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INTRODUCTION TO ADMINISTRATIVE LAW

THE ADMINISTRATIVE STATE AND RULE OF LAW HANDOUT

See Appendix I.

OVERVIEW: SCOPE, CONTENT, AND BASIC PRINCIPLES OF ADMINISTRATIVE LAW

- Involves the “supervision” by courts of decision-making made pursuant to statute or royal prerogative
  - Outside criminal law context, first level d/m is usually non-judicial actor

- History: Need for new decision making structures first became apparent with growth of the Canadian railway but not until WWI and growth of the regulatory state that we saw the advent/expansion of administrative agencies; post WWII development of welfare state also gave rise to increased numbers of boards, commissions, agencies, tribunals and Crown corporations

- Reasons for the expansion of government activity:
  - Desire to depoliticize certain decisions
  - Need for greater specialization and technical or subject-matter expertise
  - Reluctance to enmesh courts in matters not suitable to judicial review

- Concerns: arose about the proliferation of admin agencies and the legitimacy of their decisions – significant impact but not publicly accountable

- Theories:
  - Legal formalism (late 19th c – late 1920s) – A.V. Dicey:
    1) Law composed of ‘scientific’ legal rules that can be discovered by careful study
    2) Rules best discerned by close examination of previously decided cases
    3) Legal documents “speak for themselves”; emphasis on plain meaning of words
    4) Concern about the size of admin state – reduced primacy of courts and less likely to protect individual rights
    - Common Law is most favourable source of regulation to government legislation
    - Need to keep government minimal; allow individuals to govern themselves and when disputes arise turn to impartial judiciary
  - Functionalism (1920s-) – John Willis
    - Central concern of admin law should be to promote effective functioning of the modern state
    - Common law is weak instrument for social governance; need to have legislative instrument that can specify how modern areas of law should be handled and need experts to be front-line enforcers of those laws
    - Delegations of parliamentary power to admin tribunals both necessary and inevitable for regulatory state to operationalize itself
    - Guided by laissez faire and Diceyan ideology, Courts have sometimes too zealously guarded “common law values” against state encroachment
      - Eg. courts have sometimes used their review powers in admin law to protect private property rights and freedom of K in ways that unduly inhibit the regulatory state from achieving its redistributive aims and purposes
    - Courts sometimes impose an adversarial adjudicative model on ADMs when not appropriate
      - This interferes with efficiency of admin system and favours those who can afford to engage in litigation
Courts sometimes fails to appreciate need to infuse policy into statutory interpretation and to recognize that judges don’t hold monopoly on how to interpret statutes
  
  o Specialized admin agency may actually be better situated than a generalist judge to interpret regulatory statute in way that will best achieve leg intent and secure effective program delivery

THE CONSTITUTIONAL BASIS FOR, AND ROLE OF, JUDICIAL REVIEW

Q: Where do the courts get the power to review administrative decision-making?

Original jurisdiction: ordinary courts have jurisdiction over decisions of admin decision-makers when they are challenged by way of direct actions by a citizen in K or tort on the ground that state has infringed an individual’s private legal right

Statutory right of appeal: not automatic – must be provided for in a statute

Court’s inherent judicial review jurisdiction:

  ➢ Superior courts may hear any matter unless there is a specific statute that says otherwise or grants exclusive jurisdiction to another court or tribunal
  
  ➢ NOT a jurisdiction for general appeal – court CANNOT simply substitute own decision for that of an agency’s
  
  ➢ OLD APPROACH to Remedies: Inherited from UK. Supervisory power over admin bodies had to be exercised through old prerogative writs:

    ▪  
  
  certiorari (quash/set aside a decision),
  
  ▪  
  prohibition (order tribunal not to proceed),
  
  ▪  
  mandamus (performance of a public duty) and
  
  ➢  
  habeas corpus (order release of unlawfully imprisoned)
  
  ➢ If decision was IV, courts could only apply writs if lower decision so “patently unreasonable” so as to cause admin d/m to lose jurisdiction. If UV, court could make order of prerogative writs.

  ➢ As government expanded, courts reacted defensively vs. government giving away their jurisdiction to administrative agencies

  ➢ Legislatures inserted privative clauses to try to stop courts from reviewing decisions of admin decision-makers

  ➢ McRuer Commission (1960s) – watershed moment

    ▪  
  
  Recommendations regarding scope of judicial review
  
  ▪  
  Led provinces/territories to enact statutes to replace CL writs with single application for judicial review – eg. BC Judicial Procedures Act (S. 2 General Powers of Relief)

    ▪  
  Federal Court Act 1970 – created FCC

This inherent jurisdiction is constitutionalized in s. 96

  ➢ S. 96 provides the appointment of superior court judges is the sole responsibility of the federal government

  ➢ Superior courts have inherent jurisdiction to review admin decision making and are themselves immune from judicial review

  ➢ Provinces DO NOT have the jurisdiction to create s.96 courts

  ➢ 3-part test to determine if admin tribunal is acting like a s.96 court and is therefore unconstitutional

    1) Is the admin decision in question similar to one that, at the time of Confederation, would have been exclusively within the power of a superior, district, or county court to make?

    2) Is the impugned power a “judicial” power as opposed to a legislative or administrative power?

    3) Even if YES to 1), Has the decision making power in its contemporary institutional setting changed in character such that it cannot conform to the jurisdiction of a court?
Is judicial review available?

- Is the tribunal a public body?
  - Body or tribunal will be subject to public law, and therefore judicial review, if it is *part of the machinery of government*
  - Consider: functions and duties; sources of funding and power; level of government control and whether government would have to “occupy the field” if body were not performing the function it does

- Does the party have standing to challenge the tribunal decision?
  - Parties, collateral interest and public interest

- What is the proper court of judicial review?
  - Is the source of impugned authority’s power federal or provincial?

