applications is consistent with the last resort nature of JR

1. Introduction to the Prerogative Writs

- Certiorari
 - The most commonly used writ. A superior court requires an inferior court, tribunal, board, or judicial officer to provide it with the record of its proceedings, for review for excess of jurisdiction.
 - Successful certiorari quashes the order. It is ex post facto.
 - The superior court cannot substitute its own decision unless a statute expressly allows it to do so
- Prohibition
 - Issued by an appellate court to prevent a lower court from exceeding its jurisdiction, or to prevent a non-judicial entity from exercising a power
 - It prevents unlawful assumption of jurisdiction.
 - Unlike certiorari, it is pre-emptive; it arrests any given proceeding attempting to act outside its jurisdiction
- Mandamus
 - Writ issued by a superior court to compel a lower court or government agency to perform a duty it is mandated to perform
 - In practice, it is often combined with an application for certiorari
 - EG: Certiorari would be used to quash a decision for lack of procedural fairness, and mandamus would force the tribunal to reconsider the issue
 - A variation of mandamus is where a superior court sends a matter back to a tribunal to be reconsidered with directions.
 - Superior courts have this as inherent power, and some provincial statutes also grant this power. Including the Federal Courts Act
 - Directions only protect against unfair procedures or excess of power, and cannot direct the tribunals to decide in a particular way
- Declaration
 - A judgement that declares the legal position of the parties, or the law that applies to them. There are two varieties:
 - 1) Public law variety: used to declare some government action ultra vires;
 - This one is the main concern of AL
 - 2) Private law variety: Used to clarify the law or declare a private party's rights under a statute.
 - They are not enforceable and they cannot require anyone to take or refrain from taking action.
 - Historically used against the crown itself, because mandamus was not available against the crown
 - It was not thought appropriate for the court to order enforcement against the crown, because the crown was the source of its own authority
- *Less common: habeas corpus and quo warranto

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- Habeas corpus: used to bring a person before the court, most frequently to ensure the person's detention is not illegal
 - Alive and well in the US; primary mechanism to challenge state death sentences
 - Rarer in Canada, used mostly by detained prisoners, child welfare cases, immigration, etc
- 2. Statutory Reform
 - Over time the writs became technically complex and arcane. Reform ensued
 - BC has comprehensively reformed the writs. Only the Yukon territory has left the writs untouched. Reform is either in the rules of court or in an omnibus statute.
 - Details vary, but the **key features** are:
 - 1) Simplified application procedures:
 1. May state applications for orders in the nature of the writs shall be deemed an application for JR
 2. The JR applications supersede all the writs
 3. It is sufficient for a party to set out the grounds on which relief is sought, and the desired remedy; specifying the CL writ is unnecessary
 - 2) Simplified remedies:
 1. Powers to set aside or force reconsideration with direction
 2. Power to ignore technical irregularities or defects in form if no substantial wrong or miscarriage of justice has occurred
 - 3) Clarifies who may be a party:
 1. Sometimes the decision maker whose decision is questioned can be a party
 2. Notice to AG, who is entitled as of right to be heard on the application
 - 4) Generally, provide a right of appeal:
 1. Allows appeal of JR from superior court to appellate court
 - 5) May address the inability of JR mechanisms to challenge interlocutory orders and to resolve interim issues
 1. At CL certiorari was only available with respect to a final decision
 1. BC Act uses words "exercise of authority" instead of "final decision"
 2. Permit a tribunal to refer a "**stated case**" up to the courts for determination of a question of law; then allowing the tribunal to decide the ultimate issue
 3. In BC, tribunals that do not have jurisdiction over constitutional questions can issue a stay and refer the constitutional matter to a court of competent jurisdiction.
 1. BC *Administrative Tribunals Act*
 4. Enabling statutes must authorize **stated cases**
- 3. Discretionary Bases for Refusing a Remedy
 1. Courts have the discretion to refuse a remedy even where one is clearly warranted by the facts of the case
 1. *Immeubles Port Louis Ltee. v. Lafontaine (Village)*
 1. Discusses the discretionary bases for refusing a remedy in the nature of mandamus
 2. The most important basis for refusing to grant a remedy is that **adequate alternative remedies are available**

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1. Parties should exhaust all other reasonable alternatives before the last resort – JR JR applications brought before tribunal proceedings have concluded are usually dismissed as being premature.
 2. Includes challenges to interim procedural and evidentiary rulings
 3. Policy rationals for dismissing on prematurity grounds:
 1. Administrative action is meant to be more cost effective than court proceedings
 2. Preliminary points may become moot
 3. Court will be better able to assess tribunal's decision with a full record
 3. To obtain JR of a tribunal's interim or preliminary ruling, special circumstances that cannot wait for conclusion of the proceedings must exist:
 1. Challenge to the tribunal's legality
 2. A clear question of law about the tribunal's jurisdiction
 3. The absence of an appropriate remedy at the end of the proceedings
 4. Even where statutory timelimits have been met, delays and acquiescence are grounds for a court to refuse a remedy
 1. *Immeubles Port Louis*
 2. Parties should object promptly to any perceived impropriety on the part of the tribunal
 3. Choosing not to attend a hearing waives your right to JR
 5. A remedy in JR review will not be granted where the issues are moot
 6. The court will refuse to grant a remedy where the applicant does not come with clean hands.
- F. Private Law Remedies
1. The key issue is that neither the old writs, nor the statutory reforms allow parties to link JR and with a claim for monetary damages
 2. The crown and its servants can be liable to private parties for monetary relief.
 1. The federal crown has concurrent original jurisdiction over all actions for damages against the federal crown. ???wtf does this mean???
 1. Individual servants, including ministers are liable in private law, the same as any other citizen.
 2. *Federal Court Act s. 17*
 3. *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)* 2007 FCA
 2. Some statutes limit the liability of tribunal members
 1. e.g. *BC Administrative Tribunals Act s. 56*
 3. To seek monetary relief, the party must initiate a separate civil action for restitution or damages
 3. Government agencies can be sued: e.g. negligence, misfeasance in public office
 1. Proving misfeasance in public office requires:
 1. Normal negligence stuff, plus: deliberate and unlawful conduct, and the public officer's subjective ken that conduct was illegal
 2. Underlying purpose of the tort is to protect each citizen's reasonable expectation that public officials will not intentionally injure members of the public through intention and illegal conduct
 3. Leading case is *Odhavji Estate*

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1. Police failed to promptly cooperate with investigation into their shooting of the kid. Also, chief did not adequately compel officers to cooperate
2. Court held that P had made out a case; i.e. there is a tort of public misfeasance
4. Some torts overlap with a potential JR application. Where both private action and JR are available, the applicant must proceed by JR
 1. *The Queen v. Grenier* 2005 FCA
5. Courts are cautious of tort of misfeasance in public office because:
 1. Importance of finality in administrative decisions; circumventing the court's normally deferential stance towards tribunals; collateral attacks on govt bodies.
 2. "... " Large quote on page 74
 1. *Powder Mountain Resorts Ltd. v. BC* 2001 BCCA

V) Conclusion

1. Administrative law remedies must be considered in the context of the tension between the courts and the legislatures. Consider:
 1. Legislated internal appeal mechanism and the courts' circumvention of those internal appeals in favour of immediate JR
 2. Another tension: Stagnant courts fighting with innovative remedies provided by tribunals
 3. The above two tensions are emblematic of a deeper tension:
 1. The rule of law v. administrative expertise, efficiency, and democratic accountability
2. The remedies are also shaped by the historical writs and the piecemeal attempts to reform them
3. A panoply of different remedies are available at each stage of administrative action.

Suggested cases:

407 ETR Concession Co. v. Ontario 2005

Domtar v. Quebec 1993 SCC

Harelkin v. University of Regina 1979 SCC

McDonald v. Anishinabek Police Services et al. 2006

McKinnon v. Ontario 2003

Done Chapter 3

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Chapter 4: Government in Miniature: The Rule of Law in the Administrative State

I. Introduction

- The rule of law ties together, more than anything else, AL. It underscores much of the tension in AL

II. The Rule of Law in Theory

- For AL, the Rule of Law (RL) can be characterized as having three interrelated features
 - 1) A jurisprudential principle of legality
 - 2) An activity or practice of law-making among and within an institutional arrangement of government
 - 3) A distinctive political morality
- Together these seek to establish a normative relationship between the state and its subjects
- A. The Purpose of the Rule of Law: The non-arbitrary Rule of Men (and women)
 - At its essence, the rule of law holds that all government action must always be sourced in law and therefore bound by law in order to be considered valid and legitimate
 - In practice, this requires the law and government to control the arbitrary exercise of power
 - Arbitrariness connotes an indifference about procedures chosen to reach an outcome:
 - Random: Toss a coin, read the chicken's guts, et cetera
 - Can also suggest unconstrained discretionary powers
 - Usually by arbitrary we mean the untrammelled exercise of will
 - Abuse of power
 - If any branch of government steps outside its allotted constitutional role, it will be considered arbitrary in the sense that it is ultra vires its jurisdictional limits
 - Think of the division of powers
 - Offending the division of powers and acting outside the scope of a statute will be found invalid because they offend procedural justice (aka natural justice or fairness)
 - In contrast to the quality or appropriateness of the means used by a public body, the decision itself can be arbitrary in substance because it is biased, illogical, unreasonable, capricious, etc
 - Arbitrariness in the decision making process thus includes both procedural and substantive elements, and involves a normative view of the affected persons
 - The normativity of a legal subject fundamentally concerns the persons as a bearer of rights and responsibilities, such as autonomy, dignity, and equality
- B. Attributes of the Rule of Law
 - If the rule of law has a core meaning in law, it is the principle of legality
 - The principle of legality is that law should always authorize the use of public power and constraint eh risk of the arbitrary use of power
 - The principle of legality restrains the use of arbitrary power in three ways:
 - 1) Constrains actions of public officials;
 - 2) Regulates the activity of law making; and
 - 3) Seeks to minimize harms that may be created by law itself
 - Three theorists show how the principle of legality constrains the misuse of public power in each of the three ways: Dicey, Fuller, and Raz

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1) **Dicey:**

- Rule of law possesses three features:
 - 1) The absence of arbitrary authority in government, but especially in the executive and the administrative state;
 - 2) formal legal equality so that every person – including and especially public officials – in the political community is subject to the law; and
 - 3) constitutional law that forms a binding part of the ordinary law of the land
- On Dicey's model, CL courts provide the institutional connection between rights and remedies and are the site of the development of the CL constitution
- For Dicey, judge-made law with an unwritten constitution provided a better mode of legal constraint than written codes because they were less vulnerable to executive attempts to suspend or remove rights
- In a CL constitutional system like Britain, the constitution is not the source, but the consequence, of the rights of individuals as defined and enforced by the courts.
- For Dicey, courts were in the best position to control the executive through the rule of law and protect rights in polis
- For Dicey, parliament was supreme and all ordinary law had to come from it; all other power would be ultra vires
- Thus, administrative law provided an important check on the executive and the ultra vires principle was a central justification for curial intervention in order to control the scope of delegated power. This justification rested on several grounds including:
 - 1) The institutional role of the courts as the primary check on executive power
 - 2) The specific task allocated to the courts of ensuring administrative actors did not overstep their jurisdiction granted by statute; and
 - 3) the judicial perception that the fundamental role of the court was to protect and vindicate the private autonomy of affected individuals, primarily through private laws (tort, property, and contract)
- A consequence of the Diceyan model, is that administrative bodies were seen with great distrust and as almost an inherently lawless form of government
 - This perception deepened when it became clear that parliament could not oversee the exploding state apparatus
- In contrast to Dicey, Fuller's inner-morality of law represents a procedural approach to understanding the principle of legality.
 - Fuller sees law as the enterprise of subjecting human conduct to rules. Thus the purpose of law is to create and sustain a framework for social interaction
 - Lawmakers want to optimize voluntary compliance and cooperation with law.
 - **Fuller's eight principles** provide a guide for laws:
 - 1) Laws must be general. This ensures that laws do not take the form of ad hoc or arbitrary commands
 - 2) Laws must be promulgated and public because secret laws undermine legality and frustrate citizens' ability to know the law
 - 3) Laws must be prospective, not retroactive. Control present and future behavior, not punish previously legal conduct
 - 4) Laws must be non-contradictory

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- 5) Laws must have constancy through time. Rapid change will not allow people to adjust
 - 6) Laws must be reasonably clear
 1. This points towards arbitrariness; lawmakers should be constrained from making illogical or vague or etc laws.
 - 7) It must be possible to obey the law. Impossible laws are not nice
 - 8) There must be congruence between the laws as announced and the laws as applied
 1. This deeply informs discretionary decision making in the administrative state
- Unlike Dicey, Fuller's conception does not presume administrative bodies are inherently lawless. An administrative body can comply with the eight principles.
 - The eight principles provide a moral framework from which judges can decide cases and lawmakers can create laws. Not following the principles will undermine the integrity of the system or destroy it altogether
 - Raz provides a third model for the rule of law. While in general agreement with Fuller's principles, Raz thinks that the rule of law reduces to one basic principle: Law must be capable of guiding the behavior of its subjects.
 - Raz offers eight alternative principles (non-exhaustive list) that can guide the formation and application of law so as to ensure that law's harmful effects are well managed:
 - 1) Laws should be prospective, open, and clear
 - 2) Laws should be relatively stable
 - 3) Particular laws should be informed by open and clear general rules
 1. First three principles provide standards for laws to guide behavior effectively
 - 4) The independence of the judiciary must be guaranteed
 1. As lawmakers, the judiciary is also bound by the first three principles as controls on their discretionary power
 - 5) The principles of natural justice must be observed. e.g. fair hearing absence of bias
 - 6) Courts should have limited review powers over the implementation of other powers in parliaments etc. to ensure conformity with the rule of law
 - 7) Courts should be easily accessible
 - 8) Discretion of police etc. should not be allowed to pervert the law. Principles 4-8 ensure this by:
 1. Supervising conformity tot the rule of law; and
 2. Providing effective remedies when the legal system deviates from it
 - For Raz, the rule of law is negative and instrumental
 - Because laws create the danger of arbitrary power, the rule of law acts to minimize this risk
 - Raz' theory constrains the form, production, and application of the law; but does not provide the grounds on which to judge the content of laws
 - Raz forgot to read Kant. For Raz, conformity to the rule of law is not the ultimate goal, it is a means to an ends. He should have just gone with the categorical imperative
 - Raz wants a state that is neutral to different conceptions of the good life
 - Wants the state to guarantee as much as possible, the freedom of individuals to pursue their own good life
 - Raz' idea does not automatically import western oligarchical values
 - How can each of these theories inform judicial understandings of their role in a rule of law order?

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- The rule of law seems to entail an explicit need for a judiciary, but for what function?
 - Dicey: Chief rule of law check on executive action and control of powers delegated to the administrative state
 - Courts control government and protect individual rights
 - Thus no need or desire for judicial deference or respect for decisions made by administrative bodies
 - Text argues that courts became aware of a legitimacy problem: When was it legitimate to interfere with the democratic decision to delegate etc
 - Also missing from Dicey's model is how administrative bodies perform other functions like ensuring accountability by facilitating participation in decision-making
 - Rule of law requires an institutional framework
 - Dicey: Recommends CL model
 - Fuller: Law making as a shared and cooperative venture
 - Raz: Emphasizes judicial independence
 - Rule of law suggest a role for courts
 - Role of courts highly dependent on political choices
 - Rule of law organizes other institutional matters like the division of powers, process of appointing judges, institutional checks, and nobody is above the law
- **Three objective conditions necessary for ensuring functional independence (of judiciary?):**
 - 1) Security of Tenure
 - 2) Financial Security
 - 3) Administrative Control
 - These are identified as such by the SCC in *Beauregard v. Canada* 1986
- These three principles also apply to adjudicators who engage in more judicial-like decision making processes. Court-like independence does not map onto tribunals exactly, but there are strong analogies
 - Court has held that administrative tribunals span the constitutional divide between courts and legislature and they have strong policy creation/enforcement purposes. As such, court-like independence is unfitting on a executively created tribunal

III) The Supreme Court of Canada on the Rule of Law's Significance

A. The Heart of the Canadian Rule of Law

- *Roncarelli v. Duplessis* 1959 SCC
 - Quebec govt and Catholics persecuting Jehovah Witnesses. Many put in jail for distributing pamphlets. Roncarelli posted bail, Duplessis told him to stop, he didn't. Duplessis ordered revocation of Roncarelli's liquor license. This forced R to shut down his restaurant.
 - Contains several examples of arbitrary power: unlimited discretionary powers in an agency; decision-maker acting in bad faith; inappropriate responsiveness to an individual situation where important interests are at stake; irrelevant considerations; disregard of statute's purpose; and dictation of a decision by an unauthorized person
 - SCC said:

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- Duplessis stepped outside his power as AG by ordering revocation of license
 - Inappropriately exercised power given to Liquor Commission
 - Decision offended rule of law because the decision was incompatible with the purpose of the statute
 - *From Diceyan standpoint: Decision was not valid because the power to cancel licenses was not given to the AG
 - Problem with this model: had the Liquor Commissioner not consulted Duplessis, the decision would have been valid
 - In a concurring judgment, Rand J., held that even if a statute has no express limits on discretionary powers, the decision maker is always constrained by the unwritten constitutional principle of the rule of law
 - "there is no such thing as absolute and untrammelled "discretion,"" (at 140)
 - Even acting on his own behalf, without consultation, Rand would have found the decision to violate the substantive content of the rule of law:
 - wtf, the quote has nothing to do with substantive rule of law
 - Traditionally, in public law, the rule of law's constraints on government actors sought to prevent untrammelled discretion through enforcement of the purpose of the statute and good faith decision making achieved through the use of fair procedures. Rand added more content: the administrative tribunal violated Roncarelli's rights as a citizen – freedom of religion, freedom of expression, right to pursue his livelihood – thereby damaging the normative relationship between the state and the citizen
 - A formalist account of administrative law concerns the relationship of government to itself and to its subjects. Policy decision-makers must not act outside their authority, must not abuse their authority, and must not be seen to do either
 - AL establishes the legal parameters of power that exist by virtue of statute, sovereignty, etc
 - Judicial scrutiny focuses on the limits on authority given to a decision maker through statute etc
 - A substantive account of AL authority is bound by the purpose and terms of the statute, by regulations and guidelines, by the constitution, and by written and unwritten principles.
 - *Roncarelli* still stands as a paradigmatic example of the deeper principled and purposive approach to understanding how the rule of law animates AL
- B. A Foundational Principle, but an Unwritten One
- As an unwritten principle the RL appears implicitly in our constitution in the preamble where it states that Canada will have "a constitution similar in principle to that of the UK".
 - It also appears explicitly in the preamble: "Whereas Canada is founded upon principles that recognize the supremacy of [Morgan :] and the rule of law"
 - The two most thorough SCC reflections on the unwritten principle of the rule of law are: *Manitoba Language Rights Reference* and *Secession Reference*
 - *Manitoba Language Rights Reference*:
 - Court said that Manitoba had failed to adhere to the terms of the province's constitutional document. Thereby Manitoba had acted without legal authority, had acted arbitrarily, and had allowed officials to act outside the law.

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- RL is a "highly textured expression conveying a sense of orderliness, of subjection to its known legal rules and of executive accountability to legal authority." (62)
- RL is a fundamental postulate of our constitution (63)
 - In making this statement, court considered: principle of legality, the institutional arrangement entailed by the idea of the rule of law, and its broader connection to canadian political culture
- Throughout the judgement, the court characterized the RL as the principle of legality
- This principle has two meanings in the case:
 - 1) the law is supreme over government officials and private individuals and therefore excludes the influence and operation of arbitrary power. (59)
 - 2) Law and order are indispensable elements of civilized life within a political community.
 - As such, the RL requires the creation and maintenance of an actual order of positive laws that preserves and embodies more general principles of normative structure (60)
- *The Secession Reference*:
 - SCC dealing with potential unilateral secession of Quebec from Canada. Court rejected possibility of unilateral secession and imposed a requirement for principled negotiation.
 - Court identified four unwritten principles as the lifeblood of the canadian consitutional order: (paras 51-54)
 - 1) Federalism
 - 2) Democracy
 - 3) constitutionalism and the rule of law
 - 4) Respect for minorities
 - SCC said principles do not stand alone and are highly interconnected and permeate every aspect of Canadian order. They are organizing principles and aspirational ideals
 - They cannot trump one another and can have full legal force
 - Full legal force means they are binding on the courts, can give rise to substantive legal obligations, and may function as real constraints on government action.
 - "... paragraphs 67,68 say that democracy cannot exist without the rule of law. RL is a necessary but insufficient criteria for democracy
- thus the RL constrains the principle of parliamentary supremacy from its tendency to define democracy merely as a set of formal institutional arrangements. It also constrains the courts from unilaterally, arbitrarily, and anti-democratically substituting their views for parliament's in constitutional matters. ???How the authors make this conclusion is beyond me???

C. The New minimalist Rule of Law

- The trilogy of recent cases *Imperial Tobacco*, *Charkaoui*, and *Christie* have significantly narrowed the scope and effect of the rule of law.
- The SCC continues to assert the RL as a foundational constitutional principle. RL incorporates at least four principles:
 - 1) Supreme over private individuals and government officials, who are required to exercise their authority non-arbitrarily and according to law

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- 2) RL requires the creation and maintenance of a positive order of laws
- 3) It requires the relationship between the state and the individual to be regulated by law; and
- 4) It is linked to the principle of judicial independence.
- *See *Imperial* at 58, *Charkaoui* at 134, and *Christie* at 20
- **The rule of law cannot strike down legislation based on its content** *Imperial* at 59
 - The government action the RL constrains is that of the executive and administrative branches.
 - Legislatures are constrained by manner and form requirements in the process of enacting, amending, and repealing legislation.
 - *See *Authorson v. Canada (AG)* 2003 SCC for troubling insight into how the executive controlled government can manipulate and avoid manner and form requirements of enacting legislation, and for a tragic example of a systemic failure of accountability
 - This was the veteran's pensions case. The SCC said the legislature enacted the no-lawsuit law legally and so veterans could not sue for the mismanagement of their money.
- **What are manner and form requirements? What is the difference between manner and form?**
 - *I think manner and form refers to the need to publish the laws in the gazette and whatever else is required....need more info on this*
- ***Charkaoui v. Canada (Minister of Citizenship and Immigration)* 2007 SCC**
 - Court declared unconstitutional the detention and review process set out in the Immigration and Refugee Protection Act (IRPA). Violated s.7 PoFJs, ss. 9 and 10 guarantees against arbitrary detention, and protection against cruel and unusual treatment in s.12.
 - Court did not review reasonableness of security certificates because they are not subject to review or appeal
 - Court addressed rule of law and s. 15 charter as it applies to aliens, but did not consider reasons relevant to decision
 - Use of secret evidence and possibility of indefinite detention without meaningful and timely review for non-citizens clearly violates due process rights
 - RL did not support a right to appeal from a FC judge's determination of the reasonableness of the certificate
 - RL cannot prohibit automatic detention or detention on the basis of executive or ministerial decision making. (See paras 136-137)...some detail in there
 - Decision upholds s.7 requirements for a fair procedure in determining an issue of vital importance to a detainee
 - However, the court's reliance on a formal conception of the RL inhibits the use of RL values implicit in the CL constitution and the unwritten principles
 - Consideration of substantive RL values like those in *Roncarelli* would provide a foothold for judicial scrutiny of the failure to provide a right of appeal from the reasonableness of a security certificate, and the power of detention given to

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executive actors under IRPA

- **British Columbia (AG) v. Christie 2007 SCC**
 - Constitutional challenge of legal service tax by poverty lawyer. Because insufficient evidence to prove poor people were prevented from accessing legal services, the tax was upheld.
 - Court affirmed that one purpose of RL is to ensure access to justice
 - When rights and obligations are at stake, individual access to justice can often only happen through lawyers.
 - As a component of RL, access to justice might guarantee a right of legal service, including in some circumstances a right to counsel (especially in the criminal law context). This does not underwrite a general right to legal service, legal counsel, in relation to court and tribunal proceedings. (Paras 23-27)
 - Therefore no constitutionalized right to something like legal aid
 - Court reiterated that RL cannot be used to strike down otherwise valid legislation
- The relationship between unwritten principles of the RL and access to justice remains underspecified in Canadian law.
 - Tensions: RL, fairness, equality, and efficiency remain particularly acute in AL bc many tribunals were established to provide the poor with access to justice
 - Many tribunals fail to provide such access, and because of separation of power issues, the courts might not provide remedies
- Dicey, Fuller, and Raz all suggest some degree of access to justice:
 - Dicey: Command and control model. Relies on CL constitutionalism driven by private rights of property and contract; not oriented by ideas of equal access by all
 - Raz: Functionalist approach: Suggests easy access to justice for all. But he advocates a formalist view of legal equality within the RL < access to justice cannot be equated with equal access to legal services by all as a democratic right
 - Fuller: Consistent with Dicey's CL openness and Raz' institutional openness. Unclear if his theory would underwrite greater access to justice because citizens play a role in maintaining the legal system through litigation
- **This book is obsessed with trying to equate law and justice (and democracy). They are not actually advocating for access to justice, they are advocating for access to law.**
- The Canadian SC is worried about seeming to be an activist court and has constrained use of unwritten principles. The idea of un-democratic judicial activism has led the SCC to restrict unwritten principles as a tool for direct legal action. Instead the court uses the unwritten principles as merely influential constitutional values.
 - *In my words: The court has no balls and wants whatever the executive wants, it won't be controversial unless it absolutely has no logical way out*
- **British Columbia v. Imperial Tobacco Canada Ltd. 2005 SCC**
 - Court's clearest stance concerning the power and limits on the unwritten principle of the RL.
 - BC enacted legislation to recover costs associated with health care from smoking. Legislation allowed bc to collect current and future health care costs, and retroactive costs for the last fifty years

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- Tobacco challenged constitutionality on grounds of: Extra-territoriality; judicial independence; RL. Court focused on the meaning of RL and what principles it might incorporate.
- RL does not require legislation be prospective (except in criminal matters) or general
- Does not prohibit the conferral of special privileges on the government, except where necessary for effective governance.
- RL does not ensure a fair civil trial (para 63)
- Written constitution has primacy, such that the attributes of the RL are simply broader versions of the rights contained in the charter
- **Protection from unjust and unfair legislation lies in the written constitution and in the ballot box. (Para 66)**

D. Lower Court Unruliness?

- Though the SCC has not completely shut down use of unwritten principles, it has severely restricted their use as a gap filler. Lower courts and earlier jurisprudence seem more willing to recourse to unwritten principles.
- Unwritten principles have been used as justification for intervention in discretionary decision making. In *Lalonde v. Ontario 2001 OCA* the OCA reviewed a decision to close a francophone hospital in Ontario, allegedly in the public interest.
 - The hospital was specifically designated as a francophone hospital and the decision to close it was a shift in policy for which no explanation was given
 - Because the Commission that closed the hospital failed to give serious weight to the linguistic and cultural significance of the hospital to the minority group, it acted contrary to the normative and legal import of the unwritten constitutional principle of respect for and protection of minorities
 - The decision coheres with *Roncarelli*
 - These decisions show how judges can craft decisions that are grounded in the written constitution and informed by unwritten principles
 - Approaching language rights purposively allowed the OCA to identify and use unwritten principles to interpret the boundaries within which the O govt could act
 - Relying on Baker the court in *Lalonde* concluded that "the review of discretionary decisions on the basis of fundamental Canadian constitutional and societal values" (Baker at para 177) is possible and despite begin accorded a high degree of deference, such discretionary decisions are not immune from judicial scrutiny

IV. Administering The Rule of Law

A. A Complex Institutional Relationship

- The administrative state is a threat to parliamentary supremacy and the rule of law because delegated power to the executive operates outside legislative scrutiny
- Admin bodies have substantial powers to affect rights and obligations
- Can be manipulated by appointment process, regulations, etc, all controlled by exec
- Specialization required more discretion to admin bodies
- Long before the charter, AL had to construct a relationship with the administrative state.

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This involved respecting expert administrative bodies, and recognizing parallel bodies of law such as administrative tribunals

- AL crucially established a relationship between the courts and government
 - Over time respect by courts developed
- Courts have had to change their view and accept the welfare state as a legitimate political project. This contrasts with the role of the court as keeping the state to a minimum

B. The RL and Post-Charter Administrative Law: Deference as Respect

- With the growth of the administrative state, the role of the courts in regard to delegated power can be understood in two contrasting ways:
 - 1) Courts provide an essential accountability function by policing the exercise of delegated discretionary powers to ensure that they are confined to terms and purposes specified by the enabling statute
 - 2) Courts are conscious of the separation of powers, and given their lack of expertise in determining the merits of certain policy based exercises, are themselves under RL constraints to respect legislative and executive branches of government
- Courts used to treat decisions by the executive and the legislature with great deference, but showed little or no deference to tribunals and administrative bodies
- Now there is more deference to administrative bodies. Characterized by dialogue.
- Despite the new focus on dialogue, the relationship between the courts, ministers, the executive, and administrative bodies continues to pose problems. These problems arise from such issues as privative clauses, unwritten principles, ministerial discretion, national security, statutory interpretation, and the choice of the standard of review

C. An Example of Deference as Respect: National Corn Growers

- ***National Corn Growers Assn. v. Canada (Import Tribunal) 1990 SCC***
 - Wilson and Gonthier's opinions highlight contrasting approaches to the intensity of judicial scrutiny of agency decisions
 - The tribunal decided that importing grain from the USA would cause harm to Canadian corn producers. The federal court act allowed JR if decision was based on an erroneous finding of fact that the tribunal made in a perverse or capricious manner without regard for the material before it.
 - The Import Act also contained a privative clause
 - Thus decision was to be determined on standard of patent unreasonableness
 - Decision turned on whether it was patently unreasonable for the tribunal to refer to GATT in interpreting the import act, whether the tribunal's interpretation of s. 42 of the import act was unreasonable, and whether the tribunal had reached its decision without any cogent evidence to support its determination of material injury
- **Wilson's concurring judgement:**
 - Wilson evoked CUPE, which was the beginning of the end of Diceyan AL
 - Cautioned about the effects of engaging in a probing examination of a decision
 - CUPE was about a labour relations tribunal in NB which had to interpret a poorly worded section of its enabling statute, about the word "employee"
 - SCC held that deference was due to the board on basis of: protection by privative clause, board's expertise, the reasonableness of its decision. In cases

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- of statutory ambiguity, where there are multiple reasonable interpretations, the court should defer to the interpretation of the expert tribunal
- CUPE's approach to the standard of review, especially patent unreasonableness, entails a relationship between the courts and administrative tribunals where the courts should recognize:
 - 1) Administrative agencies, not the courts, bear primary responsibility for their legislative mandate in the area of regulation;
 - 2) Administrative agencies possess expertise, experience, and contextual ken about which the courts know very little; and
 - 3) statutory provisions, such as those found in this case, do not admit to one uniquely correct interpretation.
- Wilson was worried that probing examinations of the tribunal's interpretation of its statute and its decision would reintroduce the standard of correctness under the guise of reasonableness and displacing the patently unreasonable standard
- In the face of privative clauses, the court should not engage in wide ranging review concerning whether or not the tribunal's decision was reasonable.
- The merits of a tribunal's interpretation of an international obligation such as GATT are to be addressed by legislation
- Wilson did not want to undermine the effectiveness and importance of tribunals by engaging in deep judicial review of its decisions and interpretations
- Explicitly rejects the Diceyan model.
- **Gonthier's majority decision**
 - Concluded that the tribunal was not unreasonable with respect to any of the three matters.
 - HE delved deeply into both how th tribunal came to its decision and the decision's merits.
 - Rebut of Wilson: "I do not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it, and I would be surprised if that were the effect of this court's decision in CUPE"
 - Does not believe his more probing approach repudiates CUPE. Sees his approach as more deferential than the old Diceyan approach
- The effect of Gonthier's more probing approach seemed to be to bring the standard of review back towards correctness.
- National Corn Growers shed light on how different theoretical models can help explain how judges understand their institutional role as well as the underlying rationale behind the judicial choice of the standard of review
- Dicey envisioned that courts as guardians of private law checks on the arbitrary power of the executive and its delegates.
 - His theory of the RL argues for primacy of the correctness standard
- Fuller's theory clearly incorporates RL concerns in relation to the administrative state and JR of administrative decisions and envisages a collaborative cooperative endeavor among state actors to maintain the RL

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- In *NCG* the tribunal's expertise and proper use of its discretion would suggest a respectful approach by Fuller
 - The problems of polycentricity underscores the importance of this conclusion
 - For Fuller, where a polycentric issue arises and multiple reasonable decisions are possible, or when a decision involves balancing of competing interests, then these functions are best left with expert tribunals.
- Raz narrows the reach of the RL to correction for the harms created by law itself.
 - His theory does not provide enough detail concerning a role for the RL as a check on the arbitrary use of executive power

D. Two Problems for Deference as Respect: Privative Clauses and the Choice of Standard of Review

1. Privative clauses:

- are usually used to protect decisions made by public officials from either court review (an **ouster clause**) or further internal review (a **finality clause**).
- Problem for courts: Privative clauses are usually drafted in absolute terms and decisions were meant to be final. However, the statute prescribes limits on the delegated power
- Threat to accountability: Privative clauses would allow the agency to act with impunity as the only judge of its own substantive decisions
- Tension: Need for judicial oversight and the supremacy of the courts v. supremacy of the legislature and flexible regulation
- Court approaches to PCs:
 - Read it out where drafting error was implicated
 - Defer completely to legislative intent
 - NOW: Statutory interpretation grounded in CL presumption that legislatures always intend to respect procedural fairness
 - This laid basis for CUPE approach
 - In CUPE: Court recognized PCs as a communication from the legislature that courts should recognize the interpretive authority of the tribunal within its area of expertise, but that judges could exercise their RL powers of oversight on constitutional questions and jurisdictional matters.
 - Deference is a new and still vulnerable 'achievement'
 - *Loaded language by text...again...it never ends*
- PCs and unwritten principles uncannily mirror each other.judges seem to have an interpretive monopoly on unwritten principles, thereby ousting interpretations from other branches of government. Robust use of unwritten principles (including the RL) risks entrenching the elitist view of judges and opens the door for judicial arbitrariness, the obverse of legislatively sanctioned administrative arbitrariness due to the power of PCs.
 - This suggests that all branches owe a duty to realize the rule of law state, and that all branches can fail to do so in their distinct ways