- Has the application been filed within the necessary time limits?
  - BC – general limit is 60 days
  - Courts often statutorily empowered to extend limit

- Has the party exhausted all other adequate means of recourse for challenging the tribunal’s actions?
  - Alternative form of review may be inadequate where:
    - No statutory authority or not willing to address the issues
    - No authority to grant requested remedy
    - Incomplete evidentiary record or evidentiary errors that tribunal has no authority to correct
    - Too inefficient or costly
  - Court will NOT find inadequacy based only on unproven allegations that tribunal will suffer same errors or biases.

**REMEDIES ON JUDICIAL REVIEW**

- **Prerogative Writs**
  - Certiorari (“cause to be certified”):
    - special proceeding by which superior court requires inferior body to provide it with record of proceedings for review for excess jurisdiction;
    - successful application results in quashing/invalidation of tribunal’s decision
    - ex post facto remedy
  - Prohibition:
    - Special proceeding to prevent lower court from exceeding its jurisdiction or prevent non-judicial officer from exercising a power
    - Pre-emptive remedy
  - Mandamus:
    - Writ issued by superior court to compel lower court or gvt agency to perform a duty it is mandated to perform
    - May give court ability to send matter back to tribunal for reconsideration with directions BUT cannot be used to compel exercise of discretion in a particular way
  - Habeus corpus:
    - Writ employed to bring person before a court, most often to sure person’s imprisonment is not illegal
  - Declaration:
    - Judgment of a court that determines and states the legal position of the parties, or the law that applies to them
Two kinds: public law variety (to declare gvt action ultra viries) and private law variety (to clarify law or declare private party right under statute)

Not enforceable and cannot require anyone to take or refrain from taking any action

**Statutory Reform**
- Prerogative writs came to be characterized by technical complexity
- 1970s – provinces enacted omnibus statutes governing judicial review
  - BC Judicial Review Procedures Act
  - BC Administrative Tribunals Act
- **Statutory reforms commonly provide for the following:**
  - Simplified application procedures
  - Simplified remedies
  - Greater clarity as to who may be parties to a hearing
  - Right of appeal
  - Judicial review mechanisms to challenge interlocutory orders and to resolve interim issues
    - Contrast certiorari which was only available with respect to "decisions" – that is final orders

**Private Law Remedies**
- Neither old prerogative writs or new statutory remedy of judicial review allow party or obtain monetary relief
- To seek monetary relief, party must initiate separate civil action for restitution of damages
- Government agencies can be sued for breach of K, tort of negligence, or special tort of misfeasance in public office
- Private law action for damages does not violate rule against collateral attacks

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

**CONSTITUTION ACT, 1867**

**s. 96 " Only federal government can appoint superior court judges**
- federal appointment power = judges of superior courts
- superior courts have "inherent jurisdiction" which includes power to determine own jurisdiction
  - inherent jurisdiction = power to determine the limits of own jurisdiction
  - the province cannot give this power to provincial tribunals (why? granting these powers = creating superior courts)
- superior courts have "core powers' only superior courts can exercise
  - the province cannot give this power to provincial tribunals (why? granting these powers = creating superior courts)

However, provinces can create “inferior” courts and tribunals, and appoint their members
- these courts are “statutory courts” with no inherent jurisdiction
- if province could create a court/tribunal and shield it from all judicial review, the provincial court or tribunal would, in effect, be able to determine the limits of its own jurisdiction and therefore be, by effect, a superior court (however, s. 96 functions to prevent this by ensuring judicial review of jurisdiction, as found in Crevier)
**RE RESIDENTIAL TENANCIES ACT**

- *A test for if a tribunal is acting as a court.*
- **Facts:**
  - Ontario enacted *Residential Tenancies Act* in 1979; created Residential Tenancy Commission to oversee and enforce rights and obligations under the Act.
- **Issue:**
  - Is it within the legislative authority of the province to empower Residential Tenancy Commission to:
    - Make order evicting tenant?
    - Make orders requiring landlords and tenants to comply with obligations imposed under Act?
- **Held:**
  - No.
- **Analysis:**
  - Intended effect of s. 96 would be destroyed if province could pass legislation creating tribunal, appoint members thereto, and then confer on the tribunal the jurisdiction of the superior courts.
  - BUT “s. 96 can no longer be construed as a bar to a province seeking to vest an administrative tribunal with ancillary 'judicial' powers formerly exercised by s. 96 courts”
  - **TEST:**
    - **Historical Inquiry:** Does the power or jurisdiction conform to the power or jurisdiction exercised by superior, district or county courts at the time of confederation? If YES, proceed to second step.
    - **Judicial Power:** Can the function/power be considered a 'judicial' function, as opposed to a legislative or administrative power?
      - Primary issue is the **nature of the question** which the Tribunal us called upon to decide.
      - "Where the tribunal is faced with a private dispute between parties, and is called upon to adjudicate through the application of a recognized body of rules in a matter consistent with fairness and impartiality, then, normally, it is acting in a 'judicial capacity'.” Judicial task involves questions of principle.
    - **Institutional context:** consider the power in its overall institutional setting to determine if the setting changes the character of the power sufficiently so that an administrative tribunal should be allowed to exercise it (notwithstanding that is is a “judicial power” that was exercised exclusively by superior courts at the time of Confederation)
      - i.e. the “institutional setting” argument can allow a tribunal to exercise such a power provided the power can be characterized as a “necessarily incidental aspect” of, or “ancillary to”, a broader, more comprehensive and complex regulatory scheme
      - scheme is only invalid when adjudicative function is the sole or central function of the tribunal so that the tribunal can be said to be operating like a s.96 court