2. The Choice of the Standard of Review

- Pre-charter AL was restricted to the review of questions of law, jurisdiction, and procedural fairness in order to determine whether or not decision makers acted in excess

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- of jurisdiction, without authority, or had otherwise abused their discretion on unreasonable grounds
- Rarely could reviewing courts substitute their preferred policy outcome for that of authorized decision makers
- Deference was fully exhibited by the choice of standard of review. Review was either on standard of correctness or patent unreasonableness. Reasonableness was post-charter
 - Prime RL restraint on judges in AL
- Ideally the SR:
 - Indicates a court's understanding of the independence and expertise within administrative bodies;
 - Regulates the contours of the AL and its exercise of power; and
 - Controls the discretionary features within the exercise of JR
- Nation Corn Growers showed that the contemporary approach to the standard of review concerns the legitimacy of judicial intervention in our 'democratic' state (read oligarchy here)
 - This oligarchy has decided to impose an administrative state
- **The pragmatic and functional approach** (PFA) used to weigh the criteria involved in determine the correct SR illustrate the court's attempt to grapple with the sheer variety of administrative decision makers and keeping them accountable
 - The PFA responds to the nature of the tribunal and the nature of the issue that is subject to ?appeal?
 - *WTF I thought it was judicial REVIEW, not judicial APPEAL.*
 - More deference will be shown where the tribunal's expertise matches the issue it decided on
 - **Correctness** shows little deference or no deference and decides if the decision was correct or not
 - Applies when the agency has very little expertise or when the issue involves interpretation of general law or constitutional matters
 - **Reasonableness** is a justified middle ground between correctness and patent unreasonableness
 - **Patent Unreasonableness** is the most deferential standard. Appropriate when:
 - Decision involves a polycentric questions within the expert field of the agency
 - Court will only intervene where it is clear that the agency has made a blatant error of law or fact
- **Baker** provides an excellent illustration of the tensions among the RL, deference, SR, and the administrative state.
 - Reasons for deference:
 - Fact specific inquiry
 - That humanitarian and compassionate grounds are an exception in the Act
 - Decision maker is the minister
 - Considerable discretion granted in Act
 - Reasons against deference:

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- Lack of privative clause
- Explicit contemplation of JR by federal court
- Individual rather than polycentric nature of the decision
- As Such, the intermediate standard of reasonableness was chosen
- SCC: The administrative decision:
 - Displayed arbitrariness;
 - Did not exhibit a mind attuned to the humanitarian and compassionate requirements stipulated in the department's guidelines;
 - Showed lack of regard for affected person;
 - Gave the impression that important factors such as the best interests of the children were outweighed by discriminatory biases
- Therefore decision did not meet reasonableness that could command respect from the reviewers
- Court imposed duty on statutory and prerogative decision makers to give reasons where important individual interests are at stake. This is not a general duty for all state decision makers, but it does provide an important procedural protection
- Normally the courts grant wide deference in this area resulting from the expertise of the decision maker. However, in this case the court crafted a context-specific duty to give reasons (the immigration sphere)
- The treatment of one individual at the hands of the administrative state caused an expansion of the duty of fairness, a vital component of the RL, in an area usually demanding correctness (page 106 bottom para 2)
 - *WTF does this mean?*
- LHD for the majority points out: although discretionary language in a statute indicates that deference is owed, "that discretion must be exercised in accordance with the boundaries imposed in the statute,, the principles of the RL, the principles of AL, the fundamental values of Canadian Society (*these are explicitly not principles of fundamental justice....what are they?**), and the principles of the Charter" para 56
- The duty to give reasons stands to improve restraint and respect by the courts. Reasons give agencies an opportunity to prove its expertise and concern for affected individuals by observing procedural fairness
- Thus deference is not simply a result of a PC, it is a result of institutional competence, expertise, and mutual respect for the RL.
- ***Remember, the rule of LAW is not the rule of JUSTICE***
- A one size fits all approach to determining the standard of review on a PFA will not work. Those who prefer certainty in the determination of expertise will find this frustrating
- *Baker* is an important link for the RL as a follow-up to *Roncarelli*
 - Both disclose that administrative and constitutional law are attuned to underlying fundamental values such as concerns for human dignity, the vindication of rights, and the effects of political powers on individuals
 - Public law's normative aim is the need to justify all exercise of public power
 - This is not a carte blanche for judicial supremacy

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- Justifying public power requires consideration of other political institutions
- Baker confirms the shift to a value-centric approach to the RL in our oligarchy

E. Constraining the Charter

- Recent development: Tribunals can consider Charter challenges to their enabling statute
- This is a major shift. Originally courts arrogated to themselves the power to determine questions of law; leaving administrative bodies to interpret and apply their enabling statute.
- Originally, only administrative tribunals that structurally and purposively mirrored courts possessed the jurisdiction to hear charter claims.
 - Now statutes can expressly empower a tribunal to interpret and apply all law, including charter law. Sometimes the jurisdiction to hear charter questions is implicit in the statutory scheme
- Shift resulted from concern about access to justice and recognition of the competence and capacity of tribunals as legal bodies
- On this understanding, jurisdiction to apply the charter to enabling legislation is given by the legislature in the statute and does not arise solely from the constitution
 - Separation of powers creates limits though:
 - Scope of remedies granted by tribunals will be limited
 - HOW??
 - The particular decision will not be binding precedent; and
 - WHY NOT????????????????????????????????????
 - In Subsequent JR, the decision will be subject to a standard of correctness, ensuring that it receives little or no curial deference
 - WHY??? and wtf do they mean by "curial"?
- The Charter can constrain delegated discretionary powers where Charter rights are implicated, or where the enabling statute does not sufficiently confine the discretion
- Where individual charter rights are not at issue, the courts will tolerate greater discretion
- The right of administrative agencies to question unconstitutional enabling provisions (What about other provisions? Is it their ability limited to enabling provisions?) provides for efficiency and confirms the emergence of dialogue bt courts and agencies
- "The institutional aspiration underlying this vision is to create a constitutional democracy that reconciles the formerly competing sovereignties and reinforces institutional competency for the benefit of citizens"

F. Institutional Dialogue and the Canadian Rule of Law

- Dworkin is a deontological liberal. The purpose of politics is to allow people with different values to pursue their individual ends to the greatest degree possible
 - For Dworkin, the courts provide an independent forum where people (as bearers of rights) can demand resolution of disputes of the content of their rights through the legal system
 - This theory grounds a vision of constitutionalized public morality.
 - The RL necessarily entails the judicial determination of rights through principled interpretation in hard cases.
 - Judge must craft an answer based on rules and principles and how they fit with

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positive law

- *This section butchers Dworkin and suggest to me that it should not be trusted. They state for example that for Dworkin "government respect for individual freedom and the autonomy of non-governmental spheres of authority are requirements for his political morality." (110) This is a HUGE claim about Dworkin's theory and is not substantiated in any detail. It also appears to contrast with Dworkin's Law as Integrity.*
- I do not have faith in the academic integrity of their interpretations and claims and I am not reading anymore of their approach to Dworkin or other philosophers of law
- The joint effort of holding up the RL in Canada is often called "institutional dialogue" and is informed by three principles of the rule of law:
 - 1) The principle of legality
 - 2) Institutional practices
 - 3) A distinctive political morality
- These three elements are argued for through a poor articulation of Dworkinian theory
- In pre-Charter era, the legislature could pass laws on any subject, and no person could strike down or override the laws. The RL required that laws met "manner and form requirements"
- The legislature must be identified as the proper source of law and the proper legislative procedure must be used.
- Pre-Charter, the authority of the legislature was not constrained by the courts. Constraint came from political accountability (elections, etc)
- The Charter affected the principle of parliamentary supremacy
- Constitutional rights can be limited by s. 1 of the Charter
- Legislature can also use s. 33 notwithstanding clause to provide temporary override
- Thus the principle of parliamentary supremacy is now balanced with the rule of law
-

G. Other Grounds of Accountability in the Administrative State

- JR is one method of ensuring accountability

V. Conclusion: A Democratic Rule of Law in the Administrative State

- The concept of the RL is fundamental to understanding the relationship between the courts and administrative bodies.
- The realization (should read utilization) of the RL within our oligarchy can legitimate the sharing of power in our political institutions and secure accountability for the exercise of public power
- RL requirements are different in different areas, and the variety of areas in the administrative state make applying the RL complicated
- How a judge understands the RL will shape how they deal with review of decisions
 - Diceyan defenders of private rights against state intervention
 - Fullerian cooperationists
 - etc

DONE another shitty ass chapter

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Chapter 5: The Duty of Fairness: From Nicholson To Baker and Beyond

I. Introduction

- Until the latter half of the 20th century, AL law dominated by formalism
 - Judicial decisions had to comply with the rules of natural justice
 - *Audi alteran partem* required decision maker to "hear the other side" of a dispute
 - *Nemo judex sua causa* precluded a man from being a judge in his own cause
 - Meant to ensure unbiased hearings, but only applied to judicial and quasi-judicial spheres
 - Administrative decisions – those made by executive actors – could be made without regard to any such rules
 - Result was preoccupation with categorization and JR focused on nature of power exercised
- The SCC abandoned the all or nothing approach (judicial v. administrative) in *Nicholson*
- ***Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners 1979 SCC***
 - Summary dismissal of probational officer 15 months into his term of service. No reasons for dismissal, no notice, no right to make presentations.
 - Provincial regulations held that a police officer could not be penalized without hearing and appeal. But also held that an officer could be dismissed within 18 months of becoming a constable
 - Traditionally this would have been end of matter: administrative decision, therefore no protection
 - SCC in 5-4 majority held that s duty of procedural fairness applies to administrative decisions
 - Court held that although Nicholson did not have right to of hearing and appeal in same manner as an 18 month+ constable, had did have the right to be treated fairly/non-arbitrarily
 - Had the right to make submissions, oral or written by at the board's discretion
- In Nicholson, Laskin kept intact the rules of natural justice as rules for judicial and quasi-judicial bodies. He added a general duty of fairness to administrative and executive bodies.
 - Subsequent caselaw has abandoned natural justice and **there is no need to distinguish between natural justice and fairness**
- **Duty of fairness** applies across the spectrum and the corresponding obligations and right vary accordingly
 - Fairness = procedural fairness
 - This duty concerned with ensuring public authorities use a fair procedure in making decisions
 - Says nothing about the substantive decision and does not require that the decision be fair
 - Promotes sound public administration: well informed decisions will likely be better ones
 - Larger purpose: protects dignitary interests by ensuring people can participate meaningfully in decision making processes that affect them
 - Legitimizes administrative process by requiring people be treated with respect
 - Requirements of duty of fairness are independent of the substantive merits of the decision
 - **A particular decision may be all but inevitable, yet it must be made in accordance with**

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the duty of fairness

- "The denial of a right to a fair hearing must always render a decision invalid...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" that everyone is entitled to. "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." (*Cardinal v. Director of Kent Institute 1985 SCC*)
- **Duty of fairness requires:**
 - **1) Right to be heard** (*Audi alteran partem*)
 - **2) Right to an independent and impartial hearing** (*Nemo iudex sua causa*)
 - These are CL concepts, so can be overridden by statute. Because of their importance, the courts will require explicit legislative direction to that effect before concluding such a situation exists
- Duty of fairness has been codified federally in the *Canadian Bill of Rights*
 - In BC, under the *ATA*
- The Charter applies but has a narrower application (discussed below)
- The protection afforded by the duty of fairness is necessarily flexible given the broad area in which it applies
 - A full and formal hearing will be required when process is similar to the judicial one
 - Do not always have right to oral hearing
- Focus of chapter is on right to be heard.
- There is deference to agency's decision about what duty of fairness requires.
- Breach of duty of fairness almost inevitably leads to quashing and re-hearing
 - Does not affect subsequent decision

II. The Threshold Test: When is Fairness Required?

A. Rights, Interests, and Privileges

- Subject to some exceptions, the duty of fairness applies to any decision that affects a person's rights, interest, or privileges
 - Little dispute as to meaning. Broad enough to cover most situations where a decision can affect a person in an important way

B. Legitimate Expectations

- *Old St. Boniface Residents Assn. Inc. v. Winnipeg SCC* ????
- Legitimate expectations is simply an extension of the rules of natural justice and procedural fairness. It lets the party make representations where, based on the conduct of the public body, the party has been led to believe that his/her rights would not be affected without consultation.
- Legit expectations could arise where a party is told they will have a right to a hearing
- More controversial: Legit expectation can arise if a person is led to expect a particular outcome from the decision process. EG person told they will get a liquor license.
 - This is an expectation of a particular decision, rather than an expectation of a particular procedure
- Fundamentally, public decision makers have the right to change their mind, thus there is no

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guarantee of getting the promised license. However, before a decision to deny the license is made, the party has the right to procedural fairness.

- EG: Notice of intent to deny license, permission to make representations, written reasons, etc
- The doctrine of legit expectations requires procedural protection to be provided before an expectation can be dashed
- Legit expectations is akin to promissory estoppel.
 - Equitable remedy that offers relief from reliance on a promise that does not give rise to an enforceable contract
- SCC reiterated several times that concept of legit expectations only gives rise to procedural protection
 - IE Right to make representations and be consulted, etc. But no right to fetter decision
- Brits allow substantive expectations to be protected. This has blurred process-substance distinction
 - *Baker* made clear the SCC's desire to keep process-substance distinct
- In CUPE 2003 Binnie reiterated the procedural focus of legit expectations and the narrowness of focus in which it applies:
 - Legitimate expectations looks to the conduct of the agency in the exercise of a power, conduct, or representation, "that can be characterized as **clear, unambiguous and unqualified**" [Emphasis added] that has induced in the claimant a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is made. ... TO be legitimate, expectation cannot conflict with a statutory duty
- Relatively limited scope for operation of legitimate expectation in Canada.

C. A Common-Law Presumption

- Courts require clear statutory direction before they limit or oust procedural protection
- *Kane v. Board of Governors of the University of British Columbia 1980 SCC*
 - "To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument." (1113)
- Courts presume that the legislature intended procedural protection to apply. *Cooper 1863*
- Thus courts have acknowledged the supremacy of the legislature but granted quasi-constitutional protection to the CL duty of fairness

D. Constitutional Protection

- s. 7 Charter: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
- SCC has held that principles of fundamental justice subsume procedural fairness protection
 - *Re BC Motor Vehicles Act*
- However, s. 7 only applies where deprivation of LLS
 - Security of person is broadest, but there is no doubt that the threshold for obtaining Charter protection is higher than that required for obtaining CL fairness protection
 - Economic rights not protected by s. 7 (*Gosselin 2002 SCC*)
 - Ordinary legislation could limit or oust procedural fairness in a licensing scheme without infringing Charter. *But remember, even if legislation infringes CL procedural protection, its too bad, so sad. Statute trumps CL*

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- Where s.7 is infringed, it is highly unlikely that legislation will be saved under s. 1

III. Limitations of the Scope of the Duty of Fairness

A. The Duty Applies to Decisions

- The duty applies to *decisions*, meaning the final disposition of a matter. Rarely will it apply to investigations or advisory processes that do not have consequences, even if they lead to formal decisions that do have consequences
 - EG no need for investigator to provide notice of intent to investigate a breach of law
 - Where an investigation will be public (like a commission of inquiry) it is usually presided over by a judge and pursuant to a statutory mandate that establishes comprehensive procedural protections
 - EG: Where reputation is at stake, some minimal procedural protection might be required
 - EG: Where a preliminary decision has de facto finality, procedural fairness might apply.
 - EG: Invariable acceptance by the final decision maker of an investigation or recommendation

B. The Duty Does not Apply to Legislative Decisions

- The duty of fairness never applies to legislative decisions or functions (*Re Canada Assistance Plan (BC) 1991 SCC*)
- Court has never defined "legislative", but it clearly contemplates primary legislation.
- Primary legislation is exempt from the duty of fairness because the separation of powers between courts and legislatures requires it
 - *Reference re Resolution to Amend the Constitution*
 - How legislatures proceed is up to them, subject to the constitution and self-imposed statutory requirements
 - Legislation comes to the court after it is enacted, not before.
 - *Wells v. Newfoundland 1999 SCC*
 - Within constitutional bounds, the legislature can do as it sees fit. IT has no duty to fairness
 - Wells succeeded in contract though. The legislation abolishing his position did not foreclose his right to seek damages for breach of contract of employment
 - *Arthurson v. Canada 2003 SCC*
 - Parliament passed legislation retroactively limiting pension and benefits funds, to a group who was owed a fiduciary duty by the Crown. The Law affected thousands of veterans, none of whom were given notice.
 - Arthurson argued under the Bill of Rights, that no deprivation of property except by due process of law; right to a fair hearing in accordance with principles of fundamental justice.
 - Trial and OCA agreed. SCC gave short thrift to idea that Bill of Rights established due process procedures in regard to the passage of legislation, and CL had nothing to add.
- The rationale for exemption is clear, but it reminisces of the all or nothing distinction between judicial and administrative that was abandoned by the court.
 - What does legislative mean?
 - If the applicant convinces the court that a duty of fairness applies, then they could

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get the order quashed

- It the public authority convinces the court that its actions are legislative in nature, then the duty of fairness does not apply
1. Are Cabinet and Ministerial Decisions Covered by the Legislative Exemption?
 - Not per se, but it is often easy to categorize their decisions as legislative, and as a result they will be exempted
 - *AG Canada v. Inuit Tapirisat et al 1980 SCC (Tapirisat)*
 - Cabinet rejected an appeal from a CRTC decision allowing a rate increase without allowing the petitioning group to be heard
 - Cabinet heard from the utility, the CRTC, and the minister, but the group was essentially left out.
 - Cabinet's power is legislative in nature partly because the legislation authorized cabinet to overturn a CRTC decision on its own motion. This is "legislative action in its purest form." (754)
 - Also: Practical difficulties inherent in extending duty of fairness, it could burden cabinet with hearing requirements, and undermine Cabinet's public policy-making role.
 - *Tapirisat* heavily criticized for overstating the difficulties in applying a duty of fairness to cabinet decisions
 - Duty is flexible and could be tailored to suite the situation
 - Exempting cabinet argument weaker than exempting primary legislation argument
 - Cabinet decision making is not subject to political scrutiny in the same way
 - Court wants to avoid conflict that would likely result if it tried to scrutinize executive decisions
 - *Idziak v. Canada 1992 SCC*
 - Emphasized the unique roles and responsibilities of the executive branches as reasons for not extending duty of fairness to them
 - Minister of justice used discretionary authority to issue a warrant to surrender in an extradition case:
 - Parliament chose to give the minister this power.
 - Minister must consider the good faith and honour of the country in its relations with other nations
 - Minister has the expert ken of political ramifications of an extradition decision
 - The minister's decision should be characterized as being at the extreme end of the continuum of administrative decision-making
 - Decisions involving particular individuals are most likely to give rise to the application of the duty of fairness to Cabinet and ministerial decisions, but *Idziak* shows that even here, court will be reticent to impose procedural requirements.
 2. Is Subordinate Legislation Covered by the Legislative Exemption?
 - Political accountability can be incentive for consultation before enacting subordinate legislation; it can also do the reverse
 - Less reason to be concerned about political interference with subordinate legislation:
 - Political approval for such legislation is subsidiary in nature

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- Can be made pursuant to general authorization in the statute
 - Delegated law-making authority might extend to actors outside the political process – like independent tribunals
 - The USA experience with "notice and comment" requirements shows the procedural requirements are not unworkable
 - There are exceptions to the exemption for subordinate legislation
 - *????The text never says that subordinate legislation is exempt (or not) from fairness requirements. This claim is made in subsection 2, so I am assuming they mean to be talking about subordinate legislation. But they imply without actually stating that generally subordinate legislation is exempt from fairness requirements.) ???*
 - *Homex Realty and Development Co. v. Wyoming (Village) 1980 SCC*
 - SCC concluded that the passage of a municipal bylaw was subject to the duty of fairness. The village disagreed with developer about provision of services to a subdivision. It then passed a bylaw to ensure that lots could not be sold without permission of the village.
 - SCC held that village could not couch its actions in a form that excluded duty of fairness.
 - *Homex* ruling makes the point that substance is more important than form where legislative exemption is concerned.
3. *Are Public Decisions Covered by the Legislative Exemption?*
- Legislative exemption includes policy decisions and decisions that are general in nature
 - *Martineau v. Matsqui Institution Disciplinary Board 1980 SCC*
 - A purely ministerial decision on broad public policy grounds will not normally give rise to procedural protection
 - *Knight v. Indian Head School Division No. 19 1990 SCC*
 - Distinguishes between decisions of a legislative and general nature from acts of a more administrative and specific nature
 - Rationale for exempting policy decision is similar to that exempting formal legislative decisions
 - Both are inherently political and subject to political accountability
 - *Imperial Oil Ltd. v. Quebec (Minister of the Environment) 2003 SCC*
 - In exercising discretionary power to require an oil company to undertake site decontamination at its own expense, the minister was performing a political role in choosing from among the policy options the Act allowed and was not subject to the duty of fairness
 - Governments are elected to make policy decisions and can do as they choose within the ambit of the constitution
 - Difficulties: Although legislative functions can be identified by the formalities surrounding them, policy decisions cannot.
 - Differing judicial opinions about institutional roles, accountability, and legitimacy can create inconsistent decisions.
 - Courts can easily characterize a decision as a policy decision if it simply does not want to interfere in a particular matter

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C. The Duty May be Suspended or Abridged in the Event of an Emergency

- The duty of fairness requires that duties be observed before decisions are made. In some situations, observing such duties would cause great harm
- In these cases, courts can defer compliance until emergency is dealt with
- *Cardinal v. Director of Kent Institute*
 - Court held that while duty of fairness applies in imposing isolation/segregation in prison context, an apparently urgent situation justifies the suspension of the duty. However, once the review body recommended to end the segregation, the director had a duty of fairness to inform the prisoners of his intention to reject the recommendation, provide reasons, and afford them an opportunity to contest his intended decision
- *The text says that whether the duty of fairness applies in emergency situations is unclear and that there is the possibility that public officials will be over-zealous in their understanding or what constitutes an emergency. The first part is bullshit. In a real emergency, there will be no duty of fairness.*

IV. The Content of the Duty of Fairness

- Duty of fairness might include some or all of:
 - A right to notice of a potential decision
 - “Notice must be adequate in all circumstances in order to afford those concerned a *reasonable* opportunity to present proofs and arguments, and to respond to those presented in opposition”
 - A Right to Disclosure of particulars
 - *May v. Ferndale Institution 2005 SCC*: Noting that the disclosure principles developed in the criminal context in *R. v. Stinchcombe* do not apply to administrative proceedings. In administrative context it is enough that the decision maker disclosed the information relied on in making the decision. The individual must know the case she has to meet.
 - A right to make written submissions
 - *Nicholson*: Court held Nicholson's right to make submissions about his dismissal could be satisfied either orally or by written submissions.
 - *Baker*: Right to written submissions is sufficient to meet duty of fairness in context of a request for relief from deportation on compassionate and humanitarian grounds. NO oral hearing was required
 - Right to a hearing within a reasonable time
 - *Blencoe v. BC 2000 SCC*: the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied
 - Right to an oral hearing
 - *Khan v. University of Ottawa 1997 OCA*: Duty of fairness requires oral hearing where credibility is in issue.
 - *Singh v. Minister of Employment and Immigration 1985 SCC*: Right to oral hearing where credibility is at issue is protected by s.2(e) *Bill of Rights* and s. 7 *Charter*
 - Right to counsel
 - Right to counsel under Charter 10(b) is limited to arrest or detention situations

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- In limited circumstances s. 7 might guarantee right to counsel *NB v. G.J.*, 1999 SCC
 - *B.C. v. Christie* 2007 SCC: There is no general right to counsel in proceedings before courts and tribunals dealing with rights and obligations. However, some specific situations might call for such a right
 - Must be determined case by case
 - Right to call and cross-examine witnesses
 - Normally part of right to an oral hearing, but scope of the right is subject to control by the tribunal.
 - *Innisfil (Township) v. Vespra (Township)* 1981 SCC: Right to cross examine is not to be withheld on basis that tribunal thinks it will serve no utility. Exercise of the right is solely at the discretion of the holder of the right
 - Right to written reasons for a decision
 - *Baker* etc
 - Most of these rights are well established, parameters are open to argument in specific cases
 - Right to written reasons least well developed aspect of duty of fairness.
 - *Baker*: Where the decision will have important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be given
 - Plenty of wiggle room: Reasons only necessary in "certain circumstances"; the requirement is for "some form of reasons".
 - The retrospective nature of fairness determinations is mitigated somewhat by the institutional knowledge that develops over time. As agency decisions are dealt with by the courts, they develop an appreciation for what the courts will want in the future
 - Duty of fairness concerns are least likely to arise in the context of tribunals that run oral hearings, because the procedures for those hearing will likely be well known by all concerned
 - Some tribunals operate through detailed legislated procedural requirements.
 - Some tribunals establish their own procedures
 - Ontario Labour Relations Board: the chair has rule making authority and the board has developed its own procedural code. *Labour Relations Act*
 - Canadian Transportation Agency controls its own processes and establishes its own procedural rules. *Canada Transportation Act*
 - Some tribunals operate through general statutory mandates that establish minimum default procedural requirements. EG *Statutory Powers Act* Ontario.
 - For many decision makers, the CL governs and the leading case is *Baker*
- A. *Baker v. Canada (Minister of Citizenship and Immigration)* 1999 SCC**
- Baker lived an illegal immigrant who worked as a domestic worker for 11 years. She had four children while in Canada. IN 1992 she was ordered deported. The immigration legislation required applicants for immigration status apply from outside of Canada. She asked that this be waived pursuant to regulations providing the minister the right to waive on humanitarian or compassionate considerations
 - Baker argued her psychiatric wellbeing would be jeopardized if she had to return to Jamaica. Also, two of her children still depended on her for care. They would all suffer if she had to return to Jamaica
 - A note by immigration officer created reasonable apprehension of bias

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- Baker sought JR of Minister's decision, arguing among other things, that the minister failed to observe procedural fairness requirements
 - Should have been granted oral hearing
 - Should have given notice to father and children
 - That they should have been allowed to make submissions
 - That they should be allowed to attend the interview with counsel
 - Entitled to reasons
 - Officer's notes gave reasonable apprehension of bias
 - SCC held:
 - Entitled to more than minimal procedural fairness, but not an oral hearing
 - enough that should be allowed to provide written submissions
 - Entitled to have minister's reasons
 - Reasons provided (the officer's notes) gave reasonable apprehension of bias
 - SCC also said:
 - **Purpose of duty of fairness:** "The purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its **statutory, institutional, and social context**, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered." (22)
 - *Baker* follows what LHD said in *Knight v. Indian Head School Division No. 19*: duty of fairness was "entrenched in the principles governing our legal system." At the same time she emphasized the need to respect administrative decision makers:
 - "...every administrative body is the master of its own procedure and need not assume the trappings of a court. **The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. ...the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome.**" (*Indian Head School* at 46)
 - **The Baker Criteria**
 - They were not meant to be prescriptive or exhaustive. However subsequent fairness cases have been argued on the criteria established in *Baker*
- 1) The Nature of the decision being made and the process followed in making it
 - Although classification as judicial/quasi-judicial or administrative is no longer crucial to determining whether procedural protection must be provided, the more court-like the decision, the more extensive the procedural requirements will likely be.
 - Court-like: Decisions that resolve disputes between parties by finding facts and applying law
 - 2) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates
 - **PAY ATTENTION TO THE LEGISLATION!**
 - Usually preliminary steps will require little procedural fairness. EG Investigations

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- Where one final decision is to be made, greater procedural protection
- A decision need not be final to require high procedural protection.
 - EG existence of right of appeal
- 3) The importance of the decision to the individual(s)
 - The more important to the individual affected, the greater the level of fairness protection required. True when the matter affected is a right, interest, or privilege
 - The importance to the individual must be balanced with needs of decision maker and decision makers are often given considerable deference in selecting procedures
- 4) The legitimate expectations of the person challenging the relevant decision
 - By adding this to the list, the court reaffirmed the limited procedural focus of the concept of legitimate expectations.
 - Where a legit expectation of a particular procedure exists, the court may expand content of duty of fairness. But legit expectation of a particular substantive outcome will NEVER result in the protection of that outcome. At most, a legit expectation will give rise to increased procedural entitlements before expectation is dashed
- 5) Deference to the procedural choices made by the decision maker
 - The content of the duty of fairness affects more than just the person whose rights, interests, or privileges are at stake. It also affects the decision-maker and all subsequent people whose rights, interests, or privileges will be decided by the agency. Thus needs of decision-maker must be taken into account:
 - The analysis of what the duty of fairness requires should also take into account and respect the choices of the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has expertise in determining appropriate procedures in the circumstances. While note determinative, important weight must be given to the agency's choice of procedures." *Baker* at 17
 - "important weight" gives little guidance and it remains unclear how much will be given
- One of the important tasks for respondents on JR is to educate the courts as to the needs of their processes, which may reflect compromises necessary to allow decisions to be made within a reasonable time frame and at a reasonable cost

V. Judicial Review of the Duty of Fairness

- It is important to distinguish JR on procedural grounds and JR on substantive grounds
- The court has developed an elaborate approach to JR on substantive decisions – decisions about the matter in issue, typically involving the interpretation and application of the legislation pursuant to which the decision was made
- Until recently there was three standards of review: **Correctness**, **reasonableness simpliciter**, and **patent unreasonableness**
- The standard was selected using a **pragmatic and functional approach** (*Pushpanathan v. Canada* 1998 SCC)
- No similar approach to duty of fairness. Historically, compliance with duty of fairness was seen as a jurisdictional issue, and jurisdictional questions must be answered correctly
 - Decision-makers do not have the right to be wrong where procedural questions are

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- concerned
- Jurisdiction will be lost in proceedings where the duty of fairness is breached
- IF breach occurs, then decision is quashed and the decision-maker will have to make a new decision in accordance with the correct procedure
- The application of the correctness standard leaves room for deference
 - Needs of decision-maker are a relevant consideration in fashioning the content of the duty, etc
 - However, once the content of the duty is determined, the court will determine if it has been met on a correctness standard
- Violation of duty of fairness will NOT result in a substantive outcome. It is supervision of process, not of substance. The decision will be quashed and sent back; decision maker can make the same decision. Although *Baker* shows that this will not necessarily be the case
 - Baker was granted the humanitarian/compassionate grounds exception she sought
- Regardless of result at subsequent hearing, the results of a breach of duty of fairness can be significant.
 - Administrative proceedings can take months and cost a lot of money. A quashing order can cause great inconvenience to those involved and the public interest.
 - The automatic nature of the remedy may turn out to be counterproductive to the protection of fairness rights.
 - In a close case the court might find the duty is met to err on the side of caution and avoid the far-reaching consequences of forcing a re-hearing
 - As long as quashing is the usual remedy, courts will likely be circumspect about expanding the scope and content of the duty of fairness

VI. Postscript: *Dunsmuir v. New Brunswick*

- *Dunsmuir* created an exception to the general principles governing the application of the duty of fairness. The law no longer draws a distinction between public office holders and other employees in dismissal cases.
- If the employment is covered by contract, the regular contract law applies.
- The duty of fairness will, in general, have no application in the dismissal of employees
- Court believed that the employment contract of the public official will include procedural fairness requirements
- *Dunsmuir* clearly limits the protection of public employees to some extent
 - No longer possible for them to restore their position because such a remedy is not in contract
 - So long as proper procedure is followed, there is no remedy of reinstatement. This used to be a major motivation for bringing JR proceedings
- Following *Dunsmuir*, the crucial consideration is whether or not a public employee has a contract of employment. Where there is a contract, it will be assumed that it addresses procedural fairness issues. If not, the CL or civil law principles will apply. In any event, the protection for wrongful dismissal will be governed by contract principles.
- Two exceptions:
 - Employees not protected by employment contracts and at pleasure employees

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- Duty of fairness may arise by necessary implication in some statutory contexts
- Dunsmuir narrows significantly the circumstances in which a duty of fairness applies. Although the general principles outlined in Indian Head School District concerning the duty of fairness owed by administrative decision-makers, remain relevant, the court notes that on its new approach, the duty would not have applied in the circumstances of the case, given the existence of an employment contract.

DONE! The bit on Dunsmuir is messy and unclear in the text.

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Chapter 6: Independence, Impartiality, and Bias

I. Introduction

- Independence, impartiality, and bias (IIB) all center on notion of fairness
 - Decision maker should not proffer undue preferential treatment or be driven by preconceived notions
 - Vital to public confidence in administration of justice
- Reasonable apprehension of bias is sufficient to have a decision overturned
- Impartiality: Decision-makers comes to the decision without preconceived notions, with an open mind
- Independence: The means of achieving impartiality

II. Sources of the Guarantee of an Independent and Impartial tribunal

- At CL the principle of natural justice is captured in two central ideas:
 - 1) **Nemo iudex sua causa:** The decision-maker should neither judge her own case, nor have an interest in the case before her
 - aims to avoid situations where the decision-maker both prosecutes and judges the same matter or where the decision maker has an interest in the outcome
 - the rule against bias (no judging your own cause)
 - 2) **Audi alteram partem;** Hear and listen to both sides
 - Encourages the decision-maker to focus on the facts of the dispute and the relevant law, and not on extraneous considerations
- Some have argued that the guarantee of an independent and impartial tribunal is assured by the unwritten constitutional principles (little success)
 - *Ocean Port Hotel Ltd. v. BC 2001 SCC*
 - *McKenzie v. Minister of Public Safety... 2006 BCCA leave refused at SCC*
- Arguments of independent and impartial tribunal through Constitution, Charter, and other such creatures:
 - *Charter* s. 7, Life, Liberty, Security of the person
 - *Charter* s. 11(d) If charged with an offence, presumed innocent and fair and independent tribunal
 - *Quebec Charter of Human Rights:* s. 23 Right to fair hearing by independent tribunal to determine rights and obligations, and merits of any charges brought before her
 - *Canadian Bill of Rights:* ss. 1(a) LLS and enjoyment of property and right not to be deprived except through due process of law
 - 2(e) Right to fair hearing in accordance with principles of fundamental justice for determination of rights and obligations
 - *Alberta Bill of Rights:* s. 1(a) LLS except through due process of law
- What do due process and principles of fundamental justice have in common? How if at all, do they relate to CL principle of natural justice?
 - Hard questions, see for eg *Singh v. Minister of Employment and Immigration 1985 SCC*
- Independence and impartiality are context driven in their application

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- To predict the degree of IIB, you need to understand the context in which the body is functioning. Need to know the law, **the nature, the purpose, and the practical ways of operating** the administrative body in question
- Challenging administrative decisions for lack of independence has become one of the most litigated areas in AL.
- This chapter thus focuses on arguments regarding lack of independence as a source for alleging reasonable apprehension of bias on the part of the decision-maker of institution
- Other CL challenges for bias:
 - Pecuniary interest
 - The nature of the administrative state:
 - Many different actors with different roles
 - Attitudinal bias
 - Consistency and efficiency
- Also discussed later: full board meetings and lead cases

III. What is "Tribunal Independence" and Why is it Important?

- By design, most tribunals are open to suspicions of bias.
 - They are linked with the executive through a minister
 - Generally through statute, they are required to maintain contact with their minister
 - Might be asked to provide advice or information about the development of the sector
 - Minister will be involved in process of appointing and removing members of the tribunal
- The executive is inherently political and responsible for shaping government policy
 - Concern is further increased when government is the opposing party in the proceedings
- Independence in this context means that tribunals are able to "Decide matters free of inappropriate interference or influence."
 - Potential sources of interference:
 - The executive
 - Staff
 - Other tribunal members
 - Other litigants
- The public has more confidence in the tribunal's decision being made on relevant considerations without inappropriate interference when the tribunal is isolated
 - In the administrative state it is difficult to define precisely what is meant by "relevant considerations" and "inappropriate interference"
- By focusing primarily on JR of administrative action, AL has to date, given privilege to judicial conceptions of independence without adequately integrating the realities of tribunal work

A. The Development of the Law of Tribunal Independence in Canada

- The jurisprudence on tribunal has developed in three waves
 - 1) Used the independence of the judiciary as a foundation on which to mould the concept of tribunal independence
 - 2) *Ocean Port Hotel* affirmed the hybrid nature of tribunals and maintained that there is no general guarantee of independence where tribunals are concerned
 - 3) Retrenchment: Litigants pushed again for judicial declaration that administrative

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tribunal independence is guaranteed by the constitution

1. *Laying the Groundwork: The Theory of Judicial Independence*

- Judicial independence ensures that judges are free from influence and interference
- Dickson in *Beauregard v, Canada*: "the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them..." (para 21)
- **To guarantee independence from government, three conditions are necessary:**
 - 1) Security of tenure
 - Stops the executive from removing judges for making decisions they don't like
 - Judges can only be removed for cause
 - Guaranteed by the constitution: Judges hold office as long as they have good behavior until the age of 75. (s. 99)
 - Before being removed, judges must have opportunity to respond to the allegations against them
 - At pleasure appointments of judges have been rendered invalid
 - 2) Financial security
 - Two goals:
 - 1) Guarantee that pay will not be altered for reasons such a discontent with decisions rendered
 - To accomplish this, judges salaries are guaranteed under the constitution. (See s. 100)
 - Also, compensation commissions have been set up to negotiate judges' pay
 - 2) Sufficient pay to address worries of bribery and to ensure judges do not seek to otherwise supplement their income
 - 3) Administrative control
 - Deals with the manner in which the affairs of the court are administered. EG: budget allocation for buildings and equipment, assignment of cases, etc
 - Allocation of court cases falls to the chief justice
 - For the Supreme court, the tax court, and the federal court, the Federal Commissioner of Judicial Affairs negotiates on the behalf of the courts to get government funding
 - Trying to ensure judges do not decide cases in certain ways to protect their own employment and interests
 - Administrative control, unlike the first two controls, has a primarily institutional nature. (As opposed to an individual nature)
 - It is not the individual judge that is at issue, but the relationship between the courts and the government
 - *There is also adjudicative independence* There is nothing said about it
 - The goal is not the protection of judges, but the protection of the public
 - Providing independence aims to assure the public that judges are deciding impartially

2. *From Judicial Independence to Tribunal Independence*

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- **Test for tribunal independence is whether a reasonable, well-informed person having thought the matter through would conclude that an administrative decision maker is sufficiently free of factors that could interfere with her ability to make impartial judgements.** (AKA the reasonable apprehension of bias test)
 - Test has been used to determine whether a decision-maker has exhibited bias. It has also been used to test administrative bodies as a whole.
 - The standard from tribunal independence is not as strict as for judicial independence
 - *Canadian Pacific Ltd. v. Matsqui Indian Band*
 - While administrative tribunals are subject to the *Valente* factors, the test for institutional independence must be applied in light of the functions being performed by the tribunal. The requisite level of independence (security of tenure, financial security, and administrative control) will depend on the nature of the tribunal, the interests at state, and other indicia of independence such as oaths of office.
 - The operational context of the tribunal must take into account both the tribunal's functions as declared in its enabling statute and the tribunal's functions in practice.
 - In *Matsqui* the need to see the tribunal in practice was the point of contention
 - The majority held that Lamer's test should be deferred until the tribunal is up and functioning in order to see how they operated in practice. The minority agreed with Lamer's test, but I guess, wanted to apply it strictly to the tribunal as it is envisaged in the statute
 - In 2747-3174 *Quebec Inc. v. Quebec (Regie des permis d'alcool)* 1996 SCC (**Regie**) SCC held that the directors of the Quebec liquor board had sufficient security of tenure. There is no need for administrative actors to have tenure for like (unlike judges).
 - Court did say that at pleasure appointments were insufficient. The fixed term appointments were acceptable because the directors; orders of appointment provided expressly for what constituted grounds for dismissal
 - They could also contest their dismissal in court
 - Court also held that it was not unreasonable for a minister to have many points of contact with a tribunal under its responsibility. There was no evidence that the minister could affect the decision-making process
 - Best attempt to explain the normative grounding for why tribunals do not need the same level of independence as the judiciary is found in *Ocean Port Hotel* (below)
 - While administrative control is similar in courts and tribunals in many cases, financial security and security of tenure are starkly different.
 - Tribunal members can be appointed for different terms. They also tend to make less money than judges.
3. *Ocean Port Hotel and Parliamentary Supremacy*
- *Ocean Port Hotel Ltd. v. BC* 2001 SCC
 - BC Liquor Appeal Board could impose sanctions and remove licenses upon finding that a licensee contravened the province's liquor act.
 - The RCMP reported five breaches and these were said to be substantiated on the BOP by a senior investigative officer

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- The officer imposed a two day suspension on the hotel's license
- The Appeal Board held a hearing de novo and confirmed the suspension. Finding that the evidence supported four of the five alleged infractions
- At the BCCA the hotel argued that the board lacked sufficient independence to render a fair hearing and therefore the board's decision was invalid
 - The terms of appointment were at pleasure of the lieutenant governor in council
- BCCA focused on similarities between the BC liquor board and the Quebec board
 - Easy, since the Regie decision had just come down
- In Regie, Gonthier held that fixed term appointments held by directors would not be valid if the directors could be removed without cause (ie at pleasure)
- The decision to suspend a liquor license closely resembles a judicial decision and has serious economic consequences
- The same contraventions could have been prosecuted in BC Provincial Court where high level of independence would be guaranteed
- Moreover, the statute provided for lesser penalties in Provincial Court
- At SCC, the hotel also argued that tribunals exercising adjudicative functions require the same degree of independence guaranteed to the courts.
 - The independence of superior courts of inherent jurisdiction is enshrined in the constitution
 - The Hotel relied on *Reference re Remuneration of Judges...PEI 1997 SCC* which held that judicial independence is an unwritten principle that applies to both superior courts of inherent jurisdiction and provincial courts of summary jurisdiction
 - The SCC disagreed that this reasoning applies to tribunals.
 - Judicial independence developed to protect the judiciary from the executive. Administrative tribunals are not separate from the executive.
 - Administrative tribunals may be seen as “**spanning the constitutional divide** between the executive and the judicial branches of government.” (para 24)
 - Tribunals are created precisely for implementing the policies of the executive
 - In doing so tribunals may be required to make quasi-judicial decisions
 - Tribunals' primary role as policy makers and their status as extensions of the executive make parliament the best determiner of their degree of independence
 - The legislature's will should prevail in determining a tribunal's degree of independence, structure, and responsibilities
 - There is no free-standing constitutional guarantee of tribunal independence
 - Tribunal independence is a CL principle of natural justice. The degree of independence required by CL can be ousted by statute (express or by necessary implication)
 - Few, but some, tribunals will attract Charter or quasi-constitutional requirements of independence
- Basically Ocean Port held that there is no general constitutional guarantee of

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independence for administrative tribunals

- The BC ATA was created to provide guiding principles and uniformity to various aspects of administrative law. Section 3 suggests initial appointments of 2-4 years and reappointments of up to five years.
 - In Quebec, as of 2005, their ATQ provides tenure during good behavior. This is equivalent to the tenure of judges of the courts of inherent jurisdiction
4. *Reasserting the Push For Independence: Unwritten Constitutional Principles, Tribunal Independence, and the Rule of Law*
- Because tribunals are an extension of the executive, there is no general constitutional guarantee of independence (Ocean Port)
 - The third wave involves litigants pushing again for constitutional guarantees of tribunal independence.
 - *McKenzie*: Argued guarantee should be expanded to rental tenancy arbitrators. Court did not address this because provisions were repealed, so it was a moot point
 - *Bell Canada v. Canadian Telephone Employees Assn.* 2003 SCC: had suggested a spectrum of decision-making types.
 - At one end: highly adjudicative tribunals endowed with court-like powers and procedures could require stringent procedural fairness, including a high degree of independence
 - At other end: Tribunals that dealt primarily with developing or supervising the implementation of government policies may need to offer little procedural fairness and independence.
 - Petitioner argued that tenancy arbitrators were at the high end of the spectrum and it would violate the rule of law to deny constitutional guarantee of independence
 - Petitioner was an arbitrator who had her appointment rescinded mid-term
 - BCSC agreed with petitioner.
 - Judicial independence stemmed not only from specific Charter provisions (7 and 11d), but also from unwritten constitutional principles dating back to 1701 UK Act of Settlement. These principles applied because the preamble to the constitution say that the Canadian constitution will be similar to the British one.
 - In *Ell v. Alberta* 2003 SCC, the SCC held that the unwritten principles also protect the judicial independence of justices of the peace.
 - In light of extension of unwritten principles to classes decision-makers beyond superior and provincial court judges, the highly adjudicative nature of tenancy arbitrators, and that the tenancy jurisdiction had been taken from the courts of civil jurisdiction, judicial independence should apply to tenancy arbitrators.
 - Upheld at BCCA, leave to appeal to SCC denied
 - The author suggests that the court maintains the the rule of law, through the affirmation of the principles of judicial independence in this case, will serve to keep the legislature from inappropriately vesting tribunals with lesser aspects of natural justice than they should have

IV. Discussion

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A. Competing Images: Views of Independence and Impartiality from the Inside and Outside

1. The Appointment and Removal Process: Institutions, Ideologies, and Institutional Culture
 - Some of the most controversial and contested issues surround processes of appointment and removal and security of tenure
 - Tribunals are distinct from courts insofar as they are institutions in which their members and staff work together within a broad framework of regulatory governance aimed at managing a sector of industry.

B. Bias, Adjudicative Independence, and Policy Creation

- Policy making is central to tribunal existence
- Adjudicative tribunals create policy through three primary modes:
 - 1) Decision making
 - 2) Informal rule creation through the use of soft law such as guidelines, bulletins, and manuals
 - 3) Formal rule making through delegated legislation
- Generally the policies serve to:
 - further the law the agency is mandated to administer;
 - Promote consistency in the decisions rendered by the tribunal's various members; and
 - Render the tribunal more efficient in its decision making process
- In the context of the administrative state, policy creation relates to the expertise possessed by the tribunals that administer and further the law under a particular statute.
- Tension arises when methods used by tribunals infringe on the adjudicative independence of the individual decision maker.
- Adjudicative independence is often challenged
 - This concept embodies the ability to decide free of inappropriate interference
 - EG: Pressure to decide a certain way, substitution of a decision.
 - This is a delicate balance area. Tension between the need for tribunal members to collaborate in order to further the law as an institution and the need for the decision maker to have room to make correct decision
 - Shows up most frequently in full board meetings
 - The tension between policy and adjudicative independence also surfaces where an agency assists the executive in developing policy and the use of lead cases to promote efficiency and independence
 - Adjudicative independence also ensures that decision makers are not biased.

1. Reasonable Apprehension of Bias

- Close relationship between IIB, but they are distinct concepts
- "Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and parties in a particular case. The word "impartial"...connotes absence of bias, actual or perceived." *Valente* 15
 - Deals with the attitude of the institution and the decision maker in respect to **both the parties and the issues** before them
 - Not just impartial towards the parties, but also impartial towards the issue
 - Either impartiality can raise reasonable apprehension of bias
- Test for bias relies on perception, not actual bias. If a reasonable person with a well

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informed understanding of how the tribunal functions perceives that the decision making is biased, then this is enough to have the decision quashed

- Test comes from dissent in *Committee for Justice and Liberty v. National Energy Board 1978 SCC*
 - Chair of panel of National Energy board was responsible for issuing certificates and receiving applications. Chair had been involved in study group that put the application together. SCC said there was a reasonable apprehension of bias
 - "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude...?"
- the grounds for an apprehension of bias must be substantial. Proof on BOP
- Th test applies the same to institutions
- whether there could be "a reasonable apprehension of bias in the mind of a fully informed person in a *substantial number of cases.*" *Lippe 59*, see also *Matsqui 29*
- Whether bias will be found is context specific
 - Contrast *Committee for Justice* with *Imperial Oil*
 - In *Committee*, SCC found reasonable apprehension of bias in chair's involvement. The chair was to act in an adjudicative capacity
 - In *Imperial Oil*, Minister of Environment's involvement created no such apprehension. Minister did not act in an adjudicative capacity. His work was political and in the public interest. Minister's involvement in other site decontaminations involving lawsuits did not create a reasonable apprehension of bias when he later exercised his statutory duties
- Determining what procedural safeguards, including independence and impartiality, is a matter of balancing factors including:
 - The nature of the decision being made;
 - the nature of the statutory scheme; and
 - the agency's choice of procedures.
 - ***THESE ARE KIND OF MOOT....THE BAKER FACTORS SHOULD BE APPLIED**

2. Consistency and Decision Making

- Methods used to promote consistency in decision making have prompted allegations of reasonable apprehension of bias
 - At heart, the question is whether an individual's capacity to make correct decisions has been compromised
- Tools used tend to involve the input of tribunal members other than those charged with deciding a particular claim
- The policy that consistent decisions develop is a form of non-binding guidelines.
- In a trilogy of cases, the SCC set out the guidelines that tribunals should follow so that members can collaborate without compromising the adjudicative independence of any decision maker (or the fairness to the parties). The cases are: *Consolidated-Bathurst Tremblay*, and *Ellis-Don Ltd.*
- ***International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd. 1990 SCC [Consolidated Bathurst]***

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- Ontario Labour Relations Board held a **full meeting** to discuss draft reasonings of one its its three member panels. Purpose: Facilitate understanding and appreciation of policy developments through the board, evaluate practical consequences of proposed policy initiatives. Issue at meeting was whether they should replace a legal test with a new one
- At issue in court: Whether full board meetings constitute a breach of the principle of natural justice that "he who hears must decide", by placing decision maker where they can be influenced by others who have not heard the evidence
- Also argued that such meetings are unacceptable because parties cannot address issues that might arise in the meeting
- Basically argument was improper encroachment on independence of decision maker and lack of opportunity to know the full case to be met
- SCC acknowledged need for full board meetings.
 - Majority said such meetings allowed members to benefit from the acquired expertise of the whole board. Also, consultation was conducive to achieving the Labour Board's mandate
 - The structure of the Board was conducive to the exchange of opinions between the management and the union in order to use its combined expertise to regulate labour relations quickly and with finality
 - Consistency is a goal that should be fostered so that outcomes are not dependent on the identity of the individual decision maker
 - The privative clause made it even more important that the Board take measures to avoid conflicting results
 - Fostering consistency should not compromise any panel member's capacity to decide in accordance with her conscience and opinions
 - The relevant issue is whether there is pressure on the decision maker to decide against her conscience
 - **Conditions for full board meetings:**
 - Discussion be limited to law or policy; no factual issues
 - Parties be given reasonable opportunity to respond to any new issues arising out of the meeting
 - The court approved the checks and balances the Board had implemented
 - No keeping of minutes
 - no keeping attendance
 - no vote at the end of the discussion
- **Tremblay v. Quebec (Commission des affaires sociales) 1992 SCC**
 - Court clarified that the imposition of consultation meetings by a member of the board who was not on the panel could amount to inappropriate constraint. Even where the consultation process is voluntary, it is important to see if in practice, the consultation in fact comprises systemic pressure
 - In this case, although voluntary in theory, the CAS made consultation compulsory when a proposed decision was contrary to the previous decisions
 - Other factors that gave reasonable apprehension of bias:

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- the president herself could refer a matter before another member for plenary discussion
 - The SCC noted that in such a case, a decision-maker may not feel free to refuse to submit a question to consultation
 - Because the Act expressly indicated that the individual decision-maker must decide matters, a compulsory group consultation was contrary to the legislative intent
 - The plenary meetings aimed at consensus
 - Many of the protection approved of in *Bathurst* were not extant
 - Attendance and votes were taken, and minutes were kept. These amounted to an appearance of systemic pressure
 - ***Ellis-Don Ltd. v. Ontario (Labour Relations Board) 2001 SCC***
 - Issue was whether facts had been discussed at a full board meeting contrary to the rules set out in *Bathurst* and *Tremblay*
 - Deals only with the issue of providing parties with a full opportunity to respond to matters discussed at plenary meetings; did not deal with questions of independence and pressure.
 - Useful because it sets out concisely the jurisprudential rules governing intra-agency consultation
 - ***Geza v. Canada (Minister of Citizenship and Immigration) 2005 FCA***
 - Issue of **lead cases**
 - Immigration and Refugee board set up a process to select one of several similar refugee claims that could be used to create a full evidential record for all
 - The board was trying to deal with a large influx of Hungarian Roma applicants
 - The case was selected with the lawyer with the most pending Roma claims
 - Minister was invited to participate at the meetings
 - Claim was then heard by an experienced panel chosen from members from across the country and because of their familiarity with the relevant country conditions and experience with case management of Roma claims.
 - Purpose was to enable the board to have one case in which there were informed findings of fact and a relatively thorough analysis of the relevant legal issues
 - ???and that's it I guess...the text just trails off into...hey birds!
3. *Adjudicative Independence and the Legislative Process*
- ***Communications, Energy and Paperworkers Union of Canada, Local 707 v. The Alberta Labour Relations Board 2004 AQB***
 - The board was consulted for its ken of the field by the executive in order to help government implement a new policy
 - As a result, Board was faced with legal battle claiming lack of independence and impartiality with respect to any matter dealing with the policy. Also a grave loss of confidence manifested by large public outcry by a major stakeholder affected by the policy
 - The question this case raises: How should feedback on the industry be transferred to the executive that has responsibility for the tribunal?

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- Communicating information without losing independence

C. Multifunctionality

- Tribunals are often created to manage polycentric mandates.
 - Their expertise is not just juridical, but often includes special ken of the sector
- Appointment process often reflects the diversity through composition requirements
 - Lawyers, experts, members of the public, et cetera
- Some tribunals appoint experts to advise them
- The structure of the enabling statute may also suggest or require polycentric mandates
- The Canadian International Trade Tribunal CITT has broad powers to create policy and adjudicate matters
 - CITT conducts inquiries and provides advice on economic, trade, and tariff matters. Also hears appeals of decisions made under various statutes by the Canada Revenue Agency
- Polycentric issues have been attacked
 - See particularly *Toshiba Corp. v. Canada (Anti-dumping Tribunal) 1984 FCA*
 - Staff research was not revealed to all parties, raising procedural fairness issues
- Many tribunals make their reports, research, training manuals, and decision making guides public
- Some tribunals try to maintain *de facto* separation within their agency
 - Trying to avoid allegations of inappropriate interference et cetera
- Most common multifunction complaint is that tribunals can appear to **both prosecute and judge matters.**
 - Generally not considered a problem if sanctioned by statute enacted in conformity with the constitution and so long as the multifunctionality does not give rise to reasonable apprehension of bias under a quasi-constitutional statute.
- Some tribunals take proactive measures to reduce apprehension of too close a relationship between prosecution and judging
 - *Lippe* suggested that impartiality in a substantial number of cases is whether the system is structured in a way that creates a reasonable apprehension of bias on an institutional level
 - **Factors to consider in looking at the tribunal regarding institutional bias**
 - Look at the tribunal, the way it operates in practice, any safeguards that may exist to prevent incidents of bias in practice
- *Sam Levy & Associates Inc. v. Mayrand 2006 FCA*
 - Superintendent of Bankruptcy had power to investigate and adjudicate, hiving off adjudicative responsibility was sufficient to avoid reasonable apprehension of institutional bias and avoid violating the right to a fair hearing under fed Bill of Rights
- *Currie v. Edmonton Remand Centre 2006 AQB*
 - Court found institutional bias from overlapping functions of prison guards and the disciplinary board members.
 - Disciplinary hearings used to determine if breaches of conduct occurred and what punishment appropriate

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- Problem: Those responsible for maintaining order were also placed on the disciplinary panel
- Created appearance of conflict: Institution's primary decision would be to maintain order at the expense of prisoners' having a fair opportunity to contest the issue
- Applicants argued that Alta Corrections Act and Correctional Institution Regulation, which allowed the decision making structure, breached ss. 7 and 11(d)
- Court found that s. 11(d) did not apply but there was a breach of s. 7
 - Also, no traditional guarantees of independence existed
 - Also, the culture of the institution and the types of hearing within the institution made it impossible for a prisoner to assert her side of the story

V. Conclusion

- Although security of tenure, financial security, and administrative control are central to judicial independence, they are not central to administrative independence. impartiality, and bias.

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Chapter 7: The Charter and Administrative Law: Cross-Fertilization in Public Law

I. Introduction

- Relationship between AL and Charter law is complex and still unfolding
- Emerging consensus is that Charter does not replace CL, but rather embodies and supplements fundamental legal principles contained in it
- In realm of procedure, courts rely on CL to interpret PFJs set out in s. 7
- When reviewing substance, of decision, they tend to rely on Charter interpretation from *R. v. Oakes 1986 SCC*, to test validity of legislation

II. Procedural Fairness and the Principles of Fundamental Justice

- Duty of procedural fairness requires decision-makers to provide a fair hearing to affected individuals
 - At minimum: Right to make submissions (hear the other side....*What's the latin?*) and decide the matter impartially, independently, and without undue delay
 - No necessary right to oral hearing
 - Right to notice of proceedings and fair opportunity to respond
 - Implicit in duty to hear other side is duty to disclose facts and issues
 - Sometimes right to legal counsel
 - These safeguards aka "**participatory rights**"
 - If decision affects an important interest, then right to reasons
- **Charter section 7** says: "everyone has the right to life, liberty and security of the person and the right to not be deprived thereof except in accordance with the principles of fundamental justice"
 - Section 7 is the only rights-conferring provision in the Charter that refers to PFJs
 - Within the Charter's substantive rights-conferring provisions, only PFJs have been found to include procedural fairness. ***Wtf does this mean? PFJs include procedural fairness, but something else in section 7 does not? What else? What has been found to NOT include PFJs? What do they mean by the Charter's substantive rights-conferring provisions?***
 - Arguably section 1 implicitly contains procedural fairness by virtue that infringements of rights must be limited to those that can be "demonstrably justified in a free and democratic society"
 - Also, the preamble refers to the rule of law, so a procedural rights argument could be made in this regard
 - *What about the rule of God? God is in the preamble, no?*
 - **To access procedural safeguards in the context of s. 7**, complainant must establish that their LLS interests are impaired by the relevant decision
 - ***If complainant cannot prove impairment of LLS interests, then procedural safeguards might still apply, but under the CL
 - Another threshold issue: At CL, judges are reluctant to apply onerous procedural requirements in the face of clear statutory language that dictates otherwise. However, under s. 7 the procedural requirements of the PFJs are Constitutional requirements.

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- **If section 7 is engaged, then procedural fairness is engaged through PFJs and the legislation MUST conform to them in order to be lawful**

A. Oral Hearings and the Scope of Section 7

– ***Singh v. Canada (Minister of Employment and Immigration) 1985 SCC***

- PFJs include procedural fairness
- Seven refugee claimants had no opportunity to present their cases in oral hearings before either the decision-maker at first instance (the minister) or the Immigration Appeals Board.
- At the time, the statutory scheme provided for possibility of oral hearing, but only before the IAB, and only if the IAB decided the refugee had a legitimate chance based on their written submissions
 - Statutory scheme precluded IAB from granting oral hearing if claimant could not make out reasonable grounds.
 - The scheme excluded possibility of oral hearing, so CL could not fill the gap, as that would contradict the express intent of the legislation (No omission, but a clear exclusion)
- Six judges: 3 found infringement of s.7 Charter; three found infringement of s. 2(e) Bill of Rights
 - Wilson Charter:
 - “every one” means every human being physically present in Canada
 - Security interest includes both from threat of physical punishment and freedom from such punishment
 - In this case, threshold crossed by Singh
 - While no constitutional right to stay in Canada, Singh has constitutional right to have claim determined in accordance with PFJs.
 - Interests protected under s. 7 are so important that generally an oral hearing will be required.
 - Where credibility is at stake, it would be “difficult to conceive of a situation” where an applicant would not be entitled to an oral hearing
 - It was the Charter that allowed Singh to overcome the clear statutory language. But once Charter provide grounds to overrule the legislation, the court used CL to define the content of the procedural requirements: Credibility from criminal and civil context requires oral hearing.

B. Incorporation of the Common-Law Framework Under Section 7

– ***Baker v. Canada 1999 SCC***

- Framework for establishing content of procedural fairness in a particular case is composed of five non-exhaustive steps:
 1. Nature of the decision
 - The more judicial the decision, the weightier the procedural safeguards need to be
 2. Role of the decision within the statutory scheme
 - EG: If the decision constitutes an exception to the statutory scheme, then less safeguards are required. On the other hand, if procedural safeguards are present elsewhere in the statutory scheme and the decision is final, then more safeguards

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are likely due

3. The practical importance of the decision to the individual affected
 4. Legitimate expectations
 - Can result from past experiences or representations of public officials
 5. Deference to minister's or agency's choice of procedure
- Baker had right to make submissions, but not oral ones. Children denied standing because their interests in the proceedings could be communicated through Baker's lawyer.
 - Court also considered the issues of bias and the duty to give reasons independently of the *Baker* framework
 - In *Suresh* the SCC extended the *Baker* framework under s. 7 to establish specific requirements of the duty to give reasons
 - ***Suresh v. Canada (Minister of Citizenship and Immigration) 2002 SCC***
 - Convention refugee detained on a security certificate for alleged links to tamil tigers
 - The FC upheld certificate. In a subsequent hearing, the adjudicator found Suresh to be inadmissible because of membership in a terrorist organization
 - Pursuant to s. 53(1)(b) of *Immigration Act*, Minister issued opinion that Suresh was a danger to national security and should be deported, notwithstanding that Suresh would face risk of torture if returned to Sri Lanka
 - SCC held that barring extraordinary circumstances, deportation to torture will generally violate PFJs protected by s. 7 of the Charter.
 - Case was decided in favour of Suresh on grounds that Minister breached Suresh' s.7 PFJs by failing to provide Suresh with adequate procedural safeguards and reasons
 - Unlike the statutory provisions in *Singh*, s. 53(1)(b) in *Suresh* did not require the Minister to adopt or follow any particular procedure.
 - Minister notified Suresh of intent to issue a "danger opinion" and gave him opportunity to make submissions. Submissions were considered by an officer who weighed them against government's commitment to fight freedom fighters and recommended danger opinion. Suresh had no opportunity to see or respond to officer's memo.
 - With lack of statutory guidance as to procedural safeguards, court used *Baker* criteria

C. The Duty to Disclose and the Right to Reply

- In *Suresh*, the court weighed the *Baker* factors and determined that Suresh did not have a right of an oral hearing, but had the right of disclosure of materials on the basis of which Minister would decide the case, including the officer's memo. Suresh also had the right to reply to the claims set out in the memo. Minister had obligation to consider Suresh' submissions and those of her staff
- ***Pritchard v. Ontario (Human Rights Commission) 2004 SCC***
 - Case of JR, NOT Charter
 - CL doctrine of Solicitor-client privilege barred a complainant from from obtaining disclosure of a legal opinion drafted by the Commission's in house counsel
 - *Issue did not arise in Suresh because the minister provided Suresh with the officer's memo, but only after decision was made*
 - Ordinary statute can oust SCP, but such a statute will be interpreted narrowly

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- *Christie* (poverty lawyer tax case). Court will not use unwritten principles to invalidate legislation
- Where a decision impairs s. 7, the state will be required to provide the individual with legal counsel in certain situations
- ***New Brunswick (Minister of Health and Community Services) v. G.(J.) 1999 SCC***
 - NBMHCS sought to extend a previous custody order over an indigent complainant's three children
 - Lamer for majority and LHD for concurring minority held that a forced separation would be a serious and profound effect on the parent's psychological integrity and stigmatize her, thereby engaging s.7 security of the person
 - Custody proceedings are adversarial and held in court
 - Lamer held that because of the seriousness of the proceedings, their complexity, and the limited capacities of the individual, the principles of fundamental justice required a fair hearing and a fair hearing required the state to provide legal aid to the parent
 - The court has never found an infringement of s. 7 justified under s. 1.
 - The interests protected under s. 7 are very significant; thus "rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society." (At 99)
- The SCC in *Suresh* insisted that the CL of procedural fairness is not constitutionalized, but informs the constitutional principles that apply. But:
 - By enfolding procedural fairness into the s. 7 principles of fundamental justice, procedural fairness has been elevated to new heights
 - The consistent refusal of the SCC to find an infringement of s. 7 justified under s. 1, signals the extent to which the right to a fair hearing has been constitutionalized

F. Undue Delay

- This is another element of procedural fairness
- ***Blencoe v. British Columbia (Human Rights Commission) 2000 SCC***
 - While undue delay is not constitutionalized, in certain circumstances it could infringe security of the person interests. Specifically, it could stigmatize and impair the psychological integrity of the alleged wrongdoer
 - Blencoe was a minister and was accused of sexual harassment by an assistant in March 1995. One month later he was removed from cabinet and the NDP caucus. July and August two others filed sexual harassment complaints with the BC Human Rights Commission. Hearings scheduled in March of 1998
 - This basically ruined his political life/career and forced him to move twice
 - Court said that even if the delays were the cause of his suffering, "the state has not interfered with the respondent and his family's **ability to make essential life choices**" and so the state did not infringe Blencoe's s. 7 security interests
 - SCC also considered whether the delay had caused Blencoe to suffer an **abuse of process** as a matter of CL
 - Court held that in principle such a claim could be made out if there was prejudice caused by the delay (EG a witness became unavailable etc), or if the delay caused

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significant psychological harm, or attached a stigma to a person's reputation that **brought the human rights system into disrepute**

- Bastarache found that the threshold had not been crossed in this case
- LeBel's (and three others) **dissent**:
 - Case could be settled on AL grounds, no need to invoke the Charter
 - Rejected majority contention that the unreasonableness of delay depends on whether it brings the human rights system into disrepute
 - The facts did give rise to an undue delay, especially considering the five month period that the Commission did nothing
 - To take into account the interests of the women, a stay was not warranted. Instead he ordered costs for Blencoe and an order for an expedited hearing
- Since majority did not find a s. 7 infringement, they did not have to consider whether the principles of fundamental justice had been compromised
 - *Were an infringement of the security interest made out, one would expect the court to import its CL reasoning on undue delay into its analysis of the principles of fundamental justice, just as *Baker* framework was imported into *Sures*

G. Ex Parte, in Camera Hearings

- After Trade center bombings, many countries expanded terrorism legislation
- Canada already had Immigration and Refugee Protection Act, this allowed non-citizens suspected of terrorism or links to terrorism to be detained. IRPA detainees are not charged criminally, so no presumption of innocence or other due process guarantees that permeate the criminal law
- Part of review of security certificates could occur behind closed doors if the information could not be disclosed for national security reasons
- This scheme led to *Charkaoui*
- ***Charkaoui v. Canada (Minister of Citizenship and Immigration) 2007 SCC***
 - Canadian security agencies alleged Charkaoui was involved with terrorist organizations
 - Charkaoui was a permanent resident
 - Minister of Public Safety and Emergency Preparedness issued security certificates under s. 77 of IRPA, leading to their detention pending deportation
 - Under ss. 78-84, the detentions and the reasonableness of security certificates are subject to review by the federal court
 - During review, *ex parte* and *in camera* hearings are held at the request of Crown if judge believes disclosure could harm national security (neither the accused, nor their lawyer are present)
 - Judge then provides accused with summary of evidence, no sources or details that could undermine national security are presented
 - Judge can receive and rely on evidence that would not be admissible in court of law. Such as uncorroborated hearsay provided by foreigners known to use torture
 - If the judge determines the certificate is reasonable, there is no appeal or opportunity for further HR
- McLachlin for unanimous court said the certificates engage liberty and security interests. Liberty because of detention pending deportation and security because

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- deportation could deprive person of life or liberty, or subject them to torture
- The review violated principles of fundamental justice because it denied named person a fair hearing
 - We have adversarial court system, so judges cannot investigate and gather evidence
 - As a result, federal court could have to decide on the reasonableness of Crown's case without the benefit of having the evidence tested adequately
 - Also, named person cannot raise legal objections to the evidence or argue against it.
 - The result is that judges could have to decide the matter without a full and fair appraisal of all the facts and law at issue
- The secrecy requirements could also prevent a person from knowing the case to be met; it could be based entirely on undisclosed material
 - McLachlin said this effectively gutted the principle of knowing the case to be met when liberty is in jeopardy
- Court also reaffirmed that s. 7 does not permit a free standing inquiry into whether a legislative measure strikes the right balance between individual and societal interests. This inquiry should occur at s.1 stage
- The Crown's failure to incorporate something like an *amicus curiae* (an independent security cleared lawyer) showed that s.,7 could not be saved under s.1 because Crown did not choose minimally impairing system
- *Charkaoui* was heralded as a victory for refugee advocates, but it did not close off the *Suresh* exception. IT was a victory because it provides procedural safeguards to non-citizens, a traditionally very vulnerable group
- **Suresh Exception:** In some circumstances, a person can be deported to torture
- A troubling issue is that the SCC does not seem to think that non-citizens deserve Charter and Rule of Law protection. For example, the court in *Charkaoui* never asked whether it was just to incarcerate non-citizens without the protection of fundamental criminal law principles such as the presumption of innocence, the Crown's obligation to prove its case beyond a reasonable doubt, and protection from double jeopardy.