**CREVIER V. QUEBEC (ATTORNEY GENERAL)**

- *Constitutionalised judicial review for jurisdictional questions, even in the face of a privative clause*
- **Facts:**
  - Province of Quebec enacts *Professional Code*; that creates 2 administrative d/makers (tribunals); corporations are required to establish (1) discipline committees with authority to impose range of sanctions (2) Professional Tribunal (hears appeals from the discipline committees), which is composed of entirely provincial court judges and does not do anything except hear appeals, powers to confirm, alter or quash any decision; s. 194 of Code is a privative clause (PC) which purports to bar
all judicial review of Professional Tribunal decisions "no recourse to Quebec Superior Court by either appeal or judicial review even if it is alleged that the Professional Tribunal exceeded its statutory powers"

**Issue:**
- Can the Professions Tribunal exercise the powers conferred upon it?

**Held:**
- No – privative clause not constitutionally valid.

**Analysis:**
- “where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s.96 court”
- A provincially constituted statutory tribunal CANNOT constitutionally be immunized from review of decisions on questions of jurisdiction
  - Questions of jurisdiction “rise above and are different from errors of law”
- Cannot be left to a provincial statutory tribunal to determine the limits of its own jurisdiction without appeal or review

**THE ADMINISTRATIVE STATE AND THE RULE OF LAW**

**What is it?**
- General principle that forms part of our constitutional law (written and unwritten) – a "constitutional metaprinciple”
  - Implicitly recognized in preamble of CA 1867
  - Recognized in preamble of Charter
- Identified in Reference re: QC Secession as one of four underlying principles of constitution
- Underlies much of admin law and provides important rationale for what courts do

**The Rule of Law in Theory**
- Complex and contested concept
- Can be characterised by 3 interrelated features.
  - **Legality:** all legal action must originate from legal source of authority; no arbitrary or unauthorized gvt action
  - **Order:** law needs to be written, clear and accessible. “Law and order are indispensable elements of civilized life” (Re Manitoba Language Rights)
  - **Supremacy:** everyone, including gvt, bound by the law; need institutional practices of imposing effective legal restraints on the exercise of public power within the three branches of government.

**Purpose of the Rule of Law: The Non Arbitrary Rule of Men (and Women)**
- ROL represents a normative standard by which all legal subjects can evaluate and challenge the use of public power.
- In a legal system governed by the ROL, all persons will possess formal equality, ensuring that elected officials and high-ranking members of the executive branch of government will be held legally accountable just like any other person.
- ROL is animated by the need to prevent and constrain arbitrariness within the exercise of public authority by political and legal officials in terms of process, jurisdiction and substance.
  - Arbitrariness commonly connotes indifference by the decision maker about the procedures chosen to reach an outcome.
  - All branches of government can behave arbitrarily in relation to other branches of government.
• A decision may be found arbitrary in substance because it is biased, illogical, unreasonable, or capricious. In other words it will offend what appear to be shared standards of reasonableness, rationality, or morality.
• Decision makers act arbitrarily when they treat individuals with a lack of respect, ignore dignity interests, or deny the equal moral worth that we all share
• Arbitrariness can be associated with a unilateral method of decision-making or one that is not sufficiently reciprocal, consultative or participatory.
• Arbitrariness is expressed in the idea of an untrammelled exercise of will, or the uncontrolled power, of a public decision maker.

**ROL Theories**

**Basic (Traditional/Thin) Understandings of the Rule of Law ("Diceyan")**

- There are 3 fundamental concepts, rooted in Dicey’s understanding of the rule of law, are relevant in thinking about and understanding administrative law:
  - **Legality:** "Government acts only with lawful authority"
    - there must be lawful authority for all state actions that interfere with the rights and liberty of citizens
    - "No one should be made to suffer except for a distinct breach of the law"
    - There should be *clear and knowable legal rules* - broad discretionary power is therefore suspect and dangerous for Dicey (might be used in an arbitrary or discriminatory manner and makes accountability difficult)
    - All power is legally limited; courts can determine the limits of government power and hence the lawfulness of government action
  - **Formal legal equality:** "No one is above the law"
    - Governments and citizens alike are subject to the ordinary law of the land
  - **Judges as guardians of the law:** It is the role of the "ordinary courts of the land" to impose the law on government
    - Governments and citizens alike are subject to the ordinary law of the land as administered by the ordinary courts
    - There should be no separate court system with separate rules for administrative (public) law
    - Courts are the “final arbiters” of what the law is (i.e. courts must have ultimate authority to determine what a statute means and where its boundaries lie)
    - Courts act as the citizen's bulwark against arbitrary government and will protect the rights of citizens against the state
  - Judge made law combined with an unwritten constitution represented a better mode of legal constraint than written codes and constitutions because they were less vulnerable to executive attempts to suspend or remove rights.
  - Parliament was sovereign and supreme. Primary source of all ordinary law and ought to be the source of all governmental power.

- **Justification for judicial intervention rested on a number of grounds:**
  1. The institutional role of the courts as the principle external check on executive and agency powers.
  2. The specific task allocated to the courts through administrative law to constrain administrative discretion by ensuring that an administrative body did not overstep the jurisdiction that the legislature had set down in the statute.
3. The judicial perception that a fundamental role of courts was to protect and vindicate the private autonomy of affected individuals, primarily through common law rights derived from contract, tort and property.

- Admin bodies were viewed with distrust.

- **Substantive/Thick Rule of Law (Roncarelli)**
  - Departs from formalistic, Diceyan theory by injecting more values into assessment of gvt action
  - ROL as a particular vision of what “justice” requires in substance ie. rule of “good” law (moral content)
  - ROL can be used to measure the content of legislation for a policy perspective

- **New Minimalist/Thicker “thin” Rule of Law (Imperial Tobacco/Khadr)**
  - Slight retrenchment of substantive ROL – still concerned about values BUT also need to be deferential to gvt objectives
  - ROL cannot invalidate legislation based on content that is otherwise constitutional

- **Functionalist Critique of the Diceyan ROL model (John Willis/Raz/Fuller)**
  - A central concern of administrative law should be to promote the effective functioning of the modern state – Raz.
  - **Purposes of modern state should be fostered by law, not hindered.** These purposes include:
    - Regulation of private power in the public interest
    - Promotion of greater social and economic equality through the redistribution of income and benefits.
  - Courts have sometimes used administrative law principles (based on ideas about the rule of law) in a way that operates to uphold the status quo and curbs the interventionist state
  - This throttles the regulatory state in a way that is too restrictive
  - Courts should take a more restrained, limited, and “less interventionist” role in their oversight of administrative action – government should hold the balance of power
  - Diceyan binary between law/policy is a fallacy – all law is policy

- **Specific “Functionalist” Concerns**
  - Guided by laissez faire ideology, courts have sometimes too zealously guarded "common law values” against state encroachment
    - E.g. courts may act in administrative law in order to protect private property rights and freedom of contract in the face of state regulation in a way that unduly inhibits the regulatory state and its redistributive aims and purposes
  - Courts have imposed an adversarial adjudicative model on administrative decision-makers when it has not been appropriate to do so and this…
    - Interferes with the efficiency of the administrative system and
    - Favours those who can afford to engage in litigation
  - Courts have sometimes failed to appreciate the need to infuse policy into statutory interpretation and to recognize that they do not hold a monopoly on how to interpret statutes in a way that is consistent with legislative intent and that will best achieve legislative purposes

- **New Critique of the New Minimalist Model (Ken Roach)**
  - In post 9/11 context, new minimalist reasoning not about respect for different branches of state, but rather an anxiety about appearing to be too activist in politically charged arena (eg. immigration/securitization context)

- **New Critique of ROL as Liberal Concept (S. Razack and Others)**
  - Concept of ROL is inherently colonial and manifests in race-based ways
  - George Agamben “State of exception”: space where law does not apply an where normal legal rules, procedures and protections are not available; law setting up area of lawlessness
The SCC on the Rule of Law

- Has never set out a fully articulated conception of the rule of law.
- The Heart of the Canadian Rule of Law
  - Roncarelli v. Duplessis
    - Several examples of arbitrary power: existence of unlimited discretionary powers in an agency; a decision maker acting in bad faith; inappropriate responsiveness to an individual situation where important interests were at stake; consideration of irrelevant facts in the decision; disregard of the purpose of a statute; and dictation of the decision by an external and unauthorised person.
    - Illustrates one of the primary functions of the rule of law: control of executive arbitrariness.
    - Court held that no public official is above the law. Incompatible with the rule of law.
    - Diceyan model:
      - SCC held that the chairman of the liquor board had not made a decision at all because Duplessis had substituted his decision for that of the proper authority “exercising his power arbitrarily.”
      - Violation of the legal principle of validity, which affirms that "every official act must be justified by law" or be found ultra vires.
    - The administrative tribunal violated Roncarelli’s rights as a citizen, thereby damaging the normative relationship between the state and the citizen.

A Foundational Principle, but an “Unwritten” One

- Manitoba Language Rights Reference
  - SCC invoked the rule of law to conclude that the Manitoba government’s repeated failure to respect the mandatory requirement of bilingual enactment of provincial laws rendered all subsequent unilingual legislation invalid.
  - Throughout the judgment the Court characterized the rule of law as the principle of legality.
  - Understood in two ways: meant that the law is supreme over government officials as well as private individuals and therefore excludes the influence and operation of arbitrary power.
  - AND meant that law and order are indispensable elements of civilized life within a political community.

- Secession Reference
  - Court identified four unwritten principles that animate the Canadian constitutional order: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.
  - These principles neither stand alone nor can they be used to trump each other.
  - They are highly interrelated, permeate every part of the legal order, are the vital unstated assumptions that govern the exercise of constitutional authority, constitute the “lifeblood” of the Constitution, and mutually support every part of the Canadian state.
  - These principles have “full legal force” in certain circumstances.
  - Means they are binding on courts, can give rise to substantive legal obligations (both general and specific) and may function as real constraints on government action.
  - Court stated democracy cannot exist without rule of law.

- Unwritten principle of the rule of law constrains the principle of parliamentary sovereignty from its tendency to define democracy merely as a set of formal institutional arrangements.
The New Minimalist Rule of Law

- SCC judges disagree about the scope and content of the principle of rule of law.
- In a trilogy of cases - Imperial Tobacco, Charkaoui, and Christie - the SCC has considerably narrowed the scope and effect of this principle within Canadian law.
- According to the court, the rule of law incorporates a number of familiar themes and embraces at least four principles:
  1. It is the supreme over private individuals as well as over government officials, who are required to exercise their authority non-arbitrarily and according to law
  2. It 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
  4. It is linked to the principle of judicial independence.
- One key attribute that this principle does not possess: the ability to strike down legislation based on its content.
- The rule of law does not speak "directly" to the terms of legislation.
- The government action it is able to constrain is usually that of the executive and administrative branches.
- Imperial Tobacco
  - Concerned a statute enacted by BC, the Tobacco Damages and Health Care Costs Recovery Act, which allowed the province to sue manufacturers of tobacco products for compensation of tobacco-related health care costs incurred by individuals exposed to tobacco products.
  - Tobacco companies challenged the validity of the statute on 3 grounds: extra-territoriality, judicial independence, and the rule of law.
  - Court affirmed that the rule of law does not require that legislation be prospective (except in criminal law) or general.
  - It also does not prohibit the conferral of special privileges on the government, except where necessary for effective governance.
  - Lastly, it does not ensure a fair civil trial.
- Charkaoui
  - Declared unconstitutional the detention review hearings process set out in the Immigration and Refugee Protection Act.
  - Rule of law argument against the certificate provisions in the IRPA was relegated to the margins.
- Christie
  - Claimed the BC’s 7% legal service tax made it impossible for many of his low-income clients to retain him to pursue their claims.
  - Court affirmed that one purpose of the rule of law is to ensure access to justice.
  - But the rule of law does not underwrite a general right to legal services, to legal assistance, or to counsel in relation to court and tribunal proceedings.
  - It therefore cannot constitutionalize a particular type of access to justice, such as a specific institutional form of legal aid.
  - ROL could not be used to strike down otherwise valid legislation.
- Tensions among the rule of law, fairness, equality, and efficiency remain particularly acute in admin law because many tribunals were established to provide inexpensive and efficient access for law and middle income or otherwise vulnerable individuals.
- However, these tribunals may fail to do so and, for reasons concerning the separation of powers, recourse to the courts may not provide a remedy.