III. Review of Administrative Decisions Under the Charter

- How has the methodology developed by the courts to review legislation impugned on Charter grounds crept into the review of administrative decisions where a Charter right is at issue
- *Singh and Blancoe* held that resort to the Charter is unwarranted where AL can resolve procedural issues
 - Part of the rationale is that Charter review involves minimal deference to legislative intent
 - JR at CL is about determining legislative intent (review of substance) or supplying the omission of the legislature (review of procedure)
 - CL JR also lets the legislature have the last word (read democratic process here). Clearly worded express legislation will trump CL and no resort to s. 33 is needed
- The Charter appears to allow judges to go above the legislature (in the absence of s. 33) and thus places stress on on the idea that law making and public administration are exclusively in

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the domain of the people's elected representatives and their delegates.

- *What a crock of shit. The legislature allows the Charter to allow the courts to do X. If the legislature does not want this, they can amend the Charter. The courts are clearly under the legislature and such arguments are stupid*
- When the focus of review is the decision itself (substantive review), and a discrete Charter right (*what as opposed to a not so discrete one?*) is at stake, the Courts review the decision using almost exclusively the analytic framework developed under the Charter to review legislation
- **Two step inquiry:**
 - 1) Does the impugned decision infringe a Charter right; and
 - 2) Can the infringing decision be saved under section 1 as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society
- The court does not always resort to the Charter when it can, and the majority opinion is far from unanimous
- When reviewing a decision that touches the Charter, the court has both AL and Charter principles at their disposal
- **Three frameworks the SCC has used to review decisions alleging Charter violations:**
 - 1) The Orthodox Approach: The majority position. Reviewing court uses two step Charter framework to determine legality of impugned decision. AL still relevant to review questions of jurisdiction, fact, and application of law to facts. But where Charter is at play and contending values are in play, the critical analysis takes place under s. 1.
 - 2) The Mixed Approach: First, review legality of decision under AL principles (grant of discretion, unreasonable interpretation, etc). Then, ONLY IF the decision is lawful under AL, the two-step Charter approach is brought in
 - 3) The AL Approach: Eschews review under the Charter and limits scrutiny exclusively to what is available under AL

A. The Orthodox and Mixed Approaches

- ***Slaight Communications Inc. v. Davidson 1989 SCC***
 - First consideration of Charter application in an administrative decision
 - D worked for Slaight for four years and then was dismissed. D grieved to the labour board. Adjudicator found D had been unjustly dismissed and part of remedy included a "positive order". Required employer to write an unblemished factual reference letter. Also required negative order prohibiting the employer from providing anything but the letter to prospective employers; effectively stopping employer from blemishing D through telephone etc
 - Slaight sought JR and argued both orders infringed freedom of expression and infringement could not be justified under s.1
 - Dickson for majority: Both orders infringed 2(b) but saved under s.1
 - Rationally connected to enabling statute's legislation
 - Proportionate to the statute's end
 - Remedying power imbalance between employer and employees when employees are at their weakest
 - Without analysis said orders were reasonable from an administrative standpoint and that administrative law unreasonableness should not impose a more onerous standard

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- of review than the Charter.
- Administrative law review important for areas untouched by the Charter, such as questions of fact, because "in contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and underdeveloped values and lacks the same degree of structure and sophistication of analysis." (1049)
- Remains the basis of the orthodox approach today
- Lamer, DISSENTING IN PART
 - Found on AL grounds that adjudicator had made a patently unreasonable decision and had thereby exceeded his jurisdiction by issuing the negative order.
 - Negative order could impute to Slaight an opinion he did not have
 - Result is totalitarian
 - Lamer did not weight it against statute objective
 - Lamer said positive order was not as bad and upheld it as reasonable in light of the statute's purpose
 - Citing Hogg Lamer reasoned: (this is the orthodox approach now)
 - **Since parliament cannot pass a law inconsistent with the Charter, it cannot authorize administrative action that would breach the Charter.**
 - **Laws can be consistent with the Charter if they infringe a right but are saved by s.1. As such, Parliament can grant discretionary power that violates a right so long as that power is saved by section 1.**
 - **If Parliament expressly or by necessary implication, grants powers to infringe the Charter, then the legislation is subject to review under s. 1**
 - **If parliament grants an imprecise discretion that does not confer expressly or by necessary implication, the right to violate the Charter, then the order (and NOT the legislation) is tested under s. 1**
 - Infringed 2(b) but upheld under s.1 for roughly same reasons as the majority. In *Slaight*, the order was tested
- **Lamer uses administrative law where feasible (to knock out a decision that is patently unreasonable. He then goes to the Charter to examine the decision where administrative law would not have a role.*
- The full court concurred with Lamer about the Charter's applicability to administrative decisions. They parted ways with Lamer in their insistence that administrative law should yield to the Charter whenever Charter rights were in play and competing interests had to be weighed.
- Post *Oakes*, it was recognized that social justice and equality were underlying values in the Charter. As such, the Charter permitted the majority to give effect to the legislative purpose of promoting equality between employer and employee.
 - At common-law, judges had historically neglected this ideal when contrasted with claims to freedom of expression
- Lamer's blueprint for Charter review of discretion is the well established orthodox expression. However, courts have not adopted his inclusion of AL. Court's follow Dickson here and use s.1 to the exclusion of AL to determine the legality of decisions clearly infringing the Charter.

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- See EGs: *Eldridge v. BC (AG) 1997 SCC*: Court struck down decision to not provide sign language interpretation in hospitals
- *Ross v. N.B. School District No. 15 1996 SCC*: Infringement of teacher's 2(b) freedom to make racist remarks upheld under s.1
- At page 184 the text makes no fucking sense. It says use the Charter approach and **completely exclude** administrative law approach. Then the next sentence says "in such cases. Review on administrative grounds is generally reserved for review of factual determinations or issues involving application of law to facts and the agency's jurisdiction to make such applications."
- These issues are segmented away from the Charter analysis
- **"As a rule, it appears the SCC, under the orthodox approach, will engage in substantive administrative law review when contending values are at stake only if the complainant fails to establish a prima facie infringement of a discrete Charter right, in which case s.1 never enters the picture."** This is all they needed to say
- In *Multani*, the court further entrenches the orthodox approach. Holding that a school's decision to stop a Sikh boy from wearing a ceremonial dagger sewn into his clothing violated s.2(a) religion and not saved under s.1. Also said that administrative law should not apply where Charter right clearly at stake.
- Criticisms:
 - Lamer begins from traditional standpoint that whenever possible, legislation should be interpreted as conforming with the Charter
 - *Little Sisters Book and Art Emporium v. Canada (Minister of Justice) 2000 SCC*
 - Systemic long term discrimination under a facially neutral legislation
 - Majority: said since Customs Act could apply in non-discriminatory fashion, then review must be of the decisions
 - Minority: Legislation made no reasonable effort to respect Charter, and such an effort is required.
 - *Where is the criticism????????????????*

B. The Administrative Law and Mixed Approaches

- In a number of important cases, the court has declined to use the Charter where it could have do so.
- In *Baker*, a section 7 security of the person argument could have been made.
 - LHD held that no need to engage s. 7 because the issue could be resolved on administrative law grounds. This stands in tension with the orthodox view if the s. 7 argument is seen as compelling.
 - This would create tension with the orthodox view
- *G.(J.)*, a section 7 argument could have been made. (Custody of poor mother's kids)
- *Trinity Western* and *Chamberlain* clearly involved Charter values and arguably involved concrete Charter rights, yet neither was resolved through recourse to the Charter framework
- ***Trinity Western University v. BC College of Teachers 2001 SCC***
 - The college refused to grant the evangelical TWU permission to assume full responsibility for its educational program. College worried that TWU promoting culture of discrimination (had a thing that everyone had to sign that said gay is a sin) that would

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- be passed onto public schools
- Majority applied pragmatic and functional approach and reviewed the decision on a standard of correctness.
 - Charter s. 15 analysis in appropriate because the s. 15 interests of school children were not affected.
 - The College's decision punished religious beliefs alone, and not any wrong committed
 - Proper censure is of conduct not belief
- Impugned decision clearly infringed TWU's freedom of religion and contending values were clearly at stake. Yet majority followed orthodox approach, no review under 2(a) and s. 1. Puzzling because *Slaight* says review under s.1 allows more structured and explicit discussion of contending values.
- *From Nexis: because this textbook sucks ass*
 - *The British Columbia Supreme Court issued an order of mandamus upon judicial review of the BCCT decision to deny full accreditation to TWU of its teacher education program. BCCT had held that TWU's proposed program followed discriminatory practices against homosexuals.*
 - *SCC found that BCCT had the jurisdiction to consider discriminatory practices in dealing with the TWU application. The absence of a privative clause, the expertise of the BCCT, the nature of the decision and the statutory context all indicated a correctness standard ought to be applied to the BCCT's decision.*
 - *though the BCCT was correct in considering concerns about equality pursuant to its public interest mandate, it did not consider, as it ought to have, the right of religious freedom. The admissions policy alone was insufficient to establish discrimination as understood in the jurisprudence developed under section 15 of the Charter. In any event, TWU is a private institution not subject to the Charter and exempted in part from human rights legislation.*
 - *Furthermore, there was no evidence that TWU graduates would in fact treat homosexuals unfairly or had done so in the past. To the contrary, graduates from the combined program to date had become public school teachers with no evidence before the Court of discriminatory conduct. Absent concrete evidence that TWU training fosters discrimination, the freedom of individuals to adhere to certain religious beliefs at TWU should be respected.*
 - *The Court denied the request to return the matter to BCCT, upholding the trial judge's order of mandamus.*
- **Chamberlain v. Surrey School District No. 36 2002 SCC (Also taking this from Nexis)**
 - *The Supreme Court of Canada overturned a school board's decision not to approve supplementary educational resource material depicting same-sex parented families.*
 - *The appellant teacher applied to have three books depicting same-sex parented families approved as supplemental learning resources. The school board declined to approve the books.*
 - *The teacher sought judicial review of this decision to the British Columbia Supreme Court, who overturned the school board's decision, finding that it breached the School*

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Act since board members who made the decision were significantly influenced by religious considerations.

- *On appeal, the Court of Appeal overturned the lower court's decision, finding that the school board's decision was made within its jurisdiction.*
- *This decision was appealed to the Supreme Court of Canada. Held, the appeal was allowed by a majority of 7-2, the school board's decision was overturned and the issue was remanded to the school board to be determined according to the appropriate principles.*
- *The applicable standard of review regarding the school board's decision was one of reasonableness, and the school board breached this standard by proceeding in a manner contrary to that intended by the legislature.*
- *The school board violated the principles of secularism and tolerance in the School Act, failing to promote respect for all types of families. The school board acted on the concerns of certain parents regarding the morality of same-sex relationships without considering the interest of same-sex parented families to receive equal recognition and respect in the school system.*
- Possible that issue of standing is what led the majorities in *Chamberlain* and *TWU* to opt for review under administrative law, rather than under Charter.
 - In *Chamberlain* non of the applicants were same-sex parents or children of such parents in the relevant jurisdictions. Public interest standing would have been required.
 - In *TWU* the court would have had to establish that a corporation could initiate a challenge under s. 2(a). *which I believe a corporation cannot do. Corporations cannot have religious beliefs...right?*
- *Baker, TWU and Chamberlain* can be read as supporting a view that Charter issues do not foreclose the possibility of AL review. However, AL review does not foreclose Charter review if the impugned decision passes AL scrutiny
- Most principled defence of AL approach (don't use Charter and limit review exclusively to what is available under AL) is the concurring judgement of Deschamp and Abella in *Multani*
 - Departed from majority mainly because review of administrative decisions under s. 1 is impermissible because such a review is inconsistent with the French version of s.1.
 - It is impermissible because the French version uses the phrase "regle de droit" which has a specific canonical meaning that excludes administrative decisions.
 - So for them, s. 1 does not allow for review of administrative decisions.
 - They held that the legality of such decisions must be determined on the basis of AL, but that AL can incorporate Charter Values
 - They would have used standard of reasonableness simpliciter and that decision was unreasonable because the strict conditions for having the dagger rendered it virtually harmless.

C. Reconciliation?

- A unified approaches crucial if both official languages are to be used to posit a single framework of analysis. The idea of a shared constitution would be undermined if the french version only permitted the AL approach while the english text supports the orthodox

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- approach.
- To render them consistent:
- Option 1:
 - Regle de droit could be read to refer directly to the legislation that authorizes administrative decision making.
 - The inquiry under s.1 would begin by considering whether the scope of the authorization contained in the statute itself (the regle de droit) encompasses the power to make the decision in question.
 - If the decision is within the scope of the legislative discretion, then arguably, the legislation itself is limiting the Charter right and we remain within the meaning of the French text
 - *But this runs counter to the majority decision in Little Sisters.....the book does address this issue. The text says the subject of the inquiry is not the decision itself, but the scope of the decision's authorizing legislation. This is exactly what Little Sisters dealt with.*
 - Since the legislation is limiting the Charter right, the limit will necessarily be prescribed by law and s.1 can be used to review the limit per the orthodox approach.
- Option 2:
 - Use the proportionality part of the Oakes test to flesh out the reasoning process of JR under AL.
 - Charter rights are not absolute and can be infringed for worthy purposes
 - *What about the fact that the french/english interpretation issue already has jurisprudence? You take the interpretation that is most beneficial to the accused in the Criminal context. Applicable here? Take the interpretation that most protects the rights of the person's whose Charter rights are being violated.*

IV. Agency Jurisdiction Over the Charter

- Common principle of statutory interpretation that legislation should be interpreted so as to conform with the Charter. This applies to tribunals and courts. Sometimes legislation clearly infringes Charter rights and for a tribunal to follow the principle would be a refusal to obey the legislature.
- Issue here is whether tribunals have the authority to interpret and apply the Charter to their enabling legislation for the purpose of refusing to give effect to those provisions that violate the Charter

A. The Old Trilogy and "Jurisdiction Over the Whole Matter"

- In a trilogy of cases, *Douglas College 1990 SCC*, *Cuddy Chicks 1991 SCC*, and *Tetreault-Gadoury 1991* LaForest wrote the majorities
 - Since s. 52(1) declares the constitution to be the supreme law and any inconsistent law of no force or effect, administrative decision-makers with the power to interpret law, must interpret law in accordance with the constitution
 - Therefore, although a decision-maker cannot declare a provision invalid (reserved to courts), s. 52(1) authorizes them to both apply the Charter to their enabling legislation

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- and refuse to give effect to provisions they determine to be inconsistent with the Charter
- Court retains ability to review agency determination on standard of correctness
- Restrictive interpretation of what it would mean for an agency to interpret the law and thus apply the Charter
- ***Cooper v. Canada (Human Rights Commission) 1996 SCC***
 - Highly criticized decision
 - Question was whether HRC had authority to apply s.15 of the Charter to s. 15(c) of the Canadian Human Rights Act. 15(c) stipulated that an employer could terminate an individual who reached normal age of retirement without being discriminatory.
 - Majority said legislation did not confer on commissioner power to consider questions of law because commissioner could only screen complaints, not adjudicate them.
 - Thus HRC had to apply 15(c) and disqualified applicant from seeking redress.
 - Minority (McLachlin and L'Heureux-Dube) said all law and law-makers that touch people must conform to the Charter and that commission could consider questions of law
 - The authority to interpret law and apply the Charter must "evince a general power to consider questions of law". The power had to be conferred by the enabling legislation because agencies have no inherent authority to decide questions of law.
 - The power can be conferred expressly or implicitly
- In *Cuddis* court said that power had to be more than just the power to implement the legislations basic policies and programs, because all public officials can do this and the court does not want all public officials to have power to apply the Charter
- In *Douglas*, court insisted that recognition of agency jurisdiction over Charter did not violate separation of powers.
 - Their restrictive understanding of the authority to consider questions of law is consistent with Lamer's concurrent judgement in *Cooper*.
 - Lamer thought recognizing agency jurisdiction over Charter undermined separation of powers by:
 - Seems to let the executive decide the limits of its own jurisdiction
 - Allows executive to defeat the laws of the legislature and circumvents the relationship between legislature's first instance understanding of separation of powers and court's policing/dialogue over separation

B. Vindication of the Dissent IN *Cooper*?

- New series of unanimous decisions has adopted the dissent's opinion from *Cooper*, where they stated what a the tribunal's authority to consider questions of law is
- The three cases are *Nova Scotia (WCB) v. Martin*; *Nova Scotia (WCB) v. Laseur*; and *Paul v. British Columbia (Forest Appeals Commission) 2003 SCC*. The leading case is *Martin* which was released with *Laseur*.
- ***Nova Scotia (WCB) v. Martin 2003 SCC***
 - Under NS Worker's Compensation Act and regs, worker's who suffered chronic pain did not receive regular benefits. They received a four week restoration program and nothing else.
 - As a result, WCB denied them benefits. The workers appealed to the WC Appeal Tribunal.
 - Alleged legislation discriminated against them on basis of disability, thereby infringing

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s. 15(1) of the Charter.

- The WCAT decided it had jurisdiction to hear the Charter argument and sided with the workers. WCAT adjudicated the claim and without giving effect to the offending provisions
- The board challenged the tribunal decision
- Gonthier for the majority: administrative tribunals with jurisdiction (express or implied) "to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision" and the appeals tribunal had such jurisdiction.
 - Rejected distinction between general and limited questions of law
 - Restricted the **inquiry to one that must focus on whether the tribunal has "to decide questions of law from the challenged provision"**
 - These powers **typically found to reside in tribunals with adjudicative functions**, but such functions are not necessarily determinative
 - Factual findings and informed and expert views of the tribunal will be invaluable to a court reviewing a tribunal's constitutional decisions. However, the application of constitutional matters will still be resolved on a standard of correctness.
- *Martin's* novelty is that it eschews the prior restrictive understanding of what it meant to have authority to consider questions of law. The issue is not whether the legislation intended for the tribunal (express or implied) to apply the Charter, but "whether the empowering legislation implicitly or expressly grants to the tribunal the jurisdiction to interpret or decide *any* question of law." [Original emphasis]
- **Implicit grant of jurisdiction can be inferred from a series of factors:**
 - **the statutory mandate of the tribunal in issue and**
 - **whether deciding questions of law is necessary to fulfilling the mandate effectively**
 - **The interaction of the tribunal in question with other elements of the administrative system**
 - **Whether the tribunal is adjudicative in nature**
 - **Practical considerations including the tribunal's capacity to consider questions of law**
- **The presence of such an intent only establishes a rebuttable presumption that the agency has jurisdiction to apply the Charter**
 - **Rebut by pointing out explicit or implied statutory intent to withdraw authority to decide constitutional questions**
- A result of this ruling is that some provinces enacted legislation to insulate their statutes from Charter review by tribunals.
 - BC ATA does this. Only the Labour Relations Board and the Securities Commission can decide Charter questions. Other tribunals can still determine federalism issues, and some tribunals cannot determine any constitutional issues.
 - *Tranchemontagne v. Ontario 2006 SCC*: Court held that provinces can enact legislation that precludes tribunals from considering Charter issues through clear legislation
 - BC AG justified position by stating:
 - Courts more expert about far reaching implications of Charter issues
 - Permitting agencies to do so could result in laypeople having to hire legal services where they would not normally have to do so

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- Drain on resources and time required to resolve Charter challenges at agency level
- These resource and access to justice problems would be further exacerbated by non-bindingness of tribunal decisions
- Unchallenged assumption is that agency jurisdiction depends on legislative intent.
 - Tribunals have no inherent jurisdiction to decide questions of law
 - Should the mere fact that tribunal relies on legislature for jurisdiction to decide questions of law imply that the legislature has authority to deprive them of jurisdiction to apply the Charter to their enabling statute?
 - Respect for Constitutional supremacy weighs in favour of jurisdiction independent of legislative intent. Otherwise tribunals are not treating Constitution as supreme law
 - Put another way: Legislature cannot confer on agencies the authority to decide questions of law without conferring the concomitant authority to apply the Charter. **DONE!!!!!!!**

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Chapter 8: The Standard of Review: The Pragmatic and Functional Test

I. Introduction

- When judges review another judge's decision they ask if that judge was right or wrong; the main exception being findings of fact. It changes in the review of administrative action
- JR of ADs brings different questions: Is there a right answer? Who is better situated to determine the answer: first instance specialist tribunal or general court?
- At present the court will apply a pragmatic and functional test to determine who is in a better position to determine the issue. This will inform the court as to the requisite deference.
- In *Baker*, the SCC endorsed Dyzenhaus' view of **deference as respect** "not submission, but a respectful attention to the reasons offered of which could be offered in support of a decision."
 - Less deference = stricter review
 - Large deference = PU...not really so anymore

II. The Prequel

- Labour law is the iconic example of the fight between growth of welfare state and courts protecting private rights, privity of contract, etc..
- Frustration with courts' thwarting of attempts to protect workers, the legislatures implemented labour boards and enacted PCs to preclude entirely JR of the legality of administrative action.
- Typical PC includes a grant of exclusive jurisdiction over the subject matter, declaration of finality, and prohibition on any court from setting the outcome aside.
- PCs pose conundrum for RL
 - On the one hand:
 - Legislative grant of authority always circumscribed by terms of the statute.
 - CL presumes citizens always have access to the ordinary courts to check executive action. ADMs must at all costs be prevented from being the sole judge of the validity of their own acts.
 - On the other hand:
 - Parliamentary supremacy requires that courts interpret and apply the law according to legislative intent.
- Courts resisted PCs; best example is British case *Anisminic*
- ***Anisminic Ltd. v. Foreign Compensation Commission 1969 HL***
 - Decisions or findings that are not lawfully made are nullities.
 - Unlawful decisions:
 - Lack of jurisdiction to make the decision under enabling statute
 - Decisions that are insulated by a PC do not include actions that exceed the jurisdiction granted to the decision-maker.
- Typically issue is interpretation of a statutory provision. Historically, judges would determine if the issue fell within or exceeded jurisdiction.
 - If it fell within jurisdiction it was protected by the PC and no review would follow
 - If it fell outside of jurisdiction, it was not protected, and review was on correctness standard. As at the time, there were no gradations of review.

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- Similar to early approach to natural justice.
- Courts used two techniques primarily to circumvent PCs: “**preliminary or collateral decision**”; and “**asking the wrong question**”
- ***Parkhill Bedding and Furniture Ltd. v. Internation Molders, Etc. Union 1961 MCA***
 - Parkhill bought tangible assets from bankrupt company that was unionized. Under *Labour Relations Act*, Manitoba labour board ruled that Parkhill was bound by collective agreement. Parkhill sought JR of board's order in face of finality clause.
 - MCA held: Board's order exceeded its jurisdiction.
 - The question of whether Parkhill was a “new employer” was preliminary or collateral to whether the collective agreement bound Parkhill.
 - Whether Parkerhill was a new employer turned less on labour relations law than on bankruptcy law.
 - Especially true when asking whether the title acquired by a purchaser of assets from a trustee in bankruptcy is to be deemed encumbered by obligations under a collective agreement which had been entered into by the bankrupt company.
 - Court said a **question can be preliminary or collateral where** an issue requires consideration of “legal principles that are outside the scope of the Act.”
 - Did not explain why bankruptcy law should be determinative in context of labour relations scheme, but went on to hold that the board wrongly concluded that Parkhill was a new employer and thus gave itself jurisdiction it did not possess to declare the collective agreement bound Parkhill.
 - *My reading of the case: The court asked itself: Is the board's determination that Parkhill is the new owner a collateral/preliminary issue? Or is it the main issue? The court says it is collateral/preliminary. The issue was preliminary because, before the board could consider if Parkhill was bound by the collective agreement, it had to determine if Parkhill was a new employer. This latter determination involved questions of bankruptcy law such as the effects of bankruptcy on the contracts of workmen, the powers of the trustee in bankruptcy to sell assets...*
 - *Since this was a preliminary question, the court can review it on correctness. The board was wrong. Parkhill did not purchase the business, it bought stuff: The property, machines, etc. Only some employees were re-hired by Parkhill.*
- ***Metropolitan Life Insurance Company v. International Union of Operating Engineers 1970***
 - Ontario Labour Relations Board (OLRB) certified a union as sole bargaining agent for a group of janitors in a building.
 - The provision the board relied on required that at least 55% of employees were members of the union. The union constitution only provided for membership for operating engineers, but the union had signed up workers of many occupations.
 - The OLRB had set up policy of imposing uniform set of criteria for determining whether employees were members of a union applying for certification.
 - OLRB set out why relying on union constitution as determinative of membership would be unfair to some unions.
 - OLRB deemed that over 55% of employees had become union members by its standards.
 - The employer brought a JR application in face of a PC.

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- Decision was not protected by the PC, because the board asked the wrong question.
 - The board asked whether the employees met the Board's requirements for being members of the union (despite the union's constitution).
 - The board was supposed to determine if 55% of the employees in question were members of the union at the relevant date.
- **The court takes issue with the fact that the board, for the purpose of certification, was willing to treat any employee who satisfied the Board's criteria for membership, as an union member even if such employees clearly did not meet the union's constitutional requirements.**
- The Board asked if the employees met the criteria for membership in the union as determined by the board, instead of asking if the employees were members of the union.
- *Basically the court is trying to pull a fast one, and did a pretty shitty job of it.*
- Thus the board asked the wrong question.
- Asking the wrong question and collateral/preliminary questions have been largely discarded, but continue in muted forms.
- In *Bibeault 1988 SCC*, the court asserts that a statutory provision is properly understood according to principles of another area of law.
 - *What the fuck is that supposed to mean?*
 - In *Barrie Utilities 2003 SCC* the court held that a reasoning process that inquires into the effect of a given interpretation on advancing broader objectives of the statute can still be rejected as a flawed and self-aggrandizing attempt to expand jurisdiction of the regulator
 - *Ummmmm asking the wrong Q?*

III. The Blockbuster: CUPE v. New Brunswick Liquor Corporation

- **CUPE v. New Brunswick Liquor Corporation 1979 SCC**
 - Simple facts: CUPE went on strike. NB legislation prohibited picketing and employers could not replace striking workers with any other employee.
 - Big privative clause protecting labour board decisions
 - Board told union to quit picketing and told employer to quit using management to fill striking employee positions.
 - Issue: Interpretation of "employee" for purpose of filling position. Management personnel not employees under the Act.
 - Employer argued that management were not employees and could be used to fill positions during the strike.
 - Union argued that "with any other employee" only applied to permanent filling of positions and not to temporary replacing employees during the strike.
 - Dickson said the board said: Purpose of legislation was to prohibit picket line violence by preventing strikebreaking. Also, prevent picketing. Employer's interpretation would frustrate legislative intent because it would prohibit picketing without stopping employer from using strike-breakers.
 - **SCC allowed union appeal but did not follow precedent.**
 - Dickson canvassed reasons for PCs, emphasized:
 - legislative choice to confer certain tasks on administrative actors;

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- specialized expertise and accumulated experience of admin bodies;
- Virtues of judicial restraint
- **Dickson said that decision was at heart of the specialized jurisdiction confided to the Board, and court should only interfere (by labeling as a jurisdictional error) an interpretation of the provision that is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation."**
- CUPE 1979 did not break with earlier decisions that used jurisdiction to circumvent PCs. CUPE 1979 dramatically reconfigured the analysis of when, why, and how jurisdictional error should be deployed.
 - **Most importantly, it conveyed a sense of curial deference to ADMs, no longer the inferior tribunals.** Now specialized bodies with legislative mandates and expertise and experience to better address some issues than courts.
 - Eventually this change of view transcends PCs and to encompass substantive JR in general, including the exercise of discretion.
- Three reasons for the change in view:
 - 1) Court reassesses that respective roles assigned by the legislature to the courts and AAs in the implementation of regulatory regimes.
 1. Dickson describes the board as specialized tribunal (not inferior tribunal) possessing a legislative mandate to apply its expertise to a elaborating and implementing its enabling statute.
 - Thus courts should recognize that tribunals can bear primary responsibility for implementing their statutory mandate and can be better suited to the interpretive task at hand than generalist judges.
 - 2) The decision "bristles with ambiguity"
 - **No one interpretation can be right.** Dickson showed that the Board's decision was clearly not patently unreasonable, nor was the decision of the CA
 - *National Corn Growers* (Wilson) and *Domtar* (LHD) both amplify the fact that there is no single right answer.
 - Recognition of ambiguity allows court to ask who is in best position to interpret it
 - 3) There has been a failure by the courts to lucidly set out when a decision is reviewable.
 - Preliminary/collateral Q does not help. Easy to abuse.
- Identifying what is jurisdictional can be difficult, so courts should approach this cautiously.
 - Dickson does not provide solution, simply says jurisdiction should be determined at outset of the inquiry
 - in the case, the Board's jurisdiction over the parties and the subject matter was clear.
 - Issue was thus whether the Board did something to take its exercise of power outside the protection of the PC.
 - Short of patently unreasonable interpretation of statutory provision, court should not interfere.
- **Jurisdictional questions are to be assessed on standard of correctness. Questions within jurisdiction are evaluated against PU**
- CUPE counsels judicial restraint
- Nicholson, decided a year before, created new era of judicial scrutiny on grounds of procedural

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fairness

- Both seen as steps forward

IV. The Sequels

- *L'Acadie 1989 SCC*
 - Court moved back from position that jurisdiction should be determined at outset. Jurisdictional question attracting correctness review can arise anytime, including:
 - Questions of interpretation, questions of fact, mixed fact and law, and in fashioning remedies
- *Cuddy Chicks 1991 SCC*
 - When addressing tribunal capacity to entertain Charter challenges to their enabling statute, tribunal jurisdiction over the whole matter means over parties, subject matter, and Remedy
- *Bibeault 1988 SCC*
 - School board terminated contract with janitorial company whose employees were on strike.
 - School board hired new company.
 - Original union argued new company bound by collective agreement between previous company and its employees and thus the original union represented employee of new contractor.
 - The Quebec labour act contained a successor-employer provision.
 - The labour commission (Bibeault) ruled in favour of the original union.
 - Rival union appealed
 - By 7-4 majority, special panel of Quebec labour court upheld commissioner's order
 - **Beetz cites CUPE 1979, but nowhere mentions deference**
 - **Beetz proposes pragmatic and functional approach to determining what constitutes a jurisdictional question (correctness standard) and what constitutes a question within jurisdiction (PU)**
 - Central question is whether the legislature intended the question to be within the jurisdiction of the tribunal
 - Must examine:
 - The wording of the enactment conferring jurisdiction on the tribunal
 - The purpose of the statute creating the tribunal
 - The reasons for its existence (I assume "its" mean the tribunal's existence)
 - The area of expertise of its members
 - The nature of the problem before the tribunal
 - Beetz concludes that "alienation or operation by another" is a jurisdictional question that the commission failed to answer properly

A. Is Judicial Review Constitutionally Protected?

- Central CL precept of stat interp is that interpretation expresses the will of the legislature.
 - To this extent, judiciary accepts supremacy of legislature
 - Any interpretation is defensible insofar as legislature can amend the provision

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- ***Crevier v. Quebec (AG) 1981 SCC***
 - Constitutionality of PC in Quebec challenged on ground that it violated s.96 by depriving judges of quintessential judicial function.
 - Lamer upheld PC on assumption that PC did not preclude correctness review on challenges based on division of powers. This by implication allows a PU review for matters within jurisdiction.
 - **Constitutionalized JR for jurisdictional questions.** Thus placing it beyond reach of legislative amendments
- *Bibeault*, Beetz notes that the role of the superior courts in upholding RL is so important to warrant its constitutional protection.
- *Royal Oak 1996 SCC*, the SCC was confronted with a PC that purported to deny judicial review on any ground, including excess of jurisdiction or loss of jurisdiction. Court barely paused to consider the legislative intent, simply reviewed on PU.
- *Pasiencyk 1997 SCC*, **"since as a matter of constitutional law, a legislature may not, however clearly it expresses itself, protect an administrative body from review on matters of jurisdiction, it also cannot be left to decide freely which matters are jurisdictional and which come within the board's exclusive jurisdiction."**
- Legislative intent cannot defy the constitution. *But it can amend the constitution.*

B. Beyond Privative Clauses

- Should the court defer? Is a question to ask when:
 - There is a privative clause
 - The statute contains a finality clause
 - The statute preserves the option of JR
 - The statute provides an appeal to the courts
- ***Pezim v. BC (Superintendent of Brokers) 1994 SCC***
 - Does newly acquired information about asset value constitute a material change requiring disclosure.
 - Question of law and statute contained right of appeal
 - Iacobucci: "even where there is no PC and where there is a statutory right of appeal, the concept of specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise"
 - **Presence of PC not crucial and question of jurisdiction supplanted by question of expertise as key determinant of standard of review.** (According to text, not Iac.)
 - No question that BC Securities Commission had jurisdiction over parties, subject matter, and remedy.
 - Court pointed to several factors indicating specialized nature of Commission and the interpretation of the material in the BC Securities Act goes to core of Commission's regulatory mandate and expertise.
 - Statutory framework features that pointed towards deference:
 - Subject area is elaborate and complex

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- Commission is granted public interest mandate and broad discretion to determine what is in the public interest
- Commission has broad powers to administer the statute including authority to conduct investigations, audits, and to issue orders
- The statutory definitions are only meaningful within the factual regulatory context
- Agency played a policy development role as well as having adjudicative functions
- Interpretation of the statutory provision in question goes to the heart of the regulatory expertise and mandate of the commission. (Regulating securities market in the public interest.)
- Court concluded that curial deference was required, but never explicitly described the applicable standard of review. In **Southam** Iacobucci makes the third standard explicit and says that it was the standard used in *Pezim*
- The need for a third standard can be traced to the shift from privative clauses to expertise. The presence or absence of a PC easily maps onto a PU and correctness as standards for review. Emphasizing the relative expertise of a tribunal does not match up as cleanly onto the two standard model.
- **Southam 1997 SCC** (Text has quote "There is no PC, so jurisdiction is not at issue.")
 - Competition tribunal found that acquisition of newspapers within given market substantially lessened competition.
 - Remedy: Tribunal gave Southam option of divesting itself of one of two community newspapers.
 - Statute provided for appeal to Federal CA
 - Two issues appealed:
 - 1) The dimensions of the relevant market within which to assess impact on competition; and
 - 2) The remedy of divestment
 - Iacobucci for the court
 - Emphasizes complexity of the statutory scheme. More economic than strictly legal.
 - Businesspeople and economists have more expertise in this area than judges.
 - Judges less able to understand the commercial/economic ramifications of the tribunal's decision and therefore, less able to fulfill purpose of statute
 - Composition of tribunal: 4 members must be judges from federal court trial division; 8 lay members drawn from recommendations by experts in economics etc.
 - Judges have exclusive jurisdiction over questions of law
 - Suggests that questions of competition law not entirely beyond ken of judges
 - ***Characterization of issue was important** in assessment of standard of review
 - Parties agreed on economic principles governing determination of size of advertising market, but disagreed as to whether tribunal had ignored certain relevant evidence in making the actual determination.

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- Iac. held that tribunal had not ignored factors, real issue was weight given to certain evidence. **Held that this is a question of mixed fact and law** (application of law to fact). Similar analysis to determine remedial issue was mixed law and fact.
- After identifying factors pertinent to standard of review, Iac. points to factors suggesting deference **How are these different?**
 - Dispute is about mixed law and fact
 - Purpose of Act is largely economic
 - Thus better served by exercise of economic judgement
 - Application of principles of competition law falls squarely within the area of Tribunal's expertise
- Factors suggesting less deference:
 - Existence of unfettered statutory right of appeal
 - Presence of judges on the tribunal
- Because there are indications both ways, proper standard is somewhere between the ends of the spectrum. **"Because the expertise of the tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted."**
 - **This is reasonableness simpliciter: "An unreasonable decision is on that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."**
 - Entails inquiry into the "evidentiary foundation or the logical process by which conclusions are sought to be drawn from it."
- ***Text: Iac. not explicit, but suggests that PU is appropriate only in presence of PC where intervention must be justified by resort to jurisdictional analysis.**
- *Southam* did little to clear confusion re standard of review analysis. In *RyanSCC* rejected having either four standards or a flexible standard.

V. The Story So Far: Pushpanathan v. Canada

- Immigration and Refugee Board denied Pusphanathan's application for refugee status as his criminal record (trafficking heroin) violated art. 1F(c) of the Convention Relating to the Status of Refugees.
- Distinctive feature of Immigration Act is that there was no PC or right of appeal. However, JR could only occur with leave by federal trial court judge and no reasons required when leave denied.
 - If leave granted and appeal lost, party could only appeal to FCA if the trial judge certified "a serious question of general importance."
- The judgement canvasses factors that are to be considered when determining the standard of review that the courts should apply. These factors include:
 - The presence or absence of a **privative clause**
 - The relative **expertise** of the courts and the administrative decision-maker
 - The **purpose of the act as a whole, and the provision** at issue in particular
 - The **Nature of the Problem**: a question of law, fact, or mixed?

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A. Privative Clause

- Come in various degrees of fuck offness
- Finality clauses say the decision is final and binding on all parties
- Where statute is silent on JR, CL bases apply
- Grounds for JR can also be set out in general statute (BC JRPA, Fed. FCA)
- Under pragmatic and functional test, PC weighs in favour of deference
 - Never determinative
- Expertise can outweigh a PC, a PC has never been found to outweigh expertise
- Finality clause goes towards deference, but less than a PC
- Availability of JR is neutral
- Presence of right to appeal goes against deference
 - AS with PC, right of appeal can be outweighed by expertise (think Southam)
- JR provisions in *Pushpanathan* were distinctive (Immigration Act):
 - s. 67 Granted Refugee Division "sole and exclusive jurisdiction to...determine all questions of law and fact, including questions of jurisdiction."
 - s. 82.1 Grants FC gatekeeping power. Leave required for JR; no reasons required for denial of leave; no appeal from decision to deny leave; further appeal requires trial judge to certify that issues is of great importance (s. 83(1)).
- The SCC held that s. 67 PC superceded with "questions of great importance". Further, s. 83(1) would be incoherent if the standard of review was anything other than correctness.
 - Key to legislative intent as to standard of review was to use the words "a serious question of *general* importance".
 - Further, s. 83(1) indicates deference, but still only one factor
- ***In *Baker* a year later, there was nothing akin to this PC protecting minister's delegated decision.
- Court ultimately arrived at RS standard

B. Expertise

- **Relative expertise is the most important factor in determining standards of review**
- **Three steps to evaluating expertise:**
 - 1) **Characterize the expertise of the tribunal**
 - 2) **Consider the court's own expertise relative to that of the tribunal**
 - 3) **Identify the nature of the specific issue before the decision maker relative to this expertise**
- Where the tribunal possesses "broad relative expertise" that it brings to bear "in some degree" on the interpretation of highly general questions, the court may show considerable deference despite the generality of the issue
 - In *Southam* deference shown in interpretation of "material change"
 - *But court specifically noted that the definition was very specific to economics and factual context....fucking book*
 - In *National Corn Growers* interpretation of a treaty provision shown great deference.
- Difficult to know when court will valorize tribunal expertise and when it will discount

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it

- Broad expertise
 - Court will note agency's composition and specialized knowledge in comparison to the court's
 - Evidence of distinctive expertise can come from:
 - statutory criteria for appointment (qualifications, length of term, security of tenure)
 - Policy making functions
 - non-judicial means of implementing the Act
- **Pasiencyk**
 - "The composition, tenure, and powers of the board demonstrate that it has very considerable expertise in dealing with all aspects of workers compensation systems. Not only does the board have day-to-day expertise in handling claims for compensation, in setting assessment rates and promoting workplace safety; but it also has expertise in ensuring that the purposes of the Act are not defeated."
- **Bodies that deal with economic, financial, or technical matters sit at the apex of expertise**
- Labour boards are often protected by PCs. Courts typically acknowledge their expertise in relation to industrial relations. Yet they do not get consistent deference from the courts.
 - Stricter review tends to be justified on grounds that their expertise does not extend to the nature of the problem under review.
- Labour arbitrators given less deference than labour boards because they are often appointed ad hoc and their role is confined to interpreting specific agreement before them, rather than to administer entire industrial labour regime.
- Ad hoc nature counts against expertise in human rights tribunals
- **SCC tends to regard expertise of human rights tribunals as relatively weak.**
 - Divergent judgements of LaForest (Concurring) and LHD (Dissent) in *Mossop* show this.
 - Family status case. Does "family status" (a prohibited ground of discrimination under the *Canadian Human Rights Act*) include homosexuals?
 - Contrary to Human Rights Tribunal, majority said no.
 - **LaForest (concurring...also majority???)**:
 - Court occasionally defer to tribunals on Qs of law where PCs absent, in recognition of expertise. Human rights Tribunal is not a labour board.
 - Although human rights **commission** engage in policy-making, advising, education, and investigation; these do not confer any entitlement to deference in the **tribunal's** adjudicative functions.
 - The tribunals are ad hoc. Like labour arbitrators but even less deserving of deference
 - Labour arbitrators selected by parties and operate in confines of the specific agreement

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- Human Rights Tribunals impose decisions on the parties and have direct influence on society at large in relation to basic social values.
 - Ambit of HRT's superior expertise is "fact finding and adjudication in human rights context", as distinct from "concepts of statutory interpretation and general legal reasoning."
- **LHD Dissenting again:**
 - Does not distinguish between the commission and the tribunal
 - Determined other factors pointed towards deference and did not find HRT's decision to be PU
- **Majority:**
 - Determined the standard to be correctness and decided the HRT decided wrongly
- **McLachlin and Cory dissenting:**
 - Agreed with LaForest that correctness standard applied, but thought the HRT's decision was correct.
- There is not a lot of surprise that SCC did not defer to HRT. While expertise is the overriding factor in pragmatic and functional approach, the court's primary role is rights adjudication.
- **Ryan 2003**
 - Sanction for misconduct imposed on miscreant lawyer. SCC went to great length to defend expertise of Law Society's professional discipline committee.
 - Definitely not beyond the ken of most judges
 - Court says that practicing lawyers "may be more intimately acquainted with the ways that these [professional] standards play out in the every day practice of law than judges who no longer partake in the solicitor-client relationship"
 - Court decided on RS
- Decision-making bodies staffed by elected representatives have proven difficult for the courts in deciding expertise.
 - In *Baker*, decision conferred on Minister, but delegated to a civil servant
 - That formal decision maker is minister, suggests more deference
 - Minister has some expertise over court in immigration matters, **especially when dealing with exceptions.**
- **Chamberlain 2002 SCC**
 - School board composed of elected trustees passed resolution against same-sex books in library. One challenge was excess of jurisdiction.
 - Court used pragmatic and functional approach and determined standard of review to be RS
 - McLachlin for majority:
 - Board is expert in balancing interests of different groups like parents with different values and children from different types of family
 - Locally elected representatives have better ken of community's concerns
 - But this decision has human rights element and court is more expert here

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- Statutory requirements of generality and great importance seem determinative of correctness review (Pushpanathan)
- Less clear is how court arrives at such a designation
 - Every statutory provision must be construed and applied in its specific context with a view to fulfill statutory purpose
 - Agencies bring unique awareness of consequences of a given decision
 - This can determine issue if the court uses it to ascribe to the agency relative expertise in interpreting its own statute; sometimes true, sometimes not true
 - **Via Rail 2007**
 - "Undue obstacle to the mobility of persons" on new Via Rail units and agency ordered VR to retrofit some of the new cars.
 - **Abella for majority (5-4 split):**
 - Rejected claim that the human rights dimension of interpreting and applying the provision justified C review
 - This would unduly narrow what agency is required to decide and would disregard how inextricably interwoven human rights and transportation are
 - Agency has specific mandate to render transportation more accessible, the Act is highly specialized with strong policy focus. Agency expected to bring its expertise to interpreting the Act.
 - Worried about pre-CUPE formalism. Trying to box issue as jurisdictional because it is "human rights" would allow generalist court to intervene when it shouldn't
 - **Dissent:** Held that issue at stake was pure question of law concerning jurisdiction and human rights with important precedential value. Therefore no deference.
- **At present, the only unwavering rule appears to be that when the Charter is directly involved, the court will not show any deference and will always use correctness approach**
- Precedential value to resolve inconsistencies within or between tribunals does not constitute an independent basis for adopting correct standard unless the divergent decisions create an operational conflict where obedience to one necessitates violation of the other. **Shaw Cable 1995 SCC**
- In *Domtar* court was worried that real or apparent inconsistencies would be used to subvert curial deference.

VI. Coming Attractions

A. Disaggregation

- Where a statutory provision raises mixed issues, it can be difficult to separate them and analyze an appropriate standard of review for each
- Where a Charter right is involved, applying correctness to the Charter issue and then a different standard to other aspects of the decision can be problematic
- Same is true where application of an extrinsic statute is involved

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- In *CUPE 2003*, Binnie stated that "the court's task on JR is not to isolate...issues and subject each of them to different standards of review.:
- In *Levis (City)*, the majority endorsed differentiated standards of review. Abella, concurring, warned that segmentation leads to undue interventionism and harkens back to the doctrines of wrong question and collateral question.
- The issue is also highlighted where discretion is involved. Discretionary decisions, *ex hypothesi*, have no correct answer, so intervening on C standard would be strange. But where human rights are involved, like in *Baker*, the court still seems to apply a fairly strict standard.

B. Is Three A Crowd?

- *Southam* ushered in RS, and since then, many people have complained of the indeterminacy and confusion generated by the three standards.
- In *CUPE 2003 v. Toronto*, Lebel, concurring, canvasses the sordid history of the three standards and pleaded to return to two standards. **Lebel's *cri de coeur***
- In *Council for Canadians with Disabilities*, the 5-4 majority blended RS and PU into single standard of demonstrably unreasonable.

C. Converging Tests?

- The pragmatic and functional test turns towards a spectrum analysis and away from formalist boxes.
- This is also the case for procedural fairness.
 - At present the test for the content of procedural fairness lists five relevant factors for the determination of the level of protection.
- **Intersection:** Both list the nature of the decision, the statutory scheme, and expertise as relevant.
- The SCC has never stated that procedural fairness should be reviewed on any standard except correctness. But in *Baker*, LHD said that duty of fairness should take into account and respect the choices of procedure made by the agency itself; particularly when the statute leaves the procedures to be determined by the agency or when the agency has expertise in determining what procedures are appropriate in the circumstances.
- One pink elephant is that in the procedural fairness test, an important factor is "the importance of the decision to the individual affected". Is this simply because courts will not be deferential where human rights are involved, especially when protected by the Charter, when determining standard of review?
 - *I'd say yes. The courts have shown that they intend to remain the experts in human rights issues. See how they treat human rights tribunals etc.*
 - The difficulty is highlighted through *Suresh*. Should the question of whether Suresh faces a substantial risk of torture if deported, be reviewed on the same standard as whether deportation to torture violates s. 7?
- Can you merge the procedural fairness review with substantive review and articulate them all as one question: **Is the decision acceptable?**

D. The Last Word on Legislative Intent

- I almost every case using the P&F approach, the court reiterates that it is searching for legislative intent.
- If the legislative intent of PCs was to keep the courts out, then this message was lost or

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mistranslated along the way

- Court rationalized this through constitutionalizing JR and noting the courts duty to protect the RL in balance with parliamentary supremacy
- The BC *Administrative Tribunals Act* (2004) purports to express legislative intent regarding appropriate standards of review:
 - If T's enabling statute has PC, then:
 - PU for questions of law, fact, or exercise of discretion for all matters over which T has exclusive jurisdiction
 - CL rules of natural justice and procedural fairness must be determined having regard to whether the tribunal acted fairly
 - Correctness applies to all other matters
 - Where T's enabling statute has no PC, then:
 - Findings of fact reviewable on basis of no evidence or unreasonableness
 - Questions of law reviewable on correctness
 - Exercise of discretion on PU
 - Procedural fairness is decided based on whether in all the circumstances the tribunal acted fairly.
- **Are there any constitutional or RL impediments on the legislator's ability to dictate how much deference judges ought to demonstrate?**

VII. Review of Standard of Review: I laughed, I cried, I stood on my chair and...

- Good summary:
 - The skeptic will say that the P&F test from Pushpanathan is nothing but a veneer that thinly disguises judicial opinions on the substantive outcome. When judges believe the tribunal got it wrong, they will arrive and the standard of correctness and conclude the tribunal erred; when the court believes the tribunal got it right, they will apply PU and leave it be; or the court will use the RS standard and do whatever it likes. Agencies that the court thinks often get it wrong, attract little deference and those that regularly get it right, attract more deference. The P&F approach is easy to circumvent and sufficiently vague to allow judges to whatever they like.

VIII. Postscript: *Dunsmuir v. New Brunswick*

- Unanimous court reverted back to two standards. (NOT A UNANIMOUS DECISION THOUGH)
- Attempted to clarify criteria for choosing which standard of review applies. This is muffled because court split on methodology
- Case concerned termination of non-unionized government employee.
- **Majority Bastarache and Lebel:**
 - Return to two standards is not a return to pre-Southam law
 - **P&F test is now the Standard of review analysis**
 - **Emphasis on three bases for deference: Presence of a PC; discrete and specialized regime; and a question of law that is not of central importance to the legal system or beyond the specialized expertise of the tribunal.**

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- Non-exhaustive list of where reasonableness or correctness standard is presumptively appropriate:
 - **FIND IT, not in text**
 - Correctness will apply where "true" jurisdiction or constitutionality is at stake
 - Correctness will apply where the legal issue is both of central importance to legal system and outside the adjudicator's specialized area of expertise.
- **Binnie concurring:**
 - Considers focus on whether "issues is of central importance to legal system" distracting.
 - Prefers: Provisions of the home statute (WTF does that mean...enabling statute?) and related statutes attract reasonableness.
- **Deschamp (with Charron and Rothstein) concurring:** Most formalistic. Questions of fact, mixed law and fact, discretion, or law protected by PC deserve reasonableness standard. Other questions of law get correctness.
- In returning to two standard model, court has to define what is and is not reasonable. Court rejects negative approach to reasonableness that examines immediacy and magnitude of defect
 - Advocates positive inquiry centered on ideal of rationality
 - Directs focus towards **"the qualities that make the decision reasonable, refereing both to the process of articulating the reasons and to outcomes."**
 - **Indicia of reasonableness include:**
 - **Process-oriented factors of intelligibility;**
 - **justification;**
 - **transparency of reasoning;**
 - **an outcome that falls "within a range of possible, acceptable outcomes which are defensible in respect of fact and law."**

CUPE 1979 (v. New Brunswick Liquor Copr)

CUPE 2003 (v. ontario minister of labour) Retired Judges

*****CUPE 2003 (Toronto (City v.))****Diferent case. Need to go back through and figure out which ones are Retired judges and which are CUPE v. Toronto**

Done Chapter 8

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Chapter 9: A Fine Romance? The Modern Standards of Review in Theory and Practice

I. Introduction

- Modern standards of review offer a cloak for courts wanting to have the last say on the scope and limits of administrative action
- The romantic version begins with *CUPE 1979*
 - The romantic sees this case representing a seachange in judicial understanding of administrative action. From Diceyan lawlessness to recognition for context specific deference to administrative decisions.
 - *CUPE 1979* brings in era of substantive review that acknowledges the different roles of courts and administrative agencies in maintaining the rule of law
 - Dickson's unanimous ruling provided a fresh start for relations between administrative state and judiciary
 - Court will take seriously legislative intent expressed in PCs
 - Court will take into account practical reasons for entrusting decisions to the ADMs
 - The starkly dualist alternatives of deference/non-deference in *CUPE 1979* are still caught up in rigid formalism
 - Esp. the need for a PC to signal deference
 - Thus we move forward to three standards of review
- ***Law Society of New Brunswick v. Ryan 2003 SCC***
 - Unanimous court committed to the three distinct standards of review
- ***Dr. Q. v. College of Physicians and Surgeons of BC 2003 SCC***
 - Correctness: "exacting review"
 - Reasonableness: "significant searching and testing"
 - Patent unreasonableness: decision should be left "to the near exclusive determination of the decision-maker"
- Chapter 8 focused on defining the standards, chapter 9 focuses on applying the standards
 - TO do this chapter will focus on what judges have said about the standards and what they actually do to determine the legality of the decisions
 - Generally a lot of work goes into choosing the standard, and little work goes into applying it
 - Skeptics argue that the standards of review offer little or no relevance to the outcome of substantive review

II. Background: Statutory Interpretation and Substantive Review

- The assessment of the substantive legality of an administrative decision is steeped in statutory interpretation
- The approach is Drieger's: "words of an act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the Act, and the intention of Parliament."
 - There is ambiguity in the factors that bear relevance, or primary relevance, when interpreting statutory texts. Author distinguishes positivist from pragmatic/normative

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approaches

- **Positivist approach:** presumes that statutory language has a single unified meaning that is stable over time.
 - Ascertainment of the core meaning should be done by judges.
 - Trying to 'find' a determinate legislative intent
 - Criticism: Judges smuggle in contestable legal value judgements that should be submitted to open debate
 - In AL, positivist approach suffers to primary criticisms
 - 1) Works against deference: Judge sees their interpretation as the sole correct one
 - 2) PC clauses pose problems because clear intent to exclude judiciary
- **Normative approach:** explicit submission of value-laden bases of legal judgements for public justification.
 - Assumes contested matters cannot be resolved simply by looking to the statutory text, or even its social context. Must judge competing social values informing the statutory interpretation
 - Author implies this is a Dworkinian model: Interpretation is contingent on important public values inscribed in social and legal traditions
 - In AL, this can but need not entail strict non-deference (*remember my argument about Dworkin requiring the standard of correctness*)
- Tensions for relations between courts and ADMs
 - Positivist approach: Positivist insistence on one correct answer is inconsistent with the rationale for deference in *CUPE 1979*: Multiple possible reasonable answers
 - Normativists: Grant greater discretion, but only if ADM follows court's notion of legitimate exercise of authority. *Weak argument*
- Another problem for substantive review: What is the evidentiary basis upon which a reviewing court draws information for its decision?

III. Theory and Practice: The Modern Standards of Review

A. A Contested Correctness

1. The Correctness Standard in Theory

- In *Ryan Iacobucci* states that where a correctness standard is imposed, "the court may undertake its own reasoning process to arrive at the result it judges correct."
 - Different from the reasonableness standards
- Correctness standard usually applied in:
 - determining whether non-adjudicative decisions of municipal decision-makers are ultra vires;
 - in reviewing decision-makers' conclusions on constitutional or Charter limits of their statutory authority
 - traditionally applies in procedural fairness reviews (although, post *Baker* this is disputable. LHD said correctness standard, but findings of fact and "???" deserve respect);
 - Cases concerning the relative jurisdictional scope of different tribunals;
 - Questions of "pure law"; or law of "great precedential value"

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- These matters are said to be situations where the ADM lacks expertise or authority
- 2. *Correctness Review in Practice*
 - Until mid 90s, there were only two standards of review: Correctness and patent unreasonableness
 - Application of the latter usually required a privative clause
 - Two cases bring out the problematic tension of only having two standards, and no availability of a standard allowing some deference
 - ***U.E.S. Local 298 v. Bibeault 1988 SCC*** (Labour case)
 - School board terminating janitorial service contracts with companies whose workers were on strike, and then contracting other companies for the services.
 - Beetz concluded the question was jurisdictional and thus no deference was due. This conclusion turned on the determination that the **statutory language includes terms of art** from civil law, the interpretation of which requires general legal expertise.
 - Beetz favoured a conceptual coherence between the statute and civil law, at the expense of the context-specific sympathies of the tribunal and the labour court.
 - ***Canada (AG) v. Mossop 1993 SCC*** (Human rights case)
 - "Family status" cannot be interpreted to extend protection to same sex couples.
 - The concurring majorities offer two models of the correctness standard
 - **Lamer**, with Sopinka and Iacobucci: grounds the analysis in legislative intent.
 - The absence of "sexual orientation" from the Canadian Human Rights Act, the recommendation to add it by the commissioner, and the failure of parliament to do so, amounted to a refusal to do so.
 - *Mossop argued the case on statutory interpretation, not on Charter grounds
 - "Absent a Charter challenge of its constitutional validity, when parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else except apply the law."
 - If there is ambiguity, the court should use rules of interpretation to determine the correct answer, and if more than one reasonable interpretation is available, the court should choose the one that is more consistent with the Charter
 - But legislative intent clear, so no recourse to Charter
 - **LaForest** (with Iacobucci) concurring: Also focused on legislative intent
 - Judgement is more insistent on statutory text and specifically the word "family"
 - States his approach as on which demands that one give "to the words used in a statute their usual and ordinary sense having regard to their context and to the purpose of the statute"
 - In applying this principle, Laforest emphasizes the usual and ordinary sense of the word "family" instead of focusing on the purpose of the statute (end discrimination)
 - **L'Heureux-Dube** (alone) dissent: Patent unreasonableness should apply.
 - Emphatically normative approach
 - The scope of our understanding of human rights, equality, dignity, etc change

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- over time. In the absence of a clear definition by parliament, the definition of family status should evolve with social change
- Instead of statute-specific focus, LHD focuses on "fundamental" values which can only be curtailed by explicit legislative intent
- LHD is invoking a common-law constitutionalism where statute is seen as an open text requiring interpretation in light of the principles underlying social values and legal tradition
- Selection of patent unreasonableness standard indicates LHD's intent to show respect for tribunal's interpretation
- **McLachlin and Cory** (dissenting): Agree with LHD that the text should be interpreted according to social context and thus the changing notion of the family, and sensitivity to human rights principles
 - McLachlin/Cory chose correctness standard.
 - Possible reason: The RL principles LHD cites may have rendered the patent unreasonableness standard unpalatable to McLachlin/Cory
 - Remember: no reasonableness simpliciter yet
- Since *Mossop* and introduction of reasonableness standard, court has shown slight willingness to defer to human rights tribunals involving interpretation and application of human rights statutes.
- Court still insists on the exclusive authority of the judiciary on matters of human rights where the ADM is not a human rights tribunal
 - See both *Pushpanathan* and *TWU*
 - Majority judgements place human rights at core of the substantive reviews. Taking a concerted normative approach. No basis for deference.
- ***Pushpanathan v. Canada (Minister of Citizenship and Immigration) 1998 SCC***
 - Question: Is drug trafficking "Contrary to the purposes and principles of the UN" thereby disqualifying people from seeking refugee claims?
 - Majority focused on intent of convention drafters and narrowed scope of provision by focusing on the commitment to human rights protection
 - Minority looked to the broader framework and UN goal of stopping drug trafficking
- ***TWU 2001 SCC***
 - BCCT could not prove discrimination as per the jurisprudence. Also did not consider freedom of religion
- ***Barrie Public Utilities v. Canadian Television Assn. 2003 SCC***
 - Positivist ruling. Gonthier majority characterizes the phrase "the supporting structure of a transmission line" as a matter of pure statutory interpretation. He then applies its plain meaning.
 - Bastarache minority: Draws on LHD's unanimous ruling in ***Domtar Inc. v. Quebec 1993 SCC***
 - "Substituting one's own opinion for that of an AT in order to develop one's own interpretation of a legislative provision eliminates its decision making autonomy and expertise.
 - This can thwart legislative intent

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- **For the purposes of JR, statutory interpretation has ceased to be an exact science and this court confirms curial deference as set forth in CUPE 1979**
- The above cases illustrate tension between positivist approach and normative approach:
 - Positivists look at the statute as a closed system with singular legislative intent.
 - Normativists look at the text in light of social values and principles

B. In Search of Patent Unreasonableness

1. The Patent Unreasonableness Standard in Theory

- In the context of decisions protected by privative clauses, *CUPE* inherits the idea of a strict divide between questions of a AA's jurisdiction (where the tribunal must get the correct answer) and questions within jurisdiction (wherein deference is required).
- In *CUPE*, Dickson states: "Did the board so misrepresent the provisions of the Act as to embark on an inquiry or ask a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"
 - *This quote is obliquely important. The first question "...answer a question not remitted to it" is a throwback to pre-CUPE jurisprudence where the court, when it wanted to intervene, would say that the tribunal asked the wrong question. The second sentence reforms the issue as question of patent unreasonableness. The "cannot be rationally supported" suggests what the prof argued against. That is, the question of whether the tribunal's decision needs to be rational or whether the court can make the decision reasonable.*
- Cases subsequent to *CUPE* sometimes deployed the patent unreasonableness test, then would go searching for the right answer.
- In *Canada (AG) v. PSAC 1993* Cory tried to clarify patent unreasonableness.
 - P.U. Can only be defined in words, which are inherently ambiguous. It is a very high standard of review: "if the decision...is not clearly irrational..." then not patently unreasonable. "This is clearly a very strict test."
- In *Voice Construction 2004 SCC*
 - The decision must almost border on the absurd
- Both *Voice Construction 2004* and *CUPE 2003* LeBel tried to consolidate the role of patent unreasonableness in relation to the advent of the reasonableness simpliciter standard
 - LeBel notes that the caselaw had tended to try to clarify PU in relation to RS and C, through an analysis of the magnitude of the defect and the immediacy or obviousness of the defect. Neither lent coherence to PU as distinguished from RS and C.
- Situations that warrant a patent unreasonableness review will be rare, but include:
 - Questions of law within the expertise of the AA
 - Questions of fact
 - PU where there is no evidence to support the conclusion

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- Questions of mixed fact and law
- *I don't believe this. It seems to me that quite often PU was the standard used (Pre-Dunsmuir)*
- 2. *Patent Unreasonableness Review in Practice*
 - Basic principle of PU is that judge must not measure the decision against his/her sense of the correct decision. (Ryan 2003 SCC)
 - Issue: then what do you judge the decision by? *Stupid issue, you judge it on the basis of whether it is a reasonable decision*
 - Another issue is to what degree should the reviewing judge look into the decision-maker's reasoning and into the evidence and arguments on the record?
 - In **Southam 1997 SCC** stated that PU review may involve some review of the record, it should not require "significant searching or testing".
 - Uncertainty arises when determining the required depth
 - In **CUPE**, Dickson held that all the interpretations of the clause were reasonable (The interpretations given by the Labour board and by the court of appeal). He thus needed to break the tie. Dickson did this by looking into the purpose of the disputed provision. Concluding that the board's interpretation was the best interpretation.
 - *Text tries to suggest that CUPE just confused matters further, but the text is just shit stupid.*
 - Dickson in CUPE does something akin to LHD's dissent in Mossop. Both ground their judgements in reflections on statutory purpose, conveying a strong sense that the judge is independently verifying the tribunal's judgement. However, both rely on the explicit reasoning of the board.
 - *I think the text is wrong about CUPE, again. In CUPE Dickson resorts to reflecting on statutory purpose only as a tie breaker. The statutory purpose is not the grounds of the judgement, it is th finishing touch and nothing more.*
 - In **National Corn Growers 1990**
 - Wilson concurring disagreed with the deep and probing approach that Gonthier took. She thought that by engaging in a deep analysis of the extent to which the evidence supported the T's decision was to let a standard of correctness analysis through the back door.
 - Gonthier responded by stating that it would be difficult to determine the reasonableness of a decision without considering the reasoning underlying it. Such consideration must be determined in the context of the standard of review being used.
 - Gonthier's approach has won out.
 - Review of determinations of fact, ie the determination of "no evidence" requires by necessity the examination of the record.
 - In **Southam**, Iacobucci says that patent unreasonableness does not require significant searching or testing. Helps distinguish PU from RS
 - In **Ryan 2003**, in conducting review for RS, "not every element of the reasoning given must independently pass a test for reasonableness." The question is whether the reasons as a whole are tenable as support for the decision. Do not seize on one mistake which

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does not affect the decision as a whole.

- Another area of ambiguity is the division of labour between the courts and AAs in characterizing the purposes of the enabling statute or a contested portion thereof.
 - Analysis of the statute may fundamentally orient the the determination of whether the standard is met, particularly when the decision is being challenged for fettering of discretion, taking into account irrelevant considerations, or failing to take into account relevant considerations. *Parry Sound (District) SSAB v. OPSEU 2003 SCC*
 - Suggests that even on the most deferential standard there is an outer limit of correctness reasoning. No shit sherlock.
- **CUPE 2003 (Retired Judges)**
 - Involves PU review of ministerial discretion
 - Discretion only folded into standard of review analysis recently (Baker)
 - Issue: Piece of legislation held that where parties failed to agree on the third member of an interest arbitration panel, the minister shall appoint someone s/he deems qualified. For 20 years minister chose member based on a roster of labour arbitrators. Minister restricted appointments to retired judges. Union objected.
 - Binnie for the majority held that the minister's decision was patently unreasonable. Conclusion based on a close examination of the statute and its historical context.
 - The in-depth analysis comes before Binnie's determination of the standard of review. ...fucking shit again.
 - From Carswell:
 - Minister's approach was found to be patently unreasonable, but for reasons other than those given by Court of Appeal — Perceived interest of Minister in outcome of arbitrations did not bar him from exercising statutory power of appointment conferred on him in clear and unequivocal language — Minister, however, excluded key criteria of labour relations expertise and broad acceptability of proposed chair in labour relations community, and substituted criterion of prior judicial experience, which was relevant but not sufficient to comply with his legislative mandate — In context of process in question, appointment of inexperienced chair who was not seen as being broadly acceptable in labour relations community was defect in approach that was both immediate and obvious.
 - In applying patent unreasonableness standard, judge should intervene if he or she is persuaded that there is no room for reasonable disagreement about decision maker's failure to comply with legislative intent — Patently unreasonable approach means that many answers could have been appropriate, but decision maker's answer was not among them — Patently unreasonable appointment was one whose defect was immediate and obvious and so flawed in terms of implementing legislative intent that no amount of curial defence could properly justify letting it stand.
 - The appointment of retired judges as a class to chair Hospital Labour Disputes Arbitration Act arbitration boards **effectively frustrated the legislative scheme** under which the power had been conferred. **The Minister expressly excluded factors that were not only relevant but were essential to the legislative**

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scheme of that Act. The approach of the Minister was **antithetical to the credibility required of the process** because he excluded the criteria of labour relations expertise and broad acceptability of the proposed chair and substituted the criterion of prior judicial experience, which was relevant but not sufficient to comply with his legislative mandate. In the context of the process in question, the appointment of an inexperienced and inexperienced chair who was not seen as being broadly acceptable in the labour relations community was a defect in approach that was both immediate and obvious.