Lower Court Unruliness?

- SCC has signaled a marked unwillingness to engage in "gap filling" through the use of unwritten principles.
Those who wish to see robust use of unwritten principles must look to lower-court decisions where the unwritten principle of the rule of law, in conjunction with other unwritten principles, has supplemented the written constitutional text.

**RONCARELLI V. DUPLESSIS**

- **No such thing as absolute and untrammelled discretion.**
- **Facts:**
  - R was a successful restaurant owner and practicing Jehovah’s Witness in Montreal; furnished bail for over 375 JWs who were arrested for distributing magazines w/o permits; Chief prosecutor contacted Premier Duplessis; R’s license revoked by Liquor Commission 1946; told he was “forever” barred from holding license; evidence that this was meant to warn others they could be stripped of privileges is they assisted JWs; R could not keep business open; R brought action vs. D for damages; trial found in favour of R but overturned on appeal
- **Issue:**
  - Was the cancellation of Roncarelli’s permit a lawful act of the Liquor Commission?
- **Held:**
  - No
- **Analysis:**
  - Decision to deny or cancel liquor license is within the discretion of the Liquor Commission BUT “there is no such thing as absolute and untrammelled “discretion”
  - “‘Discretion’ necessarily implies good faith in discharging public duty, there is always perspective within which a statute is intended to operate”
  - Good faith in this context means carrying out statute according to its intent and for its purpose
  - Act of D through the Commission brought about breach of implied public statutory duty – contrary to rule of law
  - Cartwright dissent: an administrative tribunal, within its province, is a law unto itself

**RE: MANITOBA LANGUAGE RIGHTS (1985, SCC)**

- **ROL as principle of legality; precludes exercise of arbitrary power AND requires system of positive order**
- **Facts:**
  - reference Q to SCC regarding language provisions in Manitoba Act stipulating provisions of French language services in the province.
- **Issue:**
  - Are the unilingual enactments of Manitoba legislature invalid under Manitoba Language Act and Constitution Act b/c do not confirm to form respecting use of both official languages? If so, do they have any force and effect?
- **Held:**
  - Yes invalid but to declare of no force and effect, without more, would undermine rule of law
- **Analysis:**
  - In Constitutional adjudication, court can have regard to unwritten principles that form the foundation of the Constitution – such as RoL
  - RoL involves: (1) the law is supreme over officials of government as well as private individuals and is therefore preclusive of the influence of arbitrary power (supremacy of law over government); and
rule of law requires the creation and maintenance of an actual order of positive laws (the existence of a system of public order)
- Declaring Acts invalid and of no force and effect would, without more, undermine principles of RoL
- Solution: laws still valid until Manitoba can have time to comply with constitutional duty to translate/re-enact/publish

**BRITISH COLUMBIA V. IMPERIAL TOBACCO CANADA LTD. (2005, SCC)**

- **ROL cannot invalidate legislation based on content that is otherwise constitutional**
- **Facts:**
  - 2000 – BC passed the Tobacco Damages and Health Care Costs Recovery Act, which allowed action by government of BC vs. manufacturers of tobacco products for recovery of healthcare expenditures incurred by government in treating population exposed to those products. Imperial Tobacco challenges validity of Act on 3 grounds: division of powers and 2 underlying principles of judicial independence and rule of law.
- **Issue:**
  - 2) Does the Act violate the underlying constitutional principle of judicial independence?
  - 3) Does the Act violate the underlying constitutional principle of the rule of law?
- **Held:**
  - No – Act is constitutionally valid.
- **Analysis:**
  - 2) Legislature can introduce “illogical or draconian legislation as long as it does not fundamentally alter or interfere with the relationship between the courts and other key branches of government”. Shift in onus found in Act does not interfere with court’s adjudicative role
  - 3) “rule of law not an invitation to trivialize or supplant Constitution’s written terms” (para 67)
  - “in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box” (p.35).

**CANADA V. KHADR**

- **ROL requires JR even where Crown prerogative BUT for executive to decide how to remedy constitutional invalidity**
- **Facts:**
  - K was Canadian taken prisoner at 15 by US forces in Afghanistan; alleged he threw grenade that killed US soldier; detained in Guantanamo; 2003 CSIS and DFAIT officials questions K and shares info with info; questioned again knowing he was subjected to sleep deprivation; K repeatedly asked for repatriation to Canada; PM denied request; Federal Court held Canada had duty to protect K under s. 7 of Charter and ordered government to request repatriation. Upheld by FCA. Appealed to SCC.
- **Issue:**
  - Was there a breach of s. 7 of the Charter? If so, was it breached in accord with the principles of fundamental justice?
  - Is the remedy sought appropriate and just in all the circumstances
- **Held:**
  - YES breach; NO repatriation not appropriate to order, declaratory relief is proper remedy
- **Analysis:**
1) Charter applied to Canadian officials at Guantanamo Bay; Canada’s actions contributed to continued detention and deprivation of liberty and security of the person; not in accord with principles of fundamental justice – offends most basic standards about treatment of detained youth suspects. Canada violated K’s charter rights under s. 7.