- *From text - Binnie: Purpose of act: secure industrial peace by substituting compulsory arbitration for right to strike, Essential factors include: securing trust through ensuring arbitrations are impartial, independent, expert, and generally accepted in the labour community." Minister's decision patently unreasonable because it failed to consider the acceptability in the labour community.*
 - **Per Bastarache J. (dissenting) (McLachlin C.J.C., Major J. concurring):** The opinion was expressed that the appeal should be allowed. The Minister had not made appointments that were patently unreasonable. Disagreement was expressed with the conclusion of Binnie J. that the impartiality and independence of boards could be challenged on the basis of the appointment process without any direct attack on a board that had actually been constituted.
 - The appointments were not patently unreasonable because it would take a significant amount of searching or testing to find a defect, if any existed. It took significant searching even to find the factors said to constrain the Minister. It was difficult to characterize the Minister's appointments as immediately or obviously defective.
 - *From text: Bastarache agrees that the court must determine if minister failed to take into account essential factors or considers irrelevant factors. But plays up the "in the opinion of the minister" stuff. Also disagrees that the flaw identified by the majority is immediate and obvious. B. says he is upholding the RL. RL requires PU to apply where it is PU. Thus if minister chose only to appoint members of his caucus, or hospital CEOs etc.*
 - Remember two imperatives of PU: Prohibition on seeking the right answer and no deep and probing analysis.
 - Letting judges determine factors relevant to any given decision, and let AAs determine weight and value of each factor. Maybe it works? Maybe not?
- 3. The Third Way: Reasonableness Simpliciter**
- **Southam**
 - Iacobucci states that a statutory right of appeal mixed with an expert tribunal required a new standard of deference. More deferential than correctness but less deferential than PU.
 - "An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."
 - Iacobucci links RS to a conception of deference that is contingent on both the expertise of the tribunal and reason-giving.
 - **Ryan 2003**

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- Iacobucci emphasizes that there is no single right answer on the correctness standard
 - When balancing competing statutory interests, there is not going to be a single correct answer and it is not the court's role to seek out the best balance.
 - A decision will be reasonable if a tenable line of argument can be drawn from the evidence through to the conclusion
 - The reviewing judge should look to the adequacy of the reasons as a whole and should not focus on a single reason that does not affect the whole decision.
4. *Reasonableness Review in Practice*
- **Southam**
 - BC Competition Tribunal ruled that Southam's purchasing of community newspapers led to substantial lessening in competition in real estate print advertising.
 - Iac. says question of mixed law and fact. Court needs to oversee application of the law to the facts. Balance things that are not easily quantifiable.
 - The tribunal must consider each factor, but it is for the tribunal to determine how much weight will be accorded to each one.
 -
 - Iac. says that although the tribunal's reasons were weak, they did not have to be correct, and the errors did not justify overturning their decision on a RS standard.
 - **Dr. Q. v. College of Physicians and Surgeons of BC 2003 SCC**
 - When review is RS, the judge is not to posit alternative interpretations of the evidence, it is to determine if the T's decision is unreasonable.
 - **Baker**
 - Contra *Dr. Q.* and *Southam*? LHD basically holds that minister did not adequately consider the interests of Baker's children...*lies*
 - The officer's notes were inconsistent with the values underlying the discretion in question. Interpreting humanitarian and compassionate required consideration of the interests of the children, and the officer did not consider their interests.
 - *The text is wrong. In Baker, the officer failed to consider a necessary factor. It was not that the officer failed to give sufficient weight to the factor. Although the text does suggest there is ambiguity as to whether LHD was dealing with weight or consideration at all, the ambiguity appears academic.*
 - LHD also says that in some circumstances, it will be up to the tribunal to decide what factors are relevant at all; not merely in regards to the weight they should be accorded.
 - **Dyzenhaus "Deference as respect requires not submission but respectful attention to the reasons offered or which could be offered in support of a decision."** Endorsed by LHD in *Baker*. Prof does not like the "or which could be offered" bit. I think prof makes a good academic point, but in practice, this is how it plays out. If the court can find a reasonable argument to sustain the decision, it will be upheld.
 - **Starson v. Swayze 2003 SCC**
 - SCC overturned decision of Consent and Capacity Board who held that Starson could not make a decision about proposed psychiatric drugs.

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- Majority and minority agreed that proper standard was RS
- Majority said Board was insufficiently sensitive to the evidence given by Starson on the basis for treatment refusal
- Minority said majority insupportably revisited Board's evidentiary findings.
- Author believes the stark contrast between majority and majority is in their political ideologies and how these inform their understanding of the statute's purpose and values. The majority favours liberty, the minority favours welfare.
- Blah blah blah, much garbage. The end.

IV. Critiques of the Three-Standard Model

- Lebel raised a sustained critique of the three-standard model in *CUPE 2003* (aka **Lebel's cri de coeur**). In his concurring judgment, Lebel argues that the court needs to review the standards of review.
 - Lebel thesis has two parts and argues that th modern jurisprudence on the standards of review :
 - 1) Exhibits conceptual confusion; and
 - 2) Inspires deep methodological uncertainty
 - This results in too much uncertainty as to which standard will be appropriate and what effect (if any) the chosen standard will have on the method of inquiry or the inquiry's result.
 - Lebel wants to reconceive the standards so as to better reflect the role of the courts on substantive review (draws the following from McLachlin in Dr. Q): **to inquire into legislative intent...against the backdrop of the courts' constitutional duty to protect the rule of law**
 - Lebel critiques the correctness standard for the tendency of cases to draw a strict correlation between general questions of law and the imposition of a correctness standard
 - Lebel says this defeats the central premise of the law on deference: Tribunals may be best placed to develop a body of jurisprudence that is tailored to the specialized field in which they operate.
 - Lebel wants to restrict correctness standard as it applies to general questions of law. The role of the court faced with a general question of law is to determine if the question is "closely related to the adjudicator's core area of expertise"
 - Lebel suggests that correctness standard will invariably apply when:
 - Constitutional questions;
 - Questions ultra-vires concerns in non-adjudicative matters; and
 - cases where "the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise."
 - In these situations, Lebel would do away with the need for a pragmatic and functional approach
 - **The centre-piece of Lebel's argument is his critique of PU standard.**
 - Two fronted critique:
 - 1) Addresses problems that have plagued the distinction between PU and C

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- Plays up ambiguity in *CUPE 1979* as to whether the search is for a legal error where there is only one right answer, or whether the search is for whether there is a rational basis for the decision
- Also takes note of controversies as to whether the correct outcome of a contested decision needs to be determined in order to judge whether the decision is PU.
- Also takes note of tendency of reviewing judges to ostensibly use PU standard and then apply correctness-like reasoning
- 2) Addresses deeper issue of distinction between PU and RS
 - Argues that PU and RS share a theoretical base in that there is no single correct answer to any given stat interp problem.
 - Thus no point in seeking a fine distinction between them
 - Reaffirms this by tracing the implications of the two strands of PU: Magnitude of the defect and immediacy of the defect.
 - Idea of magnitude of defect greater than irrationality is incoherent
 - Idea of greater and lesser probing review is vague and unworkable
 - Further, both strands are inconsistent with the role of the courts in upholding RL
 - Letting irrational decisions stand because they are not sufficiently irrational is contrary to parliamentary supremacy because the legislature is presumed to act rationally.
 - Further, letting such a decision stand is contrary to the principle that in a society governed by the RL, power is not to be exercised arbitrarily or capriciously.
- ***Council of Canadians with Disabilities 2007 SCC*** (5-4 split)
 - VIA rail appeal of determination by transportation agency that new fleet of rail cars presented undue obstacles to those with disabilities
 - Indicated agreement with Lebel's conclusion re the relationship between PU and RS.
 - But does so in a very perfunctory way. Acknowledges conceptual overlap then goes on.
 - For Abella's majority, it is imperative that for PU the court needs to resist the urge to review with meticulous detail the tribunal's reasoning. Her primary concern is thus to distinguish reasonableness from correctness.
 - Draws on *Ryan 2003*: consider whether the reasons taken as a whole, can support the decision
 - Draws on Gonthier majority from *National Corn Grows*: the central question of PU is whether the decision can be sustained on a reasonable interpretation of the facts or the law
 - The immediacy of obviousness of a defect is not a tenable guide to whether the decision is untenable or evinces an unreasonable interpretation of the facts or law.
 - Also takes up some of what Wilson said in *NCG*: it is the way the tribunal understands the question its enabling legislation seeks to answer and the factors it is to consider that matters. The specific answer given should not be the focus of the review
 - Thus majority refuses to closely examine Agency's reasoning.
 - Close scrutiny suggests inappropriate insistence on re-evaluating the evidence.
 - **Difficult to balance overly meticulous review and affirming administrative legitimacy**

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- What would work best to reform the standards of review? Lebel suggests going back to a two standard model, but some fear this would lead to old-school formalism.
- Some suggest going to a spectrum reasonableness standard akin to procedural fairness
 - Move away from fixed standards of review and the four factors, towards a broader requirement that the court must justify why it intervened in a situation
 - Instead of more/less deference, use a more transparent and principled basis
- Dyzenhaus suggestion:
 - Calls into question both the patent unreasonableness and correctness standards.
 - His account of deference as respect requires that all instances of review (substantive and procedural) must be conducted with sensitivity to the complex factual, institutional, and normative considerations that bear on administrative decisions.
 - Endorses idea that ADMs and judges are co-participants in justifying state action under RL
 - Supposedly this aligns with LHD's judgement in Baker
- Bastarache favours the idea of further refining the three current standards.
 - Better to reform JR of substance through the slow gears of CL than attempt wholesale reform
 - Think about what could be lost if we forgoe PU
 - PU registers the great difference between the courts and ADMs
 - Allows for meaningful role of PCs
 - Reminds judges of their lack of experience in administrative and polycentric matters.
 - Judges are there to decide rights as between parties
 - But isn't PU inconsistent with the RL?
- And there is this new case called Dunsmuir, but what does it mean? The end.

Done Chapter 9

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Chapter 10: Discretion

I. Introduction

- Discretion is ubiquitous in our legal system
- Discretion generally refers to the right of a decision-maker to choose between options
 - This challenges the notion that the administrative state simply acts as a transmission from legislature to citizen
 - The executive does not simply execute the will of the legislature. There is room to play

II. The Role of Discretion and How it Was Viewed by Academics

A. The Role of Discretion and The Administrative State

1. Discretion to Decide Individual Cases

- The discretion to decide individual cases is central to the contemporary Canadian political system. Policy makers and legislatures simply cannot foresee every possible future case that will come under an Act.
- *Baker*
 - *Immigration Act* required applications for immigration be made from outside Canada
 - Regulation provided ministerial discretion to exempt on humanitarian and compassionate grounds
- *Roncarelli*
 - The liquor commission was delegated the power to "cancel any [liquor] permit at its discretion". The Alcoholic Liquor Act did not provide any formal restriction on the discretionary power.

2. Discretion to Adopt General Norms

- Many statutory provisions confer discretionary power on ADMs to adopt binding rules of general application.
 - Often called regulations; sometimes called bylaws, tariffs, orders, etc.
- Justification for such grants of discretionary power are twofold:
 - The need for experts – parliament does not have sufficient experts to deal with the many issues it needs to address
 - Time and information
 - Time: Legislators are too busy trying to look good to draft regulations
 - Information: Always incomplete; in essence allowing such discretion creates adaptive management
- Executive has implicit power to adopt non-binding rules such as directives, guidelines, and manuals. AKA Soft law
 - Can help create conformity in decision-making etc
 - "soft law is used to set policy orientations that are likely to determine the way in which a particular legislative or regulatory scheme will be applied"

B. Discretion and Academics

- There are two primary camps
 - Those who see discretion as inherently arbitrary
 - Dicey, Hewart, and Hayek

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- Those who see discretion as an instrument that allows the welfare state to achieve its goals
 - Robson, Jennings, Willis
- Dicey clearly fits in the first camp
 - Discretion for executive in exceptional circumstances like war
 - Two primary problems with discretion as seen in the modern state
 - Statute that grant discretion tend to be framed to exclude court oversight
 - The issues discretion was granted for tended to be 'public business' ie policy and politics. AN area unsuited for courts
- Robson wanted increased role for welfare state. Legitimate exercise of administrative power depends on ADMs exhibiting a judicial mind or a spirit of justice
 - Basically wants procedural fairness
- Jennings: Wanted administrative court (like the conseil d'Etat)
- Dicey's influence seems to linger until Baker, and maybe even beyond

III. Discretion from Roncarelli to Baker

- *Roncarelli 1959*
 - Opened JR for discretion in Canada
 - Clearly affirmed that even at the highest level of executive action, discretion is limited by legal principles
 - However, the majority and minority rulings purveyed two different visions for the judicial control of discretion. Both of which influenced the courts in the following decades
 - **Majority:**
 - Ruled in favour of Roncarelli based on two fundamental factual findings
 - 1) Although the commission formally canceled the liquor license, the commission acted on Duplessis; orders; and
 - 2) Duplessis was motivated by a desire to punish the Jehovah witnesses
 - **Rand:**
 - Both Duplessis and the commission lacked any legal basis to cancel the license, notwithstanding the broad wording "cancel any permit at its discretion"
 - Discretion is always fettered no matter how broad the grant appears to be
 - The commission is a public service and has to serve the purpose of the statute and owed a public statutory duty to Roncarelli
 - The regulatory framework and the requirement for a permit had consequences for permit holders. It strongly affects their interests and rights.
 - For discretion to be legally exercised it must pursue legitimate purposes and take into account the situation of the individual affected by the decision
 - **Dissent (Cartwright):**
 - Started from the perspective of the decision maker
 - No actionable wrong committed by cancellation of license
 - The court cannot look into whether the decision maker had reasonable grounds to cancel the license.
 - The statute allowed unfettered discretion and the decision was administrative, not quasi-

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judicial. Thus the court cannot intervene

- Interpreting Rand's opinion:
 - Option 1: The legal regime applicable to executive discretion lies in the text of the statute, read in light of a number of underlying principles.
 - The underlying principles tend to focus on identifying legislative intent
 - Option 2: **Dominates AI in the years that follow.** Unwritten principles dependent on fundamental values in our legal order are a constitutive part of the legal regime of discretion.
 - **Dominant because**
 - More easily reconcilable with orthodox view of law: Positivism. Positivism holds that only valid positive rules are binding on judges. *WTF does this have to do with why option 2 won out? How does Roncarelli have anything substantial to do with rules that bind judges? I guess maybe that the discretionary grant created a 'rule' preventing judges from interfering in the judgement.*
 - Compatible with ultra vires rule that governed JR of executive action: Excesses of jurisdiction delegated by statute will be struck down by the supervisory power of the courts.
- **Grounds of review for abuse of discretion**
 - A. Unauthorized Object or Purpose, Improper Considerations**
 - ADMs must exercise discretion in conformity with the purpose of the delegating statute
 - Similarly, discretion cannot be exercised based on improper considerations
 - *R. v. Smith & Rhuland Ltd. 1953 SCC* *Pre Roncarelli
 - Labour board had discretion to certify union as bargaining unit. Could not refuse to certify simply because treasurer had communist allegiances.
 - *Shell Products Ltd. v. Vancouver (City) 1994 SCC*
 - City had voted resolution expressing its intention to not do business with Shell until Shell quit operating in apartheid South Africa.
 - Majority held object was to join international boycott, as such, City was not pursuing a "municipal purpose".
 - B. Bad Faith**
 - Rand held that discretion "necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."
 - *Landreville v. Town of Boucherville 1978 SCC*
 - City used its power to expropriate to prevent a resident from operating his quarry.
 - Beetz: Burden for bad faith is very high: "involves establishing the commission of an 'abuse of power equivalent to fraud' and 'resulting in a flagrant injustice,;'"
 - Made out in this case
 - C. Acting Under Dictation or Influence**
 - Presumption that when legislature delegates discretion to a particular ADM, that Adm must make the decision. *Roncarelli* is an example of dictation.
 - D. Wrongful Delegation of Power**
 - Similar to acting under dictation or influence. Courts presume that discretion is

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delegated to an ADM based on expertise or function within the administrative state.

- *Vic Restaurant Inc. v. Montreal (City)* 1959 SCC
- City adopted bylaw that made delivery of permits conditional on authorization by chief of police. Chief not given any precise norms on which to rely. So de facto, City had wrongfully delegated discretion.

E. Fettering Discretion

- Likely to arise in contexts where directives or guidelines are used to structure the exercise of discretion.
- Structuring can be too much if it does not allow ADM to manoeuvre in exceptional cases

F. Unreasonableness

- Sometimes used to reinforce the above grounds. Rarely invoked on its own.
 - Rarely invoked because of the very high threshold required. It is even steeper than PU.
 - *Wednesbury 1985 HL*: "something so absurd that no sensible person could ever dream that it lay within the power of the authority."
 - Later restated by HL: "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it."
- The application of this extreme threshold often blurred the distinction between the substance of a discretionary decision and its surrounding legal limits
 - This is why there was periodic resurfacing of "law unto itself" approach after *Roncarelli* AND THE OSCILLATION between majority and minority positions in *Roncarelli*.
 - *EG Thorne's Hardware Ltd. v. The Queen* 1983 SCC
 - It would take an egregious case to warrant striking down an order in council on jurisdictional or other grounds.
 - **Decisions of the governor in council in matters of public convenience and necessity are final and not reviewable in legal proceedings.**
- *Thorne* maintained the law/discretion dichotomy.
 - Decisions of discretion were approached from the perspective of preserving freedom of ADMs to decide on the substance and to limit judicial intervention to policing the legal limits that constrained the freedom
- In *CUPE 1979* law/discretion dichotomy continued
 - SCC mandated deference towards ADMs and eventually pragmatic and functional approach emerged
 - This seemed to narrow gap between law/discretion because courts were invited to restrain in intervening in both cases. But different reasons justified these separate but similar results
- Justification for hands-off approach to ADM decisions on non-jurisdictional issues:
 - Deference: the recognition of a legitimate role for the executive in law interpretation
 - Interpreting law not the court's monopoly
 - In many cases, expert tribunals equally competent to interpret specialized legislation

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- Justification for hands-off approach regarding discretion:
 - Necessity of maintaining division of powers and the role of the judiciary
 - Because discretion requires policy/political choices courts must stay out
 - The heads of review of discretion thus maintain formal separation of powers and keep courts out of discretionary decisions
 - Thus, not about deference here. Just the division of powers
- **The difference between unreasonableness in law and in discretion is the degree of unreasonableness.** In law, according to CUPE 1979, PU in the context of executive interpretation of the law required that the decision "could not be rationally supported by the facts". This requires digging into the decision. In discretionary unreasonableness, the defect must be massive. So no digging will be required.
- *Nicholson v. Haldimand-Norfolk (Regional) Board of Commissioners of Police 1979*
 - Same year as CUPE 1979
 - **Paved the way for reform of law of JR that occurred 20 years later**
 - Distinction between law/discretion is not a reliable criterion for determining the domain of application of procedure in admin matters.
 - *What a stupid fucking way of explaining the matter. What this sentence means, if you read the case, is that the old dichotomy between judicial/quasi-judicial and administrative decisions as a ground for either granting or denial procedural protection is a faulty notion. The distinction does not hold, especially with the emergence of the spectrum of procedural fairness rights.*

IV. The Law of Discretion: Baker and Beyond

A. Baker

- LHD: Traditionally control of administrative discretion limited to certain grounds
 - This incorporated two central ideas:
 - 1) ADM must be given an important margin to manoeuvre when exercising discretion.
 - 2) ADM must still act within certain limits
 - Must be within bounds of jurisdiction granted by the statute
 - Must be exercised in manner that reasonably interprets room to manoeuvre as contemplated by the legislature in accordance with the principles of the rule of law...in line with general principles of administrative law governing the exercise of discretion, and consistent with the Charter.
 - No strict dichotomy between discretionary and non-discretionary decisions
 - Executive decisions are often mixtures of characteristics that do not follow a simple categorical distinction
 - Exercise of discretion cannot be easily distinguished from interpretation of rules of law. Both involve making choices between two courses (action or inaction), or between various options opening up in cases of legal silence or ambiguity,
- **Review of discretion can follow pragmatic and functional approach**
 - The factors to consider can accommodate specificity of discretionary powers and will not create more intervention into discretionary decisions because the pragmatic

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and functional approach takes into account that discretion requires leeway, but
"discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the RL, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter."

- In the circumstances, review of minister's decision falls on RS standard.
 - Decision inconsistent with the values underlying the grant of power, therefore it was unreasonable
- To determine meaning of "compassionate and humanitarian grounds" court had to engage in contextual statutory interpretation. Court looked to objectives of *Immigration Act*, international instruments, and ministerial guidelines. Children's interests turned out to be central. As such, reasonable decision required close attention to children's interests

B. Baker's Promise

- By applying the pragmatic and functional approach to discretionary decision, *Baker* ended law/discretion dichotomy in the domain of substantive JR.
 - Substance of discretionary decisions can be made subject to control based on RS.
 - Moving away from Dicey: Dicey said discretion was considering issues outside the law
- Also softened dichotomy between procedure and substance
 - Reasons must be given for decisions having substantial impact on individual's interests
 - Reasons must demonstrate that decision was attentive to individual's situation
 - Thus procedure can affect substance
- *Baker and Nicholson* shift the starting point for determining legality of executive action from nature of the power to consequence of its exercise on the individuals affected

C. Baker's Aftermath

- 1) *What is Left of the Previous Approach?*
 - Baker suggested that the old categories of heads of review for discretion were still useful. "discretion must be exercised....in line with general principles of AL governing the exercise of discretion..."
 - Likely that heads of review that are more closely related to questions of fact remain unaffected by Baker (bad faith, wrongful delegation, acting under dictation, fettering)
 - Heads more related to exercise of statutory interpretation might need to be approached in line with appropriate standard of review at the close of pragmatic and functional analysis (unauthorized object or purpose, irrelevant consideration, reasonableness)
- 2) *The chilling effect of Suresh*
 - In *Baker*, the court held that a number of elements (ministerial guidelines, international instruments, and the purposes of the Act) pointed to the interests of the children as an important consideration. **Court found that the ADM had failed to give "serious weight and consideration to the interests of the children"**.
 - Evaluation of reasonableness included consideration of weight given to a relevant factor

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- In *Suresh* the SCC clearly stated that on the discretionary end of the spectrum, courts MUST NOT engage in a new weighing process. Court must limit itself to ensure relevant factors are taken into consideration
- ***How is this any different from the pre-Baker era? (Text and prof ask this)***
 - If discretion is not intrinsically different from law, then discretion should be subject to a form of control that allows evaluation of reasonableness of the decision.
 - Reasonableness can depend on the weight or relevant importance given to different factors.
 - With *Suresh* approach, how is application of the "pragmatic and functional approach" to review discretion will significantly alter the traditional approach to the review of discretion (as Baker so clearly suggested)
 - *****I think this problem is going to get worked into the exam*****

V. Conclusion

- Discretion allows the administrative state flexibility to respond to the unknowable future.
- Hard to balance discretion within the RL
 - From *Roncarelli to Baker* the courts have oscillated between various degrees of interference
- The judiciary has at least formally recognized that discretion must conform to legal principles, but this is a tentative arrangement. We are not far from reverting back to discretion as "law unto itself"
 - *I think this would be better. If people did not expect the courts to protect them and babysit the exec, then they would be more politically active*
- Courts have been oscillating between understanding discretion as power and discretion as dialogue
 - Discretion as dialogue: Discretion must be approached from the bottom up and thought of as a dialogue between the individual affected and the public decision maker
 - Fosters communication and expects dialogue to affect the outcome of the decision
 - Essentially, dialogue narrows the ambit of outcomes the ADM can reach because the decision must be responsive to the dialogue that precedes the decision
 - *Roncarelli*: Rand's view suggests dialogue.
 - *Think Baker and Nicholson*
 - Discretion as power: Top-down one way street. Discretion is seen as the descendant of the unreviewable executive prerogatives
 - *Roncarelli* Cartwright's view. Discretion is unreviewable unless the statute explicitly allows for its review.
- Discretion should be conceived as dialogue for two reasons:
 - 1) Dialogue best explains the development over the last 30 years
 - Explains why courts are now more willing to impose procedural obligations on ADMs
 - *Think Nicholson*
 - Explains obligation to justify their decisions by giving reasons when the decision affects an individual's important interests

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- This really cannot be reconciled with discretion as power.
- 2) Justifies and explains the evolution of the law of discretion, at least until *Baler*
 - Suggests how discretion is compatible with the RL and democracy
 - Requirement of justification places executive action within the realm or RL through participation and accountability
 - By creating venues for communication, it allows individuals to influence the norms that will be applied to her and substantiates democratic value of public action
- It is hard to tell if discretion as dialogue will hold out, especially in the era of state terrorists oppressing freedom fighters through such legislation as the Anti-Terrorism Act and security certificates. Does our court have balls? I doubt it.

DONE!

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Chapter 11: Administering Security: The Limits of Administrative Law in the National Security State

I. Introduction

- The notwithstanding clause s. 33 allows the suspension of certain Charter rights
- A s. 1 justification might be made out on a s. 7 right in dire circumstances (See *R. v. Heywood* 1994 SCC. See also *Nfld Treasury Board v. NAPE* 2004 SCC (Nurses and fiscal crisis))
- Unlike regular criminal offences, national security matters are more deeply secretive
- In theory, national security measures are subject to the Charter and Constitution like all other laws. In practice, administrative decision-making in this area is extremely opaque, protecting secrecy at the expense of fairness
- The courts have not attacked national security secrecy legislation with much gusto
- The purpose of the Chapter is to show the inability of administrative law to effectively hold the state accountable in these matters.

II. National Security in Canadian Law

A. Creating Special Government National Security Powers

- *Canadian Security Intelligence Service Act*
 - Authorizes special govt action to pre-empt or respond to national security matters
 - Establishes an intelligence service whose purpose is to gather information on "threats to the security of Canada". This is a carefully defined term

B. Penalizing National Security Matters

- Imposition of penalties of disadvantages to people, based on national security concerns
- *Immigration and Refugee Protection Act (IRPA)*
 - Applies its own penalties regarding national security threats
 - Not intended to be a punitive statute; but does impose penalties
 - EG: Deny entry to permanent resident or foreign national because of security threat
 - Security Certificates: If considered reasonable by a federal court judge, it is deemed to be a removal order.
 - Can allow deportation to torture in some circumstances. Perhaps far worse than anything in the criminal code
- Other such legislation: *Citizenship Act*: Deny citizenship to freedom fighters. *Charities Registration Act*: Deny status if caught supporting freedom fighters

C. Limiting Regular Government Obligations

- *Access to Information Act* (I think they mean PPEIDA)
 - Govt can refuse to disclose information for national security reasons

III. Special Qualities of National Security Administrative Proceedings

A. Notice And Right To Be Heard

- Notice and the right to be heard are fundamental to procedural fairness
- Yet in NS context, both can be trampled

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1) *A Basement Floor?*

- Where the Charter is involved, the court has demanded at least a bare minimum of fairness
- *Suresh 2002 SCC*:
 - Suresh protected by s. 7. Had the right to know the case to be met. Also opportunity to respond to the case presented against him.
- *Charkaoui 2007 SCC*
 - Legitimacy of security certificate process under immigration law
 - "The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7." Although the procedural protections offered in the NS context will be less than in other situations, they still exist.

2. **Notice and the Right to be Heard in Practice**

a. *Truncated Notice*

- Some NS procedures anticipate no notice being given. EG: CC s. 83.05 allows the cabinet to list an entity as a terrorist group if satisfied of XYZ after recommendation by minister of Public Safety
- Listing may be challenged, but limited opportunity to know case to be met
- Obvious omission is right to notice prior to being listed
- After-the-fact right to JR is too little too late. A group that is listed will be unlikely to get future donations. Stigma will not be expunged easily
- In 2007, the govt enacted regulations under the *Aeronautics Act* and created a no-fly passenger list. People would be unlikely to find out about being listed until they try to check in at the airport. Further, the list could be provided to foreign groups who might torture or kill the individuals on the list

b. *Truncated Right to be Heard*

- Special closed door (in camera) administrative proceedings conducted in the absence of both the party and their counsel (ex parte) are permitted in several NS related areas.
 - Security certificates under IRPA
 - s. 38 of the Canada Evidence Act
 - ...
- These Acts allow federal judges to deny an interested party full access to the case against them.
 - Can result in party not knowing the case to be met, and facing deportation to torture or death
- In *Charkaoui*, the court notes the deficiencies in IRPA: "BIG QUOTE" page 297 text
 - Basically says the judge cannot effectively analyze the one sided information and thus the party has no chance to meet the case against them.
 - Not saved under s.1; no attempt at minimal impairment, needs amicus curia or something like that.
 - Be careful with decision though: Court did not signal that truncated right to know the case and truncated right to be heard are per se inadmissible
 - **Also: This ruling will have little significance outside of s. 7 cases.**

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B. Discretion

- Only 9 of 33 statutes that invoke NS define the concept
- The FCA noted that the terms used allow anyone to interpret the legislation as they see fit
- Ambiguity in NS confers substantial discretion on the executive to define NS issues as they wish.
- **Mosaic effect:** posits that the release of even innocuous information can jeopardize national security if the information can be pieced together with other data. Basically a fear of cumulative disclosure
 - Has been accepted by Canadian courts and has guided disclosure decisions
 - Can be abused by government. *O'Neill v. Canada*
 - RCMP resisted disclosure of building location on national security grounds despite the fact that the building has an exterior sign indicating it is an RCMP building. The location of the building had also already been disclosed in the Arar inquiry. The OCA ordered disclosure of the location.

IV. Court Review of Discretionary National Security Decisions

- In *Suresh* the SCC defined some NS terms in the context of immigration law
- If terms are too vague, the court may strike them down as unconstitutionally vague. Especially where the term affects LLS. If the court can define the term, then it will not be sufficiently vague. Thus is searching JR can demarcate the term, it will not be struck
 - *Canadian Foundation for Children 2004 SCC*: A law is unconstitutionally vague if it "does not provide an adequate basis for legal debate and analysis; does not sufficiently delineate any area of risk or is not intelligible"
 - Legislatures cannot predict all future scenarios, thus judges must augment the law on case by case bases.
- Court can extend deference to ambiguous terms to ADMs. (Think *Barrie Public Utilities*).

A. Deference as the Starting Point in National Security Matters

- To limit uncertainty in NS context, courts have added their own gloss to the issue. In *Suresh*, the court held that the phrase "danger to the security of Canada" would survive constitutional vagueness challenge if it were read as requiring the govt to adduce evidence producing an objectively reasonable suspicion of a serious threat of substantial harm.
- *Suresh*:
 - Court applied patently unreasonable test because:
 - Minister had to make the decision
 - Minister is expert in NS matters and has access to special information
 - Decision is extremely fact-intensive and contextual
 - PU requires that the minister act in bad faith, cannot be supported by the evidence, or where the minister failed to consider the appropriate factors.
 - SCC cited with approval the UKHL case *UK (Secretary of State for the Home Department) v. Rehman 2001*. HL refused to give the govt carte blanche in its assessment of NS. "the interests of national security" cannot justify any reason the govt uses to deport a person.
- Appears that in NS context, PU is the default where ministerial discretion is challenged

B. The Application of Deference

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- *Suresh and Rehman* underscores the difficulty for courts to review govt action in the NS context
- Despite using the PU standard, in every case where the minister, under IRPA, has tried to deport a person to face potential torture, the court has sent the matter back for re-determination; usually for failing to consider appropriate matters.
- Courts demand that where s. 7 is engaged, a minimum level of procedural protections are required
 - *Suresh* sill emphasized that minister must be given wide discretion in evaluating NS threats
- In one case, the federal court has extended deference beyond the deference apparently demanded by the legislation. Section 38 of the Canada Evidence Act requires the judge to determine whether disclosure would be more injurious than non-disclosure. The judge is expected to balance and decide among competing interests. (See esp. s. 38.06)
 - The FCA stated that even in this case, deference is owed to the minister's decision. But his deference appears to be on the reasonableness standard, not PU. "...If [the minister's] assessment of the injury is reasonable, the judge should accept it." (*Canada (AG) v. Ribic 2003 FCA*)

V. Other Forms of Review

- JR is highly attenuated in NS context and judges do not like interfering in this area. So other modes of accountability are necessary
- Internal accountability is an option

A. General Bureaucratic Review

- Involves either:
 - Standing review mechanisms with responsibility that may occasionally touch on NS matters
 - Ad hoc review systems created by the gov in council under statute permitting public inquiries. for example officers of parliament, certain admin tribunals, and public inquiries
- **Officers of Parliament**
 - Essentially executive arms of the legislative branch. Obligated to report directly to parliament, rather than to a minister.
 - Auditor general, the information commissioner, and the privacy commissioner are examples
 - Each can in their own way, review NS functions of the govt
- **Independent administrative tribunals**
 - Can influence NS issues. EG: The Canadian Human Rights Tribunal and the Canadian Human Rights Commission.
 - Staff have fairly robust tenure etc. (institutional independence)
- **Ad hoc commissions**
 - Usually created under the *Inquiries Act*
 - EG: The Arar inquiry; the inquiry into Air India Bombing; the Iacobucci inquiry; ...
- These bodies all have very limited capacity to review NS issues. Limited, specific mandates, funding, etc. all limit capacity to keep govt accountable.

B. Specialized Bureaucratic Review

- Very few NS bodies are robustly monitored. CSIS is monitored by several tiers of review. EG: The Security Intelligence Review Committee (SIRC)

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- SIRC is tasked with (among other things) reviewing CSIS' performance. Also has public complaint function.
- RCMP is reviewed by the Commission of Public Complaints. This commission in reality has very little ability to probe RCMP NS functions

VI. Conclusion

- Courts, like govt itself, have trouble finding the right degree of review in NS context.
- Three specific problems with concept of NS in AL:
 - 1) The term NS is often undefined in statutes that invoke it
 - 2) Govt resort to NS is typically reviewed on PU standard
 - 3) Deferential review of undefined term takes place outside of normal public courts and adversarial system
- Deferential judges meet with govt lawyers and security experts in the absence of affected party.
- Perhaps a better solution is to use the administrative state itself. Have a national security review court or something like that

DONE Chapter 11

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Chapter 12: The Role of International Human Rights Norms in Administrative Law

Preface:

- Intl human rights law (HRL) has only garnered much attention in AL with *Baker* 1999
- The baker quote: ADMs must exercise their powers and interpret their enabling statutes "in accordance with the boundaries imposed in the statute, the principles of the RL, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."
- Intl HRL is relevant to several of these elements
 - Statutory interpretation can be influenced by intl rights and obligations; especially when the statute is expressly enacted to implement said right or obligation
 - Fundamental Cndn values can be reflected in intl rights and obligations that bind Canada through custom or convention
 - Charter interpretation can be affected by intl obligations
- Intl HR treaties can impact review of admin decisions for procedural defects
 - In *Suresh*, to define the content of fundamental justice under s. 7, the court held that the terms of an intl instrument ratified by Canada can create legitimate expectations

I. A Short Introduction to International Human Rights Law

- Intl law derives from many sources. The most important are international custom (customary international law) and intl treaties (Conventional intl law)
- **Customary international law**
 - Reflected in the conduct of states. To establish that a legal norm is a customary intl law:
 - **There must be evidence that states have consistently and generally followed the rule and that they have acted in this manner because they were of the view that they were obliged to do so under intl law, rather than for reasons of political expediency.**
 - Whether a treaty has created a customary rule depends on whether ratification of the treaty is widespread among interested states and whether these states extensively and uniformly accept that the provision sets out a binding rule of law.
 - Intl treaties can replace customary intl laws **except jus cogens (peremptory norms of customary intl law)**. No derogation is permitted. Cannot contract out by acquiescing to their breach. Cannot contract out by signing contrary treaties.
 - Jus cogens: Latin for compelling law. Includes: Genocide, slaving, wars of aggression, territorial aggrandizement, piracy. Probably includes torture; This case says torture is a jus cogens: *Prosecutor v. Furundzija* (Intl Criminal Tribunal for the Former Yugoslavia 2002.)
- **Conventional International Law**
 - Most human rights norms come from here
 - Universal Declaration of Human rights, UN Charter, ...
 - Intl HR treaties (HRTs) contain several kinds of provisions that may be relevant to Canadian ADMs, courts, and lawyers

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- Some guarantee substantive rights at intl law
 - Right to freedom from torture etc. EG: Intl Covenant on Civil and Political Rights
 - Right to earn a livelihood by a means one freely chooses: Intl Covenant on Economic, Social, and Cultural Rights.
- Some impose substantive obligations on states:
 - Intl Covenant on the Rights of the Child
 - State's institutions from courts to immigration tribunals must take into account best interests of the child as the primary consideration in all actions concerning children
- Most treaties require states to provide **effective remedy** to persons' whose substantive rights have been violated
- Some treaty provisions guarantee institutional and procedural rights at intl law:
 - ICCPR right to a fair and public hearing by an independent and impartial tribunal.
 - CRC: Children have right to express their own views on matters affecting them
- Although many treaties have enforcement mechanisms, they rely on state institutions to enforce the guarantees.
- Intl petition to UN bodies and treaty watch groups will only be considered if the individual has already exhausted all domestic remedies available to vindicate the right. This is in keeping with the primacy of state domestic law

II. Rules of Reception of Intl Law

- The SCC has not been clear about the application of intl law, especially conventional intl law

A. Reception of Customary Intl Human Rights Law (Cust-IHRL)

- *R. v. Hape 2007 SCC*
 - **The reception of customary intl law is governed by the doctrine of adoption:**
 - **Customary intl law is incorporated into domestic law as customary intl law evolves**
 - Following CL tradition: Doctrine of adoption applies in Canada
 - Customary intl law should be adopted into domestic law barring conflicting legislation
 - **Justification:** The customary laws of nations is Canada's law, unless in exercising sovereignty, Canada declares its law to the contrary.
 - **Absent express derogation** courts may look to customary intl law to aid in interpreting Canadian law and the development of the CL
 - There is tension between the earlier stronger statement that absent express derogation customary intl law applies, and the latter statement that the court "may" look to CIHRL to "aid" in interpretation and development of Canadian law.
 - *Court uneasy with abrogating its and parliament's discretion to international rules.*

B. Reception of Conventional Intl Human Rights Law (Con-IHRL)

- As a matter of intl law, an intl treaty is binding on Canada if it is signed and ratified by Canada and has entered into force.
 - Signed: **WHO SIGNS?**
 - Ratified: **WHO RATIFIES?**
- Under traditional view:

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- CIL and domestic law conceived as two different entities
- This view founded on separation of powers between executive and legislature
 - Fed executive can exercise its prerogative power to sign and ratify an intl treaty; BUT
 - ONLY legislatures can enact law affecting the legal rights and obligations within Cnda
- If treaties could create legal rights/obligations in Canada, then exec could create domestic law wo legislative consent
- Intl treaties provisions must be **implemented** into domestic law to create domestically legally enforceable rights/obligations
- **Democratic deficit**: Created when Con-IL automatically applied domestically. Could be cured by giving legislature more involvement in treaty process
- Another related problem of automatic application of Con-IL is federal infringement of provincial spheres
- It is hotly contested whether the claim (a treaty obligation binding on Canada at intl law is irrelevant" unless it is implemented by a specific statute following ratification) is hotly contested. Reasons:
 - Not all implementing legislation is obviously implementing legislation
 - Parliament might enact a statute to implement an intl treaty without specifically stating so in the statute
 - Legislation not initially intended to implement may be relied on to do so later.
 - Canada generally ratifies treaties on the assumption that domestic law already conforms to the intl treaty norms.
 - Despite this claim to conformity, the government resists attempts to enforce human rights treaty norms in Canadian courts on the ground that absent implementing legislation, the treaty provisions are not binding domestically; and that implementation should only be inferred where ratification is premised on the prior conformity of domestic law.
 - Challenge to traditionalist view:
 - Question the basis of the separation of powers and legislatures' monopoly over creation of laws.
 - Courts have long constrained the administrative state's exercise of power by insisting that it conform with fundamental and constitutional values
 - Court's increased reliance on intl norms and treaties is best understood as the judiciary updating the values to which the CL subjects the administrative state.
 - (From pre-democratic, property-based values, to a more modern set of democratic values, including fundamental human rights"
- **Baker 1999**
 - Appears to endorse traditionalist approach: "international treaties and conventions are not part of Canadian law unless they have been implemented by statute." Para 69.
 - They are not part of domestic law, but they can influence the interpretation of domestic law
 - Well established principles of statutory interpretation hold that legislation will be presumed to conform with intl law, including customary intl law and treaty obligations
- In **Hape 2007** court stated:
 - Presumption of conformity based on judicial policy that as a matter of law, the courts will

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strive to avoid constructing the law in such a way that it conflicts with intl obligations, unless statutory wording is clear.

- **Presumption of Conformity has two Aspects**
 - The leg is presumed to act in compliance with Canada's intl obligations as a signatory of intl treaties and as a member of the intl community
 - The leg is presumed to comply with the values and principles of customary and conventional intl law. Those values form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them.
 - Presumption is rebuttable: "Parliamentary sovereignty requires courts give effect to a statute that demonstrates an **unequivocal** intent to default on an intl obligation
- However, in *Baker*, the court adopted a more restrained approach to intl law. **BUT BAKER IS 9 YEARS BEFORE HAPE**. In *Baker* court applied "a *permissive* rule allowing courts to have regard to Canada's treaty obligations as an **aid** to statutory interpretation." [My emphasis]

III. International Human Rights Norms and the Substantive Review of Administrative Decision-making

A, The Role of Unimplemented Treaties

- ***Baker 1999 SCC:***
 - SCC decided the case on issue of procedural fairness (bias). The court also held that the exercise of discretion was unreasonable because the officer's notes failed to show sufficient attention to the best interests of the children.
 - Court's assessment of reasonableness was informed by the objectives of the Immigration Act, ministerial guidelines, and values underlying the Convention on the Rights of the Child.
 - Court rejected Baker's argument that Children's interests should be given primacy according to art. 3(1) of the CRC because the CRC was not part of domestic law and therefore could not apply directly to the structure of the minister's discretion under the IRPA.
 - LHD still held that CRC was important: Values reflected in IHRL can still inform statutory interpretation and JR. Legislature presumed to respect intl law (both customary and conventional). These constitute part of the context in which legislation is enacted and read. Interpretations that reflect such values are to be preferred. Para 70
- The decision that unimplemented treaty values can inform interpretation, exercise, and JR of discretion sparked debate.
 - **Iacobucci and Cory dissented on this point.** Argued that LHD had allowed Baker to "achieve indirectly what cannot be done directly, namely, to give force and effect within the domestic legal system to intl obligations undertaken by the executive alone that have yet to be subject to the democratic will of parliament." Para 80
- Arguably the court did not go far enough in giving effect to the CRC. The CRC was ratified, in force, and thus binding on Canada. Unlike other intl norms, the CRC is not "potentially persuasive, it is obligatory. *WTF? Sneaky text? only binding internationally, it was not implemented in Canada, so it was not really binding on Canada?*
 - Court should have applied the presumption of conformity and strove to interpret the

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Immigration Act in conformity with the CRC. Instead, *Baker* prescribes only that the CRC may inform the interpretation

- In *Hape 2007 SCC* the court did not mention *Baker*
- Does the force of impact of an unimplemented treaty depend on the degree to which the international instrument resonates with Canadian law?
 - *Baker*: CRC was not implemented, but had similar values to the guidelines and the Immigration Act. So has weight. This suggests that resonance matters.
- Procedural rights tend to conform with Canadian legal values, what about social and economic rights?
 - **The ICESCR**
 - individuals are entitled to the highest attainable standard of physical and mental health and states must "create conditions to assure to all medical services and medical attention in the case of sickness."
 - Also has tenancy requirements
- Despite *Hape*, it remains unclear to what extent unimplemented intl obligations will be used by the courts to interpret statutes.
- Post-*Baker* the legislature expressly enacted art. 3 of the CRC and told courts to interpret IRPA in accordance with intl norms

B. Implemented Intl Human Rights Norms and the Substantive Review of Discretion

- Now courts interpret implementing treaties through the treaty provisions. Used to be that courts would not resort to the treaty unless the implementing legislation was patently ambiguous.
- ***Pushpanathan 1998 SCC***
 - Review of Immigration and Refugee Board (IRB) interpretation of a provision of the Immigration Act that implemented a clause in the 1951 *Convention Relating to the Status of Refugees* excluding individuals from refugee protection if the individual was guilty of "acts contrary to the purposes and principles of the UN".
 - Statutory provision was meant to implement the Convention. Thus court bound to "adopt an interpretation consistent with Canada's obligations under the convention."
 - Determined Canada's obligations by analyzing the convention's text and apply the rules of treaty interpretation articulated in the Vienna Convention.
 - Court reviewed on standard of correctness because **interpretation of an intl human rights convention is a pure question of law of precedential value over which it could claim more expertise than the IRB.**
- ***De Guzman 2005 FCA***
 - Following *Baker*, parliament enacted s. 3(3)(f) of IRPA, requiring that the Act be "construed and applied in a manner that...complies with intl human rights instruments to which Canada is signatory."
 - FCA, troubled by massive potential scope of the provision.
 - Held that s. 3(3)(f) meant that intl human rights instruments that are binding at intl law are "determinative of how IRPA must be interpreted or applied, in the absence of a contrary legislative intention."
 - Suggested in obiter that non-binding intl HR instruments be used as per *Baker* (not

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- determinative, but can be used to aid in interpretation).
- **Thus, whether expressly implemented or not, intl HR instruments that bind Canada at intl law are determinative of IRPA's provisions and the validity of decisions made under it unless contrary legislative intent is found.**
- Where intl HR instrument does not bind Canada at intl law, it can still be persuasive and used as an interpretive aid
- **Thiara 2007 FC**
 - Illustrates how s. 3(3)(f) has been used to challenge the substance on an immigration officer's discretionary decision. Argued on humanitarian and compassionate grounds that she should be allowed to remain in Canada to raise her two Canadian born daughters.
 - Argued that deporting her and children to India would be bad: poor education, sexist culture, etc. and contrary to various intl HR instruments including the UDHR.
 - Officer dismissed her application. Thiara sought JR on grounds that officer failed to consider the intl HR instruments. Court rejected the arguments.
 - Held: The officer's analysis of the best interests of the Children were sensitive to the issues raised in the CRC, UDHR, and so on." No need to mention the intl instruments expressly. Decision not unreasonable.

C. Norms of Customary Intl Law and Substantive Review

- Have also influenced the substantive review of public bodies' decisions.
- **Spraytech 2001 SCC**
 - Majority held on basis of normal stat interpretation, that restricting use of pesticides fell clearly within municipality's power to secure citizens' health.
 - Held that its interpretation of the Cities and Towns Act was consistent with the precautionary principle (arguable a norm of customary intl law).
 - Reference to *Baker* approach in applying customary intl law is problematic:
 - Under CL rule of reception, customary intl norms are binding on Canada at intl law and directly applicable in domestic law.
 - They should not be treated as only potentially relevant to statutory interpretation.
 - *But the SCC has not held that the PP is a norm of customary intl law, so the Baker approach is correct.*
 - *Indian High Court held that PP is cust. Intl law. Australia held that PP is common sense and always part of CL*

D. The Use of International Law in Charter Interpretation

- Fulfilling Canada's obligations under the UDHR and ICCPR was a major impetus for drafting and adopting the Charter
- General limitation clause (s. 1); legal rights (ss. 7-14); and s. 15 equality all derived from analogous provisions in the ICCPR
- Canada has represented that the Charter is meant to implement the ICCPR and UDHR
- Open to courts and ADMs that Charter is legislation intended to implement intl HR instruments.
 - Some argue that SCC should treat binding intl HRL, whether customary or conventional, as

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- “presumptively protected” by the Charter; and
- Non-binding intl HRL should be treated as relevant and persuasive in Charter interpretation
- **Re Public Service Employee Relations Act (Alberta) 1987 SCC (Alberta Reference)**
 - the general principles of constitutional interpretation require that intl obligations be a relevant and persuasive factor in Charter interpretation” because Canada is party to intl HR treaties with substantially identical provisions to those found in the Charter.
 - A passage in the case identify two approaches to use of intl law in Charter interpretation.
 - 1) Charter should be interpreted in conformity with Canada's intl obligations
 - 2) Intl obligations should be viewed as relevant and persuasive, but not binding.
 - The second approach has won out. (See for EG *Slaight Communications 1989*)
- **Suresh**
 - SCC extended the second approach to norms of customary intl law
 - SCC held that its inquiry into whether Suresh' deportation to a country where he faced substantial risk of torture violated principles of FJ under s. 7 would be “informed not only by Canadian experience and jurisprudence, but also by intl law, including jus cogens.”
 - *The text is playign fast and loose with Suresh. The court says that s. 7 inquiry will be informed by jus cogens **and** domestic law. It does not here suggest that jus cogens is not as forceful as domestic law. The text then quotes a passage dealing with treaty norms, saying that treaty norms are not strictly speaking binding. This is true, treaty norms are not jus cogens; they are not even customary intl law.*
 - The court leaves **the Suresh exception**. The SCC suggests that given the right circumstances, the minister might be able to deport to torture; this is in spite of the fairly common agreement that torture is jus cogens (SCC refused to say so); which implies that Canada CANNOT UNDER ANY CIRCUMSTANCES including through constitutional amendment, violate this norm.
 - Sends a mixed message regarding the influence of intl HRL in Charter interpretation
 - On one hand: Decision makers must consider the influence of intl norms in determining the procedural and substantive content of fundamental justice under s. 7.
 - This is more onerous than *Slaight*, which only said ADMs should consider...
 - On the other hand: “international norms as evidence” approach to the role of intl law in Charter interpretation allowed the court to sidestep the question of whether the prohibition on torture is jus cogens
 - Jus cogens (aka peremptory norms) are more than mere evidence. They are automatically incorporated and directly enforceable in Canadian law (barring clear contrary legislative intent). *IS THIS TRUE? I THOUGHT NATIONS CANNOT CONTRACT OUT OF JSU COGENS RULES IN ANY CIRCUMSTANCE?*
 - Thus, although intl law rejects deportation to torture, even in the face of threats to national security, fundamental justice still permits the Minister to exercise an extraordinary discretion to deport refugees to torture.
- **Hape 2007 SCC**
 - RCMP searched office of accused that was located in Turkish Caicos. RCMP said they were acting under Turkish law
 - Majority held that s. 8 protection against unreasonable search and seizure could not be

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- enforced in criminal investigations carried out in another state's jurisdiction,
 - This holding is subject to accused's right to a fair trial safeguards and limits on comity that may prevent officers from acting in manner authorized by foreign state, but in violation of Canada's intl HR obligations
- ***Health Services and Support – Facilities Subsector Bargaining Assn. v. BC 2007 SCC (one day after Hape) (Facilities Bargaining)***
 - Access to collective bargaining falls within Charter's protection of freedom of association. Relied on ICESCR, ICCPR, and ILO to support its conclusion
 - Significantly, court did not use the strong language it used in *Hape*. Reiterated traditionalist view that "incorporation of intl agreements into domestic law is properly the role of" legislatures.
 - Cited ***Suresh*** for proposition that "Canada's intl obligations can assist courts" in interpreting Charter guarantees.
 - Cited ***Alberta Reference*** to conclude that it was reasonable to infer that s. 2(d) of the Charter should be interpreted "as recognizing at least the same level of protection" as intl treaties that protected union bargaining as part of freedom of association.
- **In sum, the SCC jurisprudence on the role of intl HR norms in Charter interpretation has yet to decide whether intl HR obligations provide evidence of the meaning of the Charter's guarantees or presumptively define the minimum content of these guarantees**
 - *If its only Hape that uses the strong language, then it probably has something to do with the criminal nature of the offences and investigation that led the court to use a different standard. Look into this issue more. Text does a shitty job*

E. Discretion and Rights of Access to Intl HR bodies

- Should an ADM take into account proceedings pending before an intl body that might bear on the validity of their decision at intl law, when exercising discretion? Came up in Ahani.
- ***Ahani v. Canada (Minister of Citizenship and Immigration) 2002 OCA SCC leave denied***
 - Considered Ahani a threat to public (like Suresh) and wanted to deport him.
 - Unlike Suresh, Ahani did not make out prima facie case of substantial risk of torture if deported.
 - Exhausted all domestic remedies to stay. So petitioned UN HR Committee claiming violations of ICCPR.
 - Committee made official request to govt of Canada to stay deportation until committee could consider Ahani's petition.
 - Ahani argued that by adhering to the ICCPRD Canada had granted individuals limited right to obtain committee's view on whether ICCPR rights had been violated
 - Claimed right to injunction against deportation until committee decision.
 - Committee's view not binding on Canada, but had moral suasion.
- **Majority of OCA**
 - ICCPR and petition procedure not adopted into Canadian law. Therefore Ahani's argument rejected. Ahani cannot enforce intl obligations in domestic law when not implemented. Further, obligations were limited. Canada had not committed to be bound by committee decisions.

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- By signing provision Canada allows Ahani to seek committee's view, but Canada can still reject the view
- **Dissent (Rosenberg):**
 - Allowed Ahani to seek injunction.
 - Ahani should get right to committee decision before being deported. Not asking that committee decision be binding on Canada, so no issue of executive making laws
- Canada not bound to comply with committee's view. But, **principle of effectiveness** suggests that Canada must make ICCPR and its safeguard "practical and effective". If no right to stay deportation until committee makes decision, then how is the Canada providing the Committee any practical and effective capacity to carry out ICCPR?
 - Corollary right: A signatory state cannot, and should not be presumed to, take steps to make the rights protected by the treaty nugatory or ineffective.
- The committee held that Canada's refusal to abide by the Committee's request for interim measures flouted the Protocol and undermined that protection the Covenant created.
- *Immigration Act* conferred broad discretion to deport, but was silent as to timing. Under the *Baker* approach, whereby discretionary decisions are constrained by the values underlying intl law, the adverse impacts on Ahani's ability to communicate with the committee should have been a mandatory relevant consideration in the exercise of the minister's discretion.
 - Further, Minister's discretion limited by Charter s. 7, whose content (according to *Suresh*) is informed by Canada's intl obligations.
 - Fundamental justice in this case arguably required consideration of Ahani's ability to communicate with committee after deportation
- **Courts would be justified to intervene and review substance of discretionary decisions that do not comply with the principle of conformity. However, the courts have adopted the Baker approach: binding intl HR norms from unimplemented treaties may assist in interpreting statutory provisions. Whether such a challenge will succeed depends on how deeply the intl norm resonates with the values of the Canadian legal system. Discretionary decisions can be challenged on Charter grounds, and intl instruments can serve as evidence of the meaning of Charter protections.** So far, failure to consider the impact of a decision on an individual's right to access intl HR remedy has not succeeded.

IV. The Role of Intl HR Norms In The Procedural Review of Administrative Decisions

- Procedural fairness norms at intl law resonate deeply with Canadian legal values
- Procedural fairness is a principle of fundamental justice protected by s. 7 Charter
- Arguably, procedural safeguards at intl law could be called upon to influence development of procedural safeguards in domestic law.
- **Baker**
 - Argued that CRC gave Baker legit expectations that her children would have right to be heard in proceedings affecting them.
 - SCC held that CRC terms did not create legit expectations that specific procedural rights above those normally required would be accorded.
 - CRC was not equivalent to a government representation about how humanitarian and compassionate application will be decided, nor does it suggest" any further procedural rights.

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- Dismissed Baker's claim about legit expectations, but left open the possibility that in the right case, a ratified intl instrument could create legit expects
- In *Baker*, the SCC did not mention the Australian case *Teoh* 1995 AHC (the FCA had talked about it at great length). *Teoh* held that ratified but unimplemented treaties could create legit expectations. Court held that the CRC created legit expectation that Teoh's children's interests would be given a primary consideration in the decision. Since then, several courts have suggested that *Teoh* is bad law. It basically allowed exec to create laws without parliamentary approval.
- **Suresh:**
 - Court took into account legit expects raised by terms of the CAT in determining that Suresh was owed more procedures under PFJs in s. 7.
 - **TO determine degree of procedural protection required court used CL approach:**
 - **Factors that weighed in favour of greater protection:**
 - Absence of appeal mechanism
 - Determinative nature of minister's decision
 - Serious personal, financial, and emotional costs of deportation
 - Court also considered whether Suresh had legit expects of additional procedure.
 - CAT prohibits deportation if there are substantial grounds to believe person would be in danger of being tortured
 - **Court stated that it was "only reasonable that the same executive that bound itself to the CAT intends to act in accordance with the CAT's plain meaning."**
 - Given Canada's commitment to CAT and the requirement of substantial grounds to believe torture, to trigger non-refoulement, the court found that Suresh had right to demonstrate and defend those grounds. Not a full hearing or complete judicial process though. Allowed to respond to the case against him and obtain written reasons
 - **More guidance is needed to determine whether intl instruments can create legit expects. This is because the legit expects argument were treated so differently in Baker and in Suresh. But Baker and Suresh are completely different cases...**

V. Conclusion

- No doubt that intl HR norms from binding intl treaties, customary intl law, and non-binding intl instruments can play an important role in substantive and procedural review of admin decisions. Much work needs to be done to delimit the precise role of these instruments in review.

DONE!!!!!!!!!!!!!! gfdjkgfhfjdkjhgfkdj

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Chapter 13: Regulation and Rule Making: The Dilemma of Delegation

I. The Spread Of Regulations, Rules, and Soft Law

- Legislatures enacting skeleton legislation and delegating regulation making power to the executive is widespread in Canada
 - Delegation can be to Cabinet, ministers, a legislated agency, etc
- **Regulations and rules are binding law.** As such, the power to make them must be specifically granted by statute
- **Soft Law:** Developed by executive, but not legally binding. Soft law does not need to be expressly provided for under a statute, even though it has an important role in how ADMS decide issues, both procedurally and substantively.

II. Why Delegate?

- Primary reason is **expertise**
 - remember also expertise underlies test related to procedural fairness
 - Also central to determination of standard of review
 - Impossible for legislatures to understand the details and science involved in regulating everything
- Legislators also lack the **time** and **information** needed to make proper decisions regarding regulating everything
- It is also impossible to **know the future**. So legislation needs to be sufficiently flexible.
- Issues of expertise, time, and information also come up with soft law. *Baker*: LHD used minister's guidelines in determining that officer had not acted reasonably in exercising compassionate and humanitarian discretion
- **Advantages of soft law:**
 - Certainty to those coming before the ADM
 - More adaptable to changing circumstances
 - Less likely than rules to involve time-consuming and costly procedural steps
 - Leg still can set out broad policy guidelines in the enabling legislation

III. The Risks of Delegation

- Risk that those making soft law are not following the wishes of the electorate
- **Principal-agent problem:**
 - The agent (executive) is not necessarily following the wishes of the principle (leg)
 - The leg might not be respecting the wishes of the public
- Principle's lack of expertise makes it difficult to ensure agent is doing job properly (carrying out wishes of principle to best extent possible)
- Public delegates authority to legislature, legislature delegates authority to executive. In each case, the principle rarely has the time, expertise, or information to hold the agent accountable
- **Risks:**
 - Agent may follow own views instead of those of principle
 - Agent might not be furthering the public interest

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IV. Controlling the Risks

- Four main approaches:
- Structuring Discretion: The level of discretion often depends on the level of trust the leg has regarding the body. Factors include degree of oversight. Thus in Canada, the cabinet usually has members of both the exec and the leg.
 - Problem with this approach: Cabinet has the ability to control policy at the expense of other elected representatives.
 - Amount of delegation may depend on whether it is a majority or minority gov
 - Another way of structuring delegated power is by determining which body exercises the delegated power. EG: the MoE, or the ministry of Resources could determine air quality standards.
- Legislative Oversight: Direct supervision of delegated power. Usually through a legislative committee. The committee either approves the rule or soft law, or disapproves, or requires amendments before it can be implemented
 - A committee may have more time than the leg, but it still has less time and expertise than the agency with the delegated power.
 - Does not solve problems of expertise and information. Members of the leg unlikely to have the expertise or info necessary to make intelligent decisions on rules and soft law
- Substantive JR: In theory courts are a third party that can monitor review the substance of rules that are made.
 - Such monitoring can correct:
 - Where agency oversteps its jurisdiction
 - Where agency substitutes its own view for that of the public good
 - Where agency acts in its own self-interest
 - ***Thorne's Hardware Ltd. v. The Queen 1983 SCC***
 - The governor in council (cabinet) made an order under the *National Harbours Board Act* to extend the boundaries of the Port of St. John NB. Applicant argued the decision was made in bad faith. Cabinet was trying to increase revenue of the Board, and such a purpose was not in scope of powers under the Act.
 - SCC: It is possible to strike down an order in council on "jurisdictional or other compelling grounds," but "it would take an egregious case to warrant such action. This is not such a case."
 - **SCC took very strong position against examining the actions of cabinet in making orders in council**
 - Courts will JR substance of decisions made by other agencies
- ***Enbridge and Union Gas 2005 OCA***
 - Act allowed creation of rules governing conduct of gas vendors. Had right of appeal.
 - Made rule allowing gas vendors to determine who will bill consumers for gas and transportation of gas
 - Standard of review was correctness correctness
 - Gas distributors argued for a narrow interpretation of the section. Court said such an interpretation would be contrary to broad purpose of the Act: Regulating all aspects of

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- gas distribution process
- Broad grants of discretion make review difficult for courts
 - Exception: Fettering, where statutory languages makes something mandatory, the agency cannot refuse to take it into consideration
- **Reasons court should NOT review substantive rules and soft law:**
 - JR is at best random and at worst biased in favour of certain interest groups
 - Time consuming and expensive
 - Rules tend to disproportionately affect certain groups or industries; giving them incentive to challenge the rule. No such incentive to protect the rule.
 - Courts often lack the expertise to review complex rules
 - Courts have their own biases and interests that will affect their perception of the "correct" interpretation(s) of an issue
 - Remember all the labour cases and the development of privative clauses and the fights with the courts and creation of tribunals etc- d
- Process Requirements: Whole spectrum of possibilities from non consultation or external information to broad public consultation over consecutive drafts
 - A key feature is the degree of **public consultation** required
 - Helps ensure that rule makers have the best information
 - Data and public values
 - Promotes deliberation
 - Debate and exchange of ideas.
 - More formal processes allow access to more information and better decision making through debate and deliberation
 - Costly and time consuming
 - While providing transparency, it provides interest groups another opportunity to affect outcomes.
 - It is debatable if rule makers actually consider the issues brought up in public consultations
 - Can be more harmful if the public makes mistakes
 - Difficult for the general public to make informed decisions about complex technical issues
 - Public also does not invest the time and resources necessary to become expert on issues
 - There is no CL requirement of procedural fairness where a decision is of a legislative nature. Because rules are typically general, they tend to fall under this exception
- **AG Canada v. Inuit Tapirisat et al. 1980 SCC**
 - Inuit challenged CRTC rate increase. Inuit had participated in CRTC hearings. Inuit appealed to Cabinet (right under statute). CRTC made submissions to Cabinet, Inuit not allowed to view or respond to CRTC submissions
 - Inuit sought JR claiming it was denied procedural fairness. SCC said Cabinet did not owe Inuit any procedural fairness. Act contemplated procedural fairness at CRTC hearings, not at Cabinet appeal. Estey said rate increase was "legislative action in its purest form" bc it affected many Bell customers.
 - **This case shows that for a decision to be legislative, the ADM need not be the leg.**

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- What constitutes legislative action is unclear, but it does appear to exclude action aimed at a single individual. *Homex Realty 1980*: Municipality fight with developer case.
 - Majority said bylaw was not general and so procedural fairness owed
- Thus in Canada, there is no clear CL approach to imposing procedural fairness requirements on rule making. There is some piecemeal legislation though,
 - Ontario has legislation
 - There is the federal *Statutory Instruments Act*
 - Ontario *Environmental Bill of Rights* requires that the minister of the environment "take every reasonable step to ensure that all comments relevant to the proposal that are received as part of the public participation process...are considered when decisions are made."
- ***Enbridge 2005? OCA***
 - E. argued that there was insufficient consultation despite two rounds of consultations. OCA rejected this. Purpose was not to impose discipline on the board, but to allow interested parties to make written submissions.
- Much of the public participation in rule-making in Canada has thus been in providing notice and opportunity for public comment.
 - Ensures public has some info on proposed rules.
 - Regulators receive info from the public
 - Cause delay
 - Unclear who can participate
 - Might be dominated by certain interest groups
 - Insufficient scope of deliberation: Does not allow public forum for discussion among public
 - Can reduce mistakes
 - Provides some transparency
 - Much depends on resources of the parties
- There seems to be some correlation between process requirements and deference by the courts. If there has been a lot of procedure, courts are more likely to defer.
 - Use of procedure signals better quality decision-making
 - But hard to tell if ADM actually considered issues raised

V. Ongoing Struggle

- Legislators take a risk in delegating power
 - Gain use of experts but sacrifice control.
 - Control mitigation is difficult. Structural, leg oversight, substantial JR, and process requirements all help, but none are a silver bullet.

Done Chapter 13

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Chapter 14: Getting the Story Out: Accountability and the Law of Public Inquiries

Krever Commission = *Canada (AG) v. Canada (Commission of Inquiry on the Blood System) 1997 SCC*

I. Accountability and The Public Inquiry Process

- Sept 2002, Arar returning from visit to parents. Flight re-routed to New York (instead of Montreal).
- Early October 2002 deported to Syria and tortured.
- Released in October 2003 and returned to Canada. Then the Arar Inquiry
- The legal system achieves accountability through two primary mechanisms. 1) It assesses **liability** for breaches of legal obligations; and 2) it imposes **enforceable orders** on persons found liable.
- Legal accountability: Directed at wrongdoing defined in advance; a retrospective inquiry into past events; only prospective aspect is remediation of harm; adversarial model; and its coercive, so many legal protections for the individual
- Legal accountability unsuited for Arar inquiry. Unclear if any laws were broken by Canadian officials, several large govts involved, Few active agents were identified (let alone identified as likely wrongdoers).
- Arar and supporters wanted answers. This requires a different kind of accountability (a public inquiry)
- ***Canada (AG) v. Canada (Commission of Inquiry on the Blood System) 1997 SCC***
 - A public inquiry is neither a criminal nor civil action for the determination of liability...The findings of a commissioner...are simply findings of fact and opinion...(Not findings of criminal culpability or civil responsibility for damages)...Unconnected to normal legal criteria. **They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.**
- Public inquiries are included in AL text because AL is largely told as a story of JR and govt accountability. But JR is limited: it is focused on specific acts of ADMs. Remedies are rarely systemic, and usually only require the ADM to start over. On policy level JR is generally silent.