2) Test:
   • A) is the remedy sought sufficiently connected to the breach?
     • YES – impact of the breach on present liberties
   • B) Is the remedy sought precluded by the fact that it touches on the Crown prerogative over Foreign Affairs?
     • Impact of decision on Canadian foreign relations cannot be properly assessed by Court
     • Record inadequate in terms of range of considerations faced by government
     • THEREFORE: NOT appropriate for court to give direction to executive about diplomatic steps necessary, declaratory relief is proper remedy

RÉGIE DES RENTES DU QUÉBEC

- Government can enact declaratory provisions that apply to any ongoing dispute in which final judgment on the merits has not been handed down.
- Facts:
  - R is government agency responsible for application of Supplemental Pensions Plans Act (SPPA); CBC were contributing ERs to the Fund, closed some of their divisions and created solvency deficiency of 5 mil; R ordered CBC to pay; decided provisions of Fund Rules were inconsistent with SPPA which said deficiency was debt of ER; decision affirmed by Admin Tribunal of Quebec (ATQ) and Superior Court. CA set aside decisions and remitted matter to R to decided in conformity with CA judgment; Legislature then amended SPPA in line with R’s approach; instead of following CA, R therefore applied new provisions of SPPA; upheld by ATQ; overturned by Superior Court and CA.
- Issue:
  - Did R err in applying the declaratory provisions enacted by Quebec government?
- Held:
  - No.
- Analysis:
  - Principle of res judicata precludes parties from re-litigating an issue with respect to which final determination has been made BUT does not preclude legislature from negating the effects of such a determination
  - Within the prerogative of the legislature to enter domain of courts and offer binding interpretation of its own by enacting declaratory legislation.
  - Declaratory provisions had immediate effect on pending cases; exception to general rule that legislation is prospective
  - ONLY a final judgment on the merits would preclude application of declaratory legislation
  - Here case remained pending when declaratory provisions came into force – parties’ substantive rights not definitively decided and question had been remitted to competent authority
  - Admin d/m has duty to follow the directions of a reviewing court, on the basis of stare decisis – therefore obligated to follow directions only insofar as they remain good law
  - As a result of legislature’s intervention, CA’s directions became bad law – R not only entitled to interpret SPPA in light of declaratory provisions, it was obligated to do so
  - McLachlin (dissent): here all avenues of appeal had been exhausted and matter was remitted to R to determined monetary liability, not asked to determine substantive rights of parties afresh; therefore
R did not have authority to reinstate original position; effectively circumvented process of judicial review.

THE BAKER CASE AS AN EXAMPLE OF ADMINISTRATIVE LAW IN ACTION

**Introduction to Modern Administrative Law**
- Historically the stance of courts toward administrative agencies has been negative: to limit, to reign in, to supervise, to oversee, and to constrain.
- The emphasis has shifted so that courts will tend to be deferential to administrative boards and tribunals where it seems this is what Parliament intended.
- The core function of judicial review of administrative action is to examine how and why the courts decide to intervene in the administrative process.
  - Procedural fairness:
    - First, is this an issue courts should review?
    - If yes, did the administrative decision-maker use the proper procedures in reading a decision?
  - Substantive Review:
    - Regarding the decision itself, did the ADM make an error of the kind or magnitude that the court is willing to get involved in?
  - Remedies and the legitimacy of judicial review:
    - If there are procedural or substantive defects in the decision, should the court intervene and, if so, how?

**BAKER v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)**

- Synthesized the law in both SR and PF
- Removed dichotomy between discretionary and non-discretionary decisions
- Consolidated test for SOR – Pragmatic and Functional Approach (altered by Dunsmuir)
- Non-exhaustive list of factors to determine content of PF
  - Also sets out test for RAOB
  - Relevant in particular to Q of oral hearings and duty to give reasons
- Case can be seen as reflection of BOTH functionalist and substantive theories of ROL

**Facts:**
- B was Jamaican citizen; entered Canada as visitor 1981; remained in Canada; never received PR status; supported herself illegally; had 4 children while in Canada; suffered post-partum and diagnosed with schizophrenia; applied for welfare; ordered deported 1992; under s. 114(2) of IRPA Minister has discretion to admit anyone to Canada where they were satisfied, owing to humanitarian and compassionate grounds, that admission should be allowed where it would otherwise not be allowed; B applies for exemption from requirement to apply for PR outside Canada; application rejected; rejection letter contained no reasons; simply stated insufficient humanitarian and compassionate grounds; B alleges not accorded PF; argued case required oral interview, notice to children and other parent and their right to partake in interview, and notice to have counsel present at interview; also alleged ADM required to give reasons and that notes gave rise to reasonable apprehension of bias; federal court dismissed application for judicial review BUT certified following Q: "Given the IRPA does not expressly incorporate language of Canada’s international obligations with respect to UN Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s."
114(12) of Immigration Act?” FCA found best interests of children did not need to be given primacy in assessing such an application. Baker appealed.

**Issue:**
- What do you consider when determining the amount of procedure that a particular decision requires?
- What is the test for a reasonable apprehension of bias?
- How do you determine the appropriate standard of review with discretionary powers?
- How does the pragmatic and functional approach work?

**Held:**
- Appeal allowed.

**Analysis:**
- **LHD (majority):**
  - **Substantive Review (Case overturned on this ground)**
  - The wording of the section clearly indicates that the Minister has wide discretionary powers which points to a deferential standard of review.
  - BUT “inaccurate to speak of a rigid dichotomy of “discretionary” or “non-discretionary” decisions
  - PFA recognizes that standards of review for errors of law are appropriately seen as a spectrum – 3 standards: (1) PU (2) RS (3) correctness
  - Overall, although discretionary decisions are generally given considerable deference, the discretion must be exercised in accordance with the boundaries imposed by the statute, the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the values in the Charter. This should guide the application of the pragmatic and functional approach.
  - PFA requires consideration of 4 factors, need to balance factors to arrive at one of the 3 SORs:
    - **Presence of Privative Clause:**
      - If there is a privative clause, signal to courts to show more deference
      - If statutory right of appeal, signal to courts to show less deference
      - Here the Immigration Acts DOES NOT have a privative clause, but clause JR requires leave from Federal Court (which points to small amount of deference)
      - Overall, this factor points to low deference
    - **Expertise of D/M**
      - Expertise is signal to courts to show more deference
      - Here Minister is formal d/m and presumably knows more about immigration matters than the courts, especially as it relates to exemptions from the norms
      - Overall, this factor points to more deference
      - NOTE: expertise analysis is about what is institutionally requires of an officer in this position, NOT ACTUAL EXPERTISE of d/m in particular situation; fact that decision CAN be taken by high level d/m like Minister points to > deference, even though in reality taken by lower level officer
    - **Purpose of the Act as a whole and the particular provision**
      - Polycentricity = weighing/balancing broad social interests; accountability to multiple stakeholders
      - If the decision is polycentric, indicates Tribunal action less like a court; signal of more deference
      - Here: the decision is polycentric b/c it involves considerable choice, H&C considerations, application of general legal principles and exemptions (>deference) BUT also about individual rights and interests, not interests of different constituencies (<deference)
      - Overall, this factor is fairly neutral
• **Nature of the Problem**
  ♦ Less deference to pure QOL, more deference to pure QOF
  ♦ Here: nature of Q is very fact dependent
  ♦ Overall, factor points to high deference
  ♦ Critique: a lot of flexibility in characterizing Qs; can characterize almost anything as QMFL, so not very helpful factor

• **Overall, the appropriate standard is reasonableness simpliciter.**

• **Minister's decision was unreasonable because as it did not consider the children's interests enough (and in fact was dismissive of them) – this is incompatible with the purpose of the Act (which requires a broad interpretation), international law (the *Convention on the Rights of the Child*), and the guidelines that the Minister was supposed to follow.**

• **So it would appear that reasonableness in this case means giving proper weight to factors**

• **Procedural Fairness**

  "The concept of PF is eminent variable, and its content is to be decided in the specific context of each case" *(Knight V Indian Head School Division)*

• **Non-exhaustive list of considerations when determining the level of PF required:**

  • **Nature of the decision**
    ♦ Function of the decision maker
    ♦ Nature of the decision maker
    ♦ Matters to be determined
    ♦ Process used
    ♦ The more judicial the decision, the more procedure required, and the more legislative the decision, the less procedure required.

  • **Statutory scheme**
    ♦ Greater procedure is required if there is no administrative appeal available, or if the decision is determinative of the issue (i.e. a final decision).
    ♦ Statutory exceptions do not require a great deal of fairness.

  • **Importance of the interest to the affected party**
    ♦ The more important the decision to the lives of those affected and the greater the impact on those people, the more procedure required.

  • **Legitimate expectations**
    ♦ A decision maker cannot vary from their usual practice without good reason and cannot backtrack on substantive promises previously made without according significant other procedural rights

  • **Procedural choices**
    ♦ The more statutory discretion the decision maker has to create its own procedure, this will indicate less stringent procedural requirements. This factor is not determinative.

• **Underlying principle for duty of PF: should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional, and social context of the decision.**

• **B is owed "more than minimal" PF in relation to her participatory rights. This decision is very different from the judicial process, and its role within the statutory scheme is an exception.** It is not the Minister's practice to grant interviews to applicants in these circumstances, and the Ministry is given considerable deference to create its own procedure → point to more relaxed requirements for procedure. **However,** the decision is extremely important to B, which points to stricter procedural requirements.
Administrative Law Process

- Oral hearings are not always required for these types of cases; therefore Baker's participatory rights were not violated unfairly in this case.
- Argument re: legitimate expectation that d/m would consider best interests of children in line with Convention NOT accepted – no legitimate expectation here.
- CL has NOT traditionally not required decisions to be given as an aspect of the duty of fairness BUT reasons are very useful for reviewing courts upon appeal, and help participants feel that they were treated more fairly.
- Court finds that these types of decision require reasons in some instances – however, the aide's notes satisfied this requirement in this case.
- The test for a "reasonable apprehension of bias" is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude (Committee for Justice and Liberty v National Energy Board test).
- Applying this to the facts at bar, she determines that the aide's notes did create a reasonable apprehension of bias in this case: did not demonstrate required sensitivity; makes link between mental illness/domestic work/several children and conclusion that she would be strain on welfare system for rest of her life; own "frustration" with the system interfered with his duty
- Theories of ROL: This case can be considered functionalist insofar as it allows considerable flexibility/leeway to gvt; but also substantive insofar as it considers values (best interests of children). Could also argue that PF analysis points to new minimalism → low PF required given interests at stake.
- Critique: Court here did not consider the inherent vulnerabilities built into the immigration system (consider Razack)

SUBSTANTIVE REVIEW IN ADMINISTRATIVE LAW

INTRODUCTION TO SUBSTANTIVE REVIEW: ISSUES/BACKGROUND

- Administering the Rule of Law
  - Beginning of 20th century – emerging administrative state was seen as a threat to both parliamentary sovereignty and to the rule of law b/c delegated powers from political executive operated outside legislative scrutiny
  - With expansion of administrative state courts shifted attitude to one of deference
  - Role of courts to other branches of government now aspires to kind of respectful deference characterized by "institutional dialogue" as a joint effort in governance
  - BUT recurring problems arising from interpretation of privative clauses, broad statutory grants of discretion and choice of standard of review

ADMINISTRATIVE TRIBUNALS ACT, SS. 1, 58, 59

- S.1
  - "privative clause" means provisions in the tribunal’s enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;
  - "tribunal": means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal’s enabling clause
- S. 58: Standard of review if tribunal’s enabling Act has privative clause
(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

- (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
- (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
- (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

S. 59: Standard of Review if Tribunal's enabling Act has no privative clause

(1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

PROPER METHODOLOGY FOR APPLYING THE ATA

From Lavender Co-operative Housing (2011, Human Rights ADM)

To summarise then, on the standard of review:

- Legislative provisions are paramount and must be examined first. A tribunal’s enabling act specifies which provisions of the ATA apply.
- If s. 58 or 59 of the ATA is applicable that section represents a complete code of the possible standards of review.
- If s. 28 or 59 apply, then the next step is to identify the type of question at issue.
- Once the type of question has been identified the reviewing judge must apply the mandated standard of review.
If by the enabling statute neither s. 58 or 59 is applicable, then the court must apply the common law jurisprudence, as described in Dunsmuir (see paras. 47, 49 and 50).” (para. 57)

### DEVELOPMENT OF STANDARD OF REVIEW LAW

#### STAGE 1: PRE-CUPE

- **If jurisdictional, the standard is correctness. If not jurisdictional, not reviewable.**
  - Good argument for not having a single factor to determine SOR.
  - Will turn into all or nothing, too formalistic, not contextual.
- **Use of the “preliminary questions doctrine” to determine jurisdictional questions that could be reviewed.**
  - Crevier said that privative clauses could not oust judicial review of jurisdictional questions, due to s. 96 of the CA, 1867
  - However, they could oust the court’s juridical review powers re: other questions
  - Therefore, the courts had to determine: what are the jurisdictional questions that can be reviewed?
- **To answer this question, the Courts would use the preliminary question doctrine**
  - A jurisdictional question was a question that was preliminary or collateral to the main issue that the administrative body had exclusive jurisdiction to address
  - Example: if the issue is “is this legal picketing,” a jurisdictional question (that could reviewed) would be “is there a lawful strike going on?”
- **Rule based on this doctrine:**
  - If the question was determined to be a jurisdictional question (aka a preliminary question), the standard of review was correctness. The Tribunal had to get these questions “correct” (nb: correct in the eyes of the court) and if not, the court would overrule them.
  - If it was a non-jurisdictional question, there was NO standard of review – it was non-reviewable
- **This doctrine was criticized as formalistic and superficial** → they were seen as devices used by the courts to meddle in spheres where the legislature had deliberately and explicitly excluded them.
- If Courts wanted to, they could frame anything as a question of jurisdiction and review it on a standard of correctness

#### STAGE 2: CUPE

- **Expansion of occasions for judicial deference**
- **Addition of new possible SOR (“patently unreasonable” standard)**
- **CUPE puts courts on the path to judicial deference** – end of pure “rule of law” approach
- Major turning point in administrative law in Canada – the decision in CUPE called for restrain by the courts when reviewing ADM, even in matters of statutory interpretation
- **Main changes:**
  - Rejection of the “preliminary question” doctrine
  - More deference based on privative clauses
    - Dickson J. said that PCs are a clear signal from the legislature that they want decision of that tribunal which are made within its jurisdiction to be shielded from JR on a correctness standard (deference needed)
    - Often statutory wording is unclear – no right and wrong interpretation
    - Conveyed a spirit of curial deference, a recognition that administrative DMs are not merely “inferior tribunals”, but specialized bodies that possess a legislative mandate to apply their
expertise and experience to matters that they may be better suited to address than courts – advocated for a retreat from judicial intervention

- Need to respect “specialized jurisdiction” (expertise) of certain boards, primarily when the interpretation question lies within the heart of the specialized jurisdiction of that ADM.

- Switch to defining jurisdictional questions in a very narrow way

- Questions “within the core” encompasses much more than it did pre-CUPE

- Creation of a new SOR: patently unreasonable – therefore, at this point, there were TWO potential SORs when a strong privative clause was present

- Correctness
  - Still used for questions that go directly to jurisdiction (i.e. questions of law)
  - Note: “correct” means “correct in the eyes of the court” (CUPE)

- Patently Unreasonable
  - Matters within the core jurisdiction (that go to the heart of the case) NOT entirely immune from all review anymore – now there’s a PU standard [so this actually expands the reviewing role of the Court – so actually in line with “rule of law” theory]
  - PU: 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?
  - The word “patently” signals a highly deferential standard

**CUPE v. New Brunswick Labour (1979, SCC)**

- **Landmark case – marked a move towards according more judicial deference to the ADM decisions**
  - Recognition of the “patent unreasonableness” standard
  - Got rid of the preliminary question doctrine, more deference based on privative clause.

- **Facts:**
  - CUPE went on a lawful strike, the employers had management personnel temporarily do the job of the striking workers – CUPE complained this violated the Public Service Labour Relations Act. Section 102(3) stated that during a strike “(a) the employer shall not replace the striking employees or fill their positions with any other employee...” Labour Relations Board upheld the complaint because it understood the provision to read “the employer shall not replace the striking employees [with any person] or fill their position with any other employee.” The employer sought judicial review.

- **Issue:**
  - Can the finding of the Tribunal be reviewed?

- **Held:**
  - Question was not jurisdictional so can only be reviewed on standard of PU, but can still be reviewed. Decision not PU therefore stands.

- **Analysis:**
  - Dickson J. canvassed the reasons for the existence of privative clauses and emphasized the legislative choice to confer certain tasks on admin actors, the specialized expertise and experience of ADMs, and the virtues of judicial restraint.
  - Got rid of the “preliminary question doctrine” method for determining questions of jurisdiction
  - Jurisdiction