A. Types of Public Inquiry

- Public inquiry is aka judicial inquiry; mostly bc judges (not acting as judges though) tend to preside over these inquiries
- **Royal commission:** Called so because these commissions were appointed by the executive under their prerogative powers. This has changed, **most inquiries now conducted under Inquiries Acts.** Royal commission is sometimes called a public inquiry in Canada.
- **Public inquiries** generally directed at the actions of public officials
 - Usually carried out in public view
- Two types of public inquiry common in Canada: Policy inquiries and investigative inquiries
- **Policy Inquiry:** Directed at study of broad issues of social or regulatory concern with purpose of leading to changes in law or policy
- **Investigative Inquiry:** Directed at uncovering and reporting on facts in which one or more

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- people were seriously harmed or which comprised a public scandal.
- **Combined Inquiries:** Combine Investigative and policy inquiries; called Phase 1 and Phase 2 respectively.
 - **Phase 2 Inquiry (Policy):**
 - Raise few legal issues
 - Govt often uses these inquiries to forestall having to make tough policy choices
 - It is prospective, broad-based, and open to political input.
 - Legislative and quasi-legislative decision-making do not attract procedural fairness rights (*Inuit Tapirisat 1980 SCC*) even where govt has created legit expectations of such rights (*Re Canada Assistance Plan 1991 SCC*) and (*Mount Sinai Hospital 2001 SCC*)
 - Degree of success of policy inquiries turns on degree to which govt adopts inquiry's recommendations.
 - Can have significant impact on public discourse and politics even if not adopted.
 - Generates research and consolidates information. Can mobilize interest groups, etc.
 - **Phase 1 Inquiry (Investigative):**
 - Serves to uncover what happened
 - They are independent (like judiciary), but unlike judiciary, they are usually endowed with wide-ranging investigative powers
 - Not solely concerned with ascertaining historical fact:
 - Also concerned with bringing transparency to the process itself and to carrying out the investigation in public.
 - Dramatic example: The Gomery Inquiry: Had Quebec captivated for quite some time
- **Must balance the power of the inquiry as a tool of accountability with what is at stake for individuals whose decisions, actions, and lives are at the heart of the investigation.**
 - Including victims like Arar and those subject to the investigation
 - This caused the Somalia inquiry to collapse: Too many JR applications
 - This also came up in Westray and the Tainted Blood inquiries
 - **Krever Commission** (Tainted Blood) and **Phillips** (Westray): Corey stated in both cases that the public interest value of investigative inquiries outweighs concerns about their potential harm to the individual interests of witnesses and subjects of investigation.
 - *Balancing the Rights of Individuals Facing Criminal Charges*
 - ***Starr v. Houlden 1990 SCC***
 - SCC quashed Ontario public inquiry into actions by individuals and a private corporation involved in political fund-raising. SCC confirmed that public inquiries cannot make findings of civil or criminal liability against individuals.
 - The terms of reference prohibited making a finding of criminal liability, but allowed the commissioner to state whether the individual had acted in a way that described a breach of an offence set out in the Criminal Code. SCC majority said this effectively turned the inquiry into a police investigation and prosecution, without providing the concomitant safeguards.
 - Compelled testimony and document production are significant powers granted under Inquiries legislation. Unlike criminal context, no s. 11 protection (accused need not

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- testify). Danger: Govt can use inquiries to circumvent right against self-incrimination.
- ***Phillips v. Nova Scotia (Commission of Inquiry in the Westray Mine Tragedy) 1995 SCC***
 - Majority SCC declined to rule on issues of publicity or compellability where criminal charges are extant. But Cory, Iacobucci, and Major gave lengthy concurring reasons addressing compellability and fair trial questions for sake of future cases.
 - **Cory:** Witnesses should be compellable, irrespective of whether they may be subject to criminal charges on the same matters, so long as inquiry serves a legitimate purpose and is not intended to be a substitute for criminal investigation. Sufficient protection in Charter s. 13 and 7.
 - Section 13: Protects witness testimony from being used against self in subsequent criminal proceedings
 - Section 7: Provides **derivative use immunity**: A matter of fundamental justice; bars the Crown from introducing evidence into a criminal trial that would not have been obtained "**but for**" the compelled testimony.
 - With regard to **publicity**: Cory said govt must be allowed to take the risk of losing the power to prosecute an accused, rather than the judiciary providing a blanket prohibition.
 - ***Balancing the Reputational Interests of Individuals***
 - Assigning blame when things go wrong is often what the public means by accountability
 - Section 13 of the federal *Inquiries Act* requires notice to be given to people whom a report is charging with misconduct. Further, the individual has a right to be heard in person or through counsel before the report is released
 - The SCC in *Krever Commission* that the potential harm to reputation justified procedural protections at CL, including adequate notice. This right can enhance or fill out the rights granted by the Act. Court found no procedural error for Krever.
 - Some sought JR for constitutional issue: Argued *Starr* and that inquiries lacked power to make findings of misconduct against individuals
 - Court said misconduct findings are not equivalent to civil or criminal liability findings.
 - ***Hill v. Church of Scientology 1995 SCC***
 - Individual's professional reputation has almost equivalent status to constitutional interest in free expression and deserves extensive legal protection
 - ***Blencoe v. BC Human Rights Commission 2000 SCC***
 - Individual reputation does not constitute security of person or liberty for s. 7 protection.
 - Blencoe suggests that state actions interfering with reputation will not need to meet procedural standards of "fundamental justice".

II. Public Inquiries and Administrative Law Principles

- PIs are an exercise in delegated government authority. Thus they operate w/in AL principles
- The major AL principles concerning PIs are: lawful delegation of authority; procedural fairness; and substantive review of govt decision-making

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A. Establishing an Inquiry

1. Delegation of Authority

- Power to call inquiry is understood as prerogative power of the Crown. All ten provinces have formalized certain aspects of the inquiry process. Royal commissions and PIs now appointed pursuant to their statutory provisions. There are also area-specific inquiries legislation such as the Ontario *Hospitals...Inquiries Act*. Some regulatory statutes also empower ministers to conduct investigations and grant the minister powers of a commissioner under an Inquiries Act
- **Form of Inquiry Acts:**
 - 1) Sets out matters that can be subject to inquiry
 - 2) Sets out powers of compulsion
 - Summon witnesses, place witnesses under oath, cite for contempt, order production of documentary evidence, etc
 - 3) Creates procedural protections for those under investigation and those who might be harmed by findings
- Govt of Canada usually initiates PIs with order in council issued under authority of the *Inquiries Act*
 - Order sets out terms of reference, name of commissioner(s),
- **Judges role**
 - Often judges are chosen to lead inquiries. Part of reason is they have secure livelihood, so unlikely to be influenced by potential political fallout.
 - When acting as a commissioner, they are not acting in judicial function, they are not judges, they are not part of the court. They are part of the executive.
 - No strict division of powers like US. Judges here can act as exec sometimes
- **Delegation**
 - in Arar inquiry, judge O'Connor delegated duties to Dr. Toope. O'Connor incorporated Toope's findings into report on what happened and these findings were basis of finding that Arar was tortured.
 - Not made, but could be made: Argument that no subdelegation of specific fact-finding duties originally granted to the commissioner should be allowed.

2. Terms of Reference

- Setting mandate (aka terms of reference) for inquiry is very important first step.
 - Cabinet sets terms of reference
- These are set out in Order and represent the "law of the Inquiry"
 - Have binding force on the commissioner
- Terms of reference are a form of delegated legislation
 - In Somalia Inquiry, the FCA took position that as with other regulatory law, an inquiry's terms of reference can be modified by the exec at its discretion.
 - Commissioner has important role in interpreting terms of reference
 - This is subject to JR
 - **Ontario (Provincial Police) v. Cornwall (Public Inquiry) 2008 OCA**
 - Challenged Cornwall's determination of the scope of inquiry regarding public officials' handling of child sexual abuse cases.

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- Cornwall decided that Terms of Reference allowed question of how police responded to complaints of sexual assault by minors at any time prior to 2005. Police said inquiry far more limited.
- OCA majority agreed with police and set aside commissioner's interpretation
 - **Did use standard of review test for substantive matters as set out in Pushpanathan. Held that commissioner's interpretation of terms of reference was a jurisdictional question.** Thus no deference and found interpretation incorrect and unreasonable.
- In *Krever Commission*, Cory stated that leeway should be given to inquiry engaged in interpreting its own mandate. This might be read as applying more to issues of procedure than to issues of substance

3. Independence and Bias

- Credibility and effectiveness of an inquiry depends greatly on perception of independence from the executive
- Inquiries are created by the executive though; exec sets terms of reference, timelines for reporting, and budgets.
- While judges are protected by constitution and security of tenure and all that, an inquiry has no such protection
- Inquiries are not adjudicative bodies
- Chretien's govt refused to provide a third extension to Somalia inquiry for hearings and final report. Effectively killed the Inquiry. The legal challenge failed at the FCA in ***Dixon v. Canada (Governor in Council) 1997 OCA leave refused***
 - Inquiries owe their existence to the executive, they are not like a court.
- **Terms of reference** do not provide a firm foundation for independence because the exec can change them at will. However, the political fallout of changing/tampering with the inquiry is pretty strong incentive to not fuck with the Inquiry.
- **Appointment of specific individual:** Can create challenge of bias, especially if the person has prior involvement with any of the parties. To date, most claims of bias in this context have arisen from commissioner's actions during inquiry. Gomery "small town cheap".
- In the Somalia Inquiry, a commissioner made statements suggesting bias. In ***Beno v. Canada (Commissioner...Somalia) 1997 FCA*** the FCA stated the bias is more relaxed in Inquiry setting. Not as strict as in courts. But not so relaxed to require "closed mind" test.
 - The adjudicative end of spectrum too steep. The legislative end of spectrum (closed mind) not strong enough because of serious consequences from Inquiry. Commissioner's conduct did not create reasonable apprehension of bias in circumstances.

4. Constitutional Issues

- Provincially appointed inquiries have been especially attacked on constitutional grounds and constitution has limited provincial inquiries
- In the 1970s a series of cases went to SCC regarding Inquiries into criminal matters and conduct of the RCMP (both federally regulated activities).
- ***Di Ioro v. Warden of Montreal City Jail 1978 SCC***
 - SCC permitted Quebec inquiry into organized crime as falling under "administration of justice" s. 92(14).

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- ***Keable v. Canada (AG) 1979 SCC***
 - Provincial inquiry into individual police conduct allowable, but not inquiry into RCMP policy and management
- ***Starr v. Houlden***
 - SCC said pith and substance of Ontario inquiry was alleged criminal wrongdoing of individuals, thus infringing federal criminal law power.
 - SCC has since narrowed ruling of Starr
- ***Consortium Developments (Clearwater Inc.) v. City of Sarnia 1998 SCC***
 - Court rejected Consortiums application to quash city's inquiry into certain land transactions after police had closed a criminal investigation on the matter.
 - SCC said inquiry was properly directed at good government of municipality.
 - Even if it turned up conduct amounting to criminal misconduct, inquiry lacked power to make such a finding
 - Commissioner's duty to comply with procedural fairness was sufficient to protect developer's interests.
 - Facts of *Starr* were described as unusual
- **Charter issues:**
 - Public inquiries likely bound by Charter with respect to all significant activity.
 - Certainly exercise of coercive statutory powers such as power to subpoena witnesses and documents.
 - There may be an issue as to whether an inquiry, given its non-adjudicative nature, is subject to the Charter with respect to its fact-finding or recommendation-making functions.
 - *Blencoe* held that HRT bound by Charter. Seem likely that Inquiry would be viewed similarly, especially considering the test set out in ***Enridge v. BC 1997 SCC*** for entities implementing important govt programs or policies.

B. Procedural Justice Issues

- Investigations directed at ascertaining evidence but not at determining legal liability are not always subject to CL requirements of fair process.
- ***Knight v. Indian Head School Division 1990 SCC***
 - LHD stated that the question of whether a function is final or merely preliminary is a threshold question with regard to the duty of fairness
- The investigative stage of an Inquiry is a "preliminary process"
- However, **there is little doubt that investigative inquiries are subject to duty of fairness in AL. For three reasons:**
 1. Inquiry statutes authorize inquiries to compel testimony of witnesses.
 - This is a strong power that exposes witnesses to legal consequences and denies them the right to remain silent in the face of public scrutiny and the possibility of prosecution
 - The decision to subpoena a witness is itself a "final" decision and should give rise to procedural protection at CL
 2. The findings of fact from an inquiry carry significant consequences.
 - Can be seen as "the Truth" by the public

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- Reputations can be made or broken
- 3. Public inquiries generally operate like judicial hearings. It is neither difficult nor inappropriate to meet standards of fair process.

- The investigative nature of inquiries and the fact that they do not have decision-making power lends weight to a relaxed duty of fair process

1. Inquisitorial Process

- Public inquiries employ inquisitorial system. The commissioner asks questions and what evidence to call. Inquiry can receive and act on advice of a witness or subject of investigations. But unlikely to cede its power. Commissioner charged with responsibility of conducting a thorough investigation, but this must be done in an impartial and non-prosecutorial fashion.
WHY?????
- Generally, public inquiries will establish procedural rules at the outset; dealing with matters of calling witnesses, examination, crossE, etc
- The binding force of an inquiry's procedures is questionable, despite Cory's statement that Inquiry's are to be given leeway in determining their own proceedings (*Phillips*)
 - **Disobedience of rules can lead to contempt citations, but they are not the last word on the matter. In the absence of explicit statutory power to create procedural regulations, the rules adopted by an inquiry should be subject to HR for compliance with the principles of fairness, either as a general matter or in specific applications.**

2. Standing

- In ordinary legal proceedings, standing is limited to those with a direct interest in the outcome; it is an all or nothing rule.
- In PIs, standing is more nuanced. Inquiries are generally held in the public interest. It is likely that the subjects of the inquiry and any victims will have standing, but what about other interested parties?
 - Standing can be granted in degrees; both in terms of scope of participation (can party call witnesses, examine, crossE, etc) and in terms of duration of participation (does the person have the rights for all of the inquiry or only certain parts of it?)
- **Arar Inquiry standing rules pages 380-381 text3.**

3. Representation by Counsel and Role of Commission Counsel

- Generally, parties to public inquiries may be represented by counsel in the proceedings.
- **Section 12 of Inquiries Act** (Federal) creates a statutory right to counsel for those persons who are the subject of an investigation.
- Harder question is whether witnesses called to testify have the right to counsel and what role counsel may play.
 - Subject to fair process requirements, this is up to the commissioner to decide
 - Arar: Counsel permitted at pre-hearings and during hearings if witness' interests not represented by party's counsel. Counsel allowed to ask questions following examination in chief by commission counsel and crossE by counsel for parties
- Representation at an Inquiry can be expensive; Inquiries can take huge amounts of time and require examination of large amounts of documentary evidence.
 - The SCC has recognized very limited rights to state funded counsel where LLS s. 7 involved. Given *Blencoe*, it is unlikely that subject of inquiry be able to argue successfully

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that s/he has a right to state funded counsel.

- In some cases, govt has provided funding for counsel for parties in an inquiry and delegated authority to distribute funds to commissioners.
 - More commonly, govt asks commissioner to make submissions on who should receive funding for counsel. This is what happened in Arar
- **Counsel for Commission**
 - Takes the lead in adducing evidence before the inquiry and does so in the public interest.
 - Does not assume the role of a prosecutor in the proceedings
 - Counsel's responsibilities include advising commissioner on matters of legal procedure, preparing evidence in advance of hearing days, leading most witnesses through their evidence in chief, (and increasingly, being a spokesperson for the inquiry and its chair).
 - Must perform these functions impartially and not create the impression that the proceedings are adversarial.
 - **Krever Commission**: SCC said in some circumstances, counsel for the commission might be disqualified from certain actions because of their multiple roles.

4. Notice and the Opportunity to Respond

- *Inquiries Act* section 13 requires notice be given and an opportunity to respond to anyone who the final report will make a finding of misconduct against.
- It's a statutory embodiment of the CL fairness duty to be given notice and opportunity to respond
- Provision is unclear as to what constitutes a finding of misconduct, when notice should be given, and whether a "full opportunity to be heard" includes calling further evidence or only the right to make submissions after the evidence is in.
- **Krever Commission**
 - Several parties received notice; but argued that receiving notice at end of commission denied them right to full answer and defence. Cory disagreed, pointed out that statute did not specify notice period requirements. Further, unreasonable to insist on notice of misconduct be given early. Doubly problematic: IF too early accused of bias, if too late, argue no full answer and defence.

5. Disclosure

- Investigative inquiries require (or want) large disclosure powers. Common arguments against them include: national security, SCP, right of confidentiality of counseling records, and privacy interest.
- Generally public inquiries benefit from statutory power to compel disclosure
 - Up to commissioner what evidence they believe is relevant.
- When evidence is subpoenaed, arguments against it are generally:
 - 1) The Demand for disclosure or its statutory authorization is unconstitutional
 - 2) the evidence goes to a matter not within the terms of reference;
 - 3) The statutory authorization is not broad enough to include the particular demand for disclosure in the face of a competing interest
 - 4) **In light of the statutory power to compel testimony or disclosure, it will rarely be sufficient to argue the demand is unfair at CL**
- **Important to distinguish between disclosure to the inquiry and disclosure to the public by**

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the inquiry.

- The issue of power to compel disclosure per se, goes to the issue of the inquiry's ability to obtain evidence
- In the Arar Inquiry the commissioner went public with his concerns that the govt's position regarding withholding evidence would lead to the Inquiry's inability to complete its task.
- **McKeigan v. Hickman 1989 SCC**
 - SCC dealt with issue of claimed judicial immunity from disclosure.
 - Nova Scotia public inquiry looked into wrongful conviction of Donal Marshall and sought to compel testimony and notes concerning the deliberations of the NS Court of Appeal at the time the court had conducted a review of the Marshall conviction.
 - The NSCA judges opposed the demand. The SCC majority concluded that as a matter of judicial independence, judges cannot be summoned to answer questions concerning their deliberations.
 - **Judicial Immunity**
- SCP seems to be treated similarly. IN the absence of express statutory language, inquiries cannot compel disclosure of SC communications. Other privileges get lesser protection.

6. Conducting Hearings in Public

- This is part of how Inquiries achieve their purposes.
- Arar Inquiry dealt with matters of national security and some issues were dealt with in closed sessions. Terms of reference directed commissioner to act with discretion in protecting confidentiality of national security information disclosed to him, but left it to him to rule on those questions.
 - O'Connor addressed this at some point and noted that govt chose a public inquiry instead of a private one. Implicit in terms of reference is that [O'Connor} maximize disclosure of information to the public
- Need to hear some evidence in secret created serious challenges for the inquiry, when it disappeared from public for weeks and months at a time
 - O'Connor dealt with this by providing public summary of evidence heard in closed sessions
 - Granted access to information to Arar for purpose of preparing his evidence
 - Largely succeeded in convincing Arar, the public, and the media that the important evidence was all released.

C. Substantive Review

- Prior to 1998, the central preoccupation of substantive JR (SJR) had been determining when an issue was jurisdictional or within jurisdiction of the tribunal in question
- IN *Pushpanathan* 1998 SCC, the SCC indicated that this should no longer be starting place for SJR. Starting place is to determine proper standard of review
- **Morneault v. Canada 1998 FC**
 - How to challenge a Inquiry's findings of fact if you are unhappy with them
 - Case came out of Somalia Inquiry. Inquiry made findings that Morneault's training program was inadequate. M applied to fed court to quash findings
 - First issue: was the finding of misconduct a reviewable "decision"?
 - Yes. Consequences of such a finding for an individual's reputation made them a "decision" and subject to JR.

Morgan Blakley's outline of "Administrative Law in Context" by Sossin and Flood 2008.

- Second Issue: Identify standard of review
 - Standard should be PU.
- Court ruled that commissioner had misconstrued some evidence and drawn improper inferences from other evidence; and findings were PU.
- ***Stevens v. Canada 2004 FC***
 - Commission found that Stevens had placed himself in conflict of interest in 6 situations
 - Argued that Inquiry had breached terms of reference
 - FC agreed. Said Inquiry could not define its own notion of "conflict of interest" distinct from that in the code of ethics.
 - FC did not consider commissioner's mandate in terms of 3 standards of review. Rejected argument against overly legalistic approach to reviewing Inquiry's interpretation of its terms of reference because the inquiry was strangely directed at the actions of a single individual.

III. Public Inquiries and Public Benefit

- Opposition parties use them to dig up dirt. Main party uses it to delay action. Lawyers get richer and not much else happens
- Expensive, time consuming, and stupid. They do not accomplish a lot.
- Krever Inquiry was supposed to cost 2.5 million, ended up at 17.5 million.
 - Involved over 50 lawyers
- Splitting further the division between Phase 1 and phase 2 might help: Reduce need for lawyers where they are needed least, in policy inquiries.
- Seems like more recent inquiries have been better. Walkerton, Marshall, and Arar have all been completed with little JR and decent speed.

Done Chapter 14

Chapter 15: Access to Justice and Other Worries

I. Introduction

- The diversity of tribunals makes the application of a single set of standards impossible.
- Many more people have their rights determined by tribunals than by courts
- Administrative law is not just concerned with JR of admin decisions, it is also concerned with the everyday practice of administrative justice

II. Access to Administrative Justice: The Tribunal

A. Standing

- First sense of standing in AL is standing to challenge administrative action in court
 - Under historic regime of prerogative writs, standing was limited to those directly affected by state action
 - If state action concerned the public interest, remedial authority lay with the AG.
 - *Federal Courts Act* provides standing to the AG or any party "directly affected" by state action (ss. 18(1) and 28(2)).
 - Not every citizen can challenge admin Action (AA) **as of right**
 - **JR of AA restricted to those who are found to have a sufficient legally recognized interest in the matter to justify JR.**
 - **Test for standing is whether the applicant is a "person aggrieved" by the AD.**
 - Person aggrieved: a person who will suffer some "peculiar grievance of their own beyond some grievance suffered by them in common with the rest of the public." (*Friends of Oldman River Society 1997 ACA*)
 - Limits on standing promote efficiency of administrative action by keeping the administration free of artificial or academic challenges
 - Also respects the rights of third parties who are directly aggrieved
 - General policy of courts is to not decide issues in the absence of parties whose interests will be most directly affected by court's decision
 - In other words: Courts will not permit busybodies to bring JRs in the stead of parties who are willing to live with the AD.
- **Discretionary Public Interest Standing**
 - Leading case remains *Finlay v. Canada (Minister of Finance) 1986 SCC*
 - **SCC granted PIS to claimant challenging fed govt decision to not impose penalties on Manitoba for garnishing the benefits of a welfare recipient in apparent breach of the Canada Assistance plan.**
 - Public Interest Standing requires:
 - 1) Is the Matter serious and justiciable?
 - 2) Is the party seeking standing genuinely interested in the matter?
 - 3) Is there any other reasonable and effective way to bring the issue to court?
 - Recipient raised a serious issue: Inaction in failing to penalize Manitoba for breach of the Plan
 - Recipient genuinely interested in the matter: Was a recipient of the benefits in question
 - Neither Manitoba, nor the Feds likely to bring the action to court.

Morgan Blakley's outline of "Administrative Law in Context" by Sossin and Flood 2008.

- Purpose of PIS: To "prevent the immunization of legislation or public acts from any challenge." (*Canadian Council of Churches 1992*)
- PIS available in context of ATs (See *Vriend v. Alberta 1998*)
 - Some suggestion that the scope of such challenges may be limited to legislative provisions and public acts of a legislative nature, which would exclude most tribunal decisions. (See *Canadian Bar Assn. v. BC 2006 BCSC*)
- In courts, standing is governed by CL
- In tribunals, standing is generally governed by the statute governing the tribunal
- Issue of standing before tribunals has become more important with expansion of duty of fairness in cases like *Nicholson 1979*. Arguable that there is even more pressure for for generous standing with expansion of duty of fairness in cases like *Baker 1999*, and with tribunal jurisdiction over the *Charter (Nova Scotia (Worker's Compensation Board)v. Laseur 2003 SCC)*; (*Paul v. BC Forest Appeals Commission) 2003 SCC*.
- Historically, tribunals where standing was an issue included: Regulatory tribunals (like an energy board or competition tribunal); tribunals whose decision touched many people indirectly (EG municipal planning board; and labour boards.
 - Regulatory tribunals: Typically work out representative compromises. Standing limited to those directly affected; a citizen's group might get standing (intervener).
 - Labour setting: Usually standing arises where a third party employee will be affected by the outcome of a grievance: EG if old employee successfully grieves issue, then third party loses position, should third party be allowed to make submissions?
- Tension bt fairness and efficiency is enduring

B. Hearings

- The types of proceedings allowed for a statute are usually set out in the T's enabling statute.
 - EG: Oral, written, etc
- While govt not under legal obligation to create tribunals, once it has done so, it is likely under obligations to provide adequate funding to ensure fairness, RL, and access to justice b4 these tribunals.
- ***Khan v. University of Ottawa 1997 OCA***
 - Oral hearing required when university proceeding would determine if a student would fail a course.
 - **Where a decision turns on credibility, fairness requires the individual have an opportunity to put forward her best case in person before the decision-maker**
- What about where oral hearings should occur, but attendance is difficult (EG individual is in Atlin and Tribunal is in Vancouver)
 - *Ontario Landlord and Tenant Board* has instituted video conferencing.
 - Try to balance efficiency/costs with fairness. Hence not just teleconference
- Issue of balancing costs against against govt autonomy is discussed below

III. Access to Administrative Justice: Information and Knowledge

- How to access and use a tribunal varies by the tribunal. Rarely in enabling statute

A. Guidelines

- Many Ts establish guidelines to ensure consistency and to **structure discretion**

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- Where guidelines are in place, ignoring the guidelines without justification may breach ADM's duty of fairness (*Bezaire v. Roman Catholic Separate School Board OC*)
- Tribunals cannot create binding guidelines on its own because they are creatures of statute (*Little Sisters 2000 SCC*)
 - Immigration Context: Immigration and refugee board (IRB)
 - IRB issued *Guideline No. 7* in accordance with statutory power.
 - ***Thamotharem v. Canada (Minister of Cit and Immigration) 2007 FCA***
 - Tamil student feared persecution if deported
 - Challenge to Guideline No. 7 as breach of procedural fairness and on grounds of fettering discretion of board members to decide the order of questioning appropriate to a claim.
 - FCA held that No. 7 did not breach procedural fairness. The Act does allow deviation for exceptional circumstances

B. Simplification

- If forms are complicated and guidelines are inscrutable, then access to administrative justice is very difficult

C. Language

- Providing services and adjudication in the language of the individual seeking access has constitutional dimension
- ***R. v. Tran 1994 SCC (Criminal law case)***
 - Contextual approach to Charter s. 14. Section 14 provides right to interpreter to people who don't understand language used or are deaf
 - Section 14 closely related to CL right to a fair hearing: Right to be heard includes the right to understand the case to be met.
- ***Filgueira v. Garfield Container Transport Inc. 2005 (Canadian Human Rights Tribunal)***
 - CHRT held that individual deserved interpreter for some of hearing, despite having a bilingual agent assistant. FC upheld this.

D. Prior Decisions

- Some tribunals publish these, others don't
- There are confidentiality issues for some cases
- Tribunals are not bound by their previous decisions
 - In practice, many tribunals treat previous decisions as strongly persuasive
 - Here it would be arguable that fairness and knowing case to be met requires access to past cases

IV. Access to Resources Needed To Navigate The Tribunal System

A. Legal Representation

- Limited right to state funded legal representation was created in *New Brunswick (Minister of Health and Community Services) v. G.(J.) 1999 SCC*
 - Likely not very applicable in AL setting
- Many provinces fund legal aid for representation before admin Ts
- Don't necessarily need lawyers for access to admin justice. Paralegals, resources, self-help etc

B. Fees and Costs

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1. Fees

- Ts can be funded in a variety of ways:
 - National Energy Board: 90% through industry levies, 10% through Fed govt
 - BC's energy board entirely self-funded
- Generally, most tribunals provide free access to parties
- BC ATA:
 - Section 60(c) Govt can make regs setting out fees for filing applications before Ts
- ***Polewsky v. Home Hardware Stores Ltd. 2003 OC***
 - Small claims court fee waived on constitutional principle of access to justice
- ***Pearson v. Canada 2000 FC***
 - Court held that s. 55 of Federal Court Act (allowed court to disregard its own rules in special circumstances), allowed court to except impecunious parties from having to pay filing fees
 - "...taking Court proceedings in forma pauperis" – is a civil right..." (Basically having court access fees waived in order to ensure access to justice)
- Although ATs do not create the same civil rights as court appearances, the court's approach to statutory interpretation in Pearson will likely be applied in the AT context. (Interpreting the T's rules to ensure access to justice).
- **Unwritten constitutional principle of Access to Justice:**
 - Described in ***BC Government Employees Union v. BC (AG) 1988 SCC***
 - Constitutional validity of court issued injunction prohibiting picketing on Court steps during a strike.
 - **"There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men or women who decide who shall and shall not have access to justice."**
- Unlike judicial independence, access to justice has broad application in all adjudicative proceedings in which rights and interests are at stake.
- ***Christie v. BC 2005***
 - BCCA held that a tax on any legal service would be unconstitutional as inhibiting access to justice
 - SCC held that not all limits on access to justice will be unconstitutional. EG Constitution does not mandate a *general* right to legal representation as an aspect of the RL; Right to counsel only applies where LLS are affected, and even then, only in certain circumstances

2. Costs

- In AT cases, should winning party be allowed to claim costs?
- The BC ATA expressly allows Ts to provide their own cost regimes. Section 47(1) and (2)
- ***BC Vegetable Greenhouse 1, L.P. v. BC Vegetable Marketing Commission 2005 (Farm Industry Review Board)***
 - Challenged order requiring BC Veg to pay \$375K in outstanding levies. Commission ordered BC Veg to pay costs of proceedings (seems like this was based on BC Veg playing delay games and such during proceedings).
 - FIRB upheld order requiring BC Veg to pay other parties' costs, but not Tribunal's costs.

C. Budget and staffing

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- Controversial area. Budget issues usually seen as public administration, not administrative law.
- Admin bodies are created through public policy.
 - But once created, and once people's interests and rights depend on the fairness and reasonableness of the ADMs, then the duty of fairness imposes constraints on govt.
- ***Singh v. Canada 1985 SCC***
 - Duty of fairness required oral hearings for refugee claimants. Imposed significant burdens on govt and large structural reorganization
- ...A really shitty argument here. Not worth writing down.

V. Conclusion

- Blahh blahh bla, it sucks to be poor and maybe fairness sometimes might maybe require funding for tribunals and/or parties

Done Chapter 15

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Administrative Law

Chapter 16

Advocacy Before Administrative Tribunals

II. Applicable Law

- Consider which of the following sources of law apply:
 - Governing statutes, regulations, and general regulatory context;
 - Statutory procedural codes such as the *Statutory Powers Procedure Act* (Ontario SPPA) and the *Administrative Tribunals Act* (BC);
 - tribunal rules, policies, and guidelines;
 - CL principles of procedural fairness;
 - The Charter and other Constitutional principles;
 - Other applicable law, particularly the rules of evidence. (also consider intl law)

A. Governing Statutes and Regulations

- **It is *CRITICAL* to start with the tribunal's governing statutes**
 - Statute that establishes the ADM might not be the statute that governs the particular proceedings
 - The statutes not only create procedural requirements, but they also characterize the tribunal
 - Is it primarily an adjudicative T deciding disputes between two parties? Is it regulatory with broad public policy mandates? Is it a licensing tribunal?
 - **Characterization** will often dictate the type of advocacy required and the procedural protections that may be available at CL
- In addition to legal restraints, the statutes (often supplemented with soft law) will provide a policy context (normative policy choices expressed through the Act and soft laws)
- **Purpose of the statute is more important in AL than in crim or civil law**
 - Present your case in terms of what the ADM will think is just in the context of the statute's purpose
 - Purpose clause provides a significant set of themes to develop the case from inception to conclusion

B. Statutory Procedural Codes

- **Very Important. Statute trumps CL**
- The Quebec Administrative Justice Act, Ontario SPPA, the BC ATA, etc. **Federal system does not have a statutory procedural code.**
- If statute expressly sets out who may be party and does not provide authority to add other parties, then it appears a tribunal has no authority to do so. (*Re Ontario Royal Commission on the Environment 1983 OC*)
 - Many statutes provide that persons who are "interested" or "affected" may be parties.
- CL provides that a person whose interests are seriously affected will get standing

C. Tribunal Rules, Policies, and Guidelines

- Now generally accepted that Tribunals should make soft law.
- Real issue: How to reconcile fairness and administrative efficiency
 - How much consultation before rules are promulgated? How flexible should rules be?

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- Tribunals can make non-binding rules without express statutory authorization so long as rules are consistent with the enabling statute's purpose and so long as they do not fetter discretion
- Rules can deal with procedure or substance

D. Common-law Principles of Procedural Fairness

- Types of procedural protections depends on context
- **Baker is the case that sets out the modern CL approach to procedural fairness**
 - No longer any bright line bt those subject to procedural fairness and those except from it
 - Admin decision-making falls on spectrum from quasi-judicial to legislative
 - Once an individual's rights, privileges or interests are at stake, procedural fairness applies
- **The five Baker factors try to balance legislative intent, efficiency, etc against protection of individual and public interests**
 - **In making the procedural rights argument make sure you argue in terms of fundamental principles of administrative law**
- Clear legislative provisions will oust CL. But Charter will still apply.

E. Charter of Rights/Constitutional Law

- Are there any Charter/Constitutional rights in issue? Does the Tribunal have jurisdiction to consider such issues? **The BC ATA states which tribunals have this jurisdiction in BC**
- In *Paul 2003 SCC*, court held that tribunals have jurisdiction to consider Charter (except where statute prohibits)
- Where both a tribunal and a court have jurisdiction, the tribunal must exercise its jurisdiction (*Tranchemontagne 2006 SCC*) ??? Ask prof about this issue and this case ???

III. Pre-Hearing Issues (Page 417-421)

- Notice, disclosure, oral or written hearing, agreed statement of facts, and witnesses
- Notice: meh
- Disclosure: Complex. Start with constituent statute and statutory procedural code. Rare for statutes to address this issue. See Tribunals self-created regs or soft law.
- Extent of disclosure can be governed by CL
 - Degree of disclosure depends on nature of tribunal and nature of interest affected
 - Licensing and regulatory tribunals: a representative of the tribunal acts as a "prosecutor".
 - **Stinchcombe* mostly does not apply in AL context
 - But there is still general AL duty to ensure that the individual knows the case to be met and be capable of meaningful response. (*May v. Ferndale Institution 2005 SCC*)
 - Where decision can result in loss of livelihood or damage to professional reputation, the duty to disclose may be similar to criminal law context
 - *Stinchcombe* requires disclosure of all relevant information, subject to legal privilege
 - *Stinchcombe* and the professional reputation obligations of disclosure contrast with the more traditional approach to disclose in AL. The traditional approach only requires disclosure of the case to be met.
 - *Stinchcome* requires disclosure of evidence intended to be adduced AND evidence the Crown does not intend to adduce

C. Oral or Written Hearing

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- Right to a hearing does not entitle one to a right to an oral hearing
- Where the statute is not express about it (usually), the CL prevails
 - Depends on application of the five *Baker* criteria
- An oral hearing will almost certainly be required where reputation is in issue (*Khan v. University of Ottawa 1977 OCA*)

D. Agreed Statement of Facts

- Many tribunals expect these as well as agreed book of documents. Expedites hearing process, reflects AL values of expediency and efficiency.

E. Witnesses

- What witnesses to call and how to secure their attendance
- Do not call undesirable (info or character) witnesses

IV. Advocacy at the Tribunal Hearing (Text 421-427

- Unnecessary for course

DONE Chapter 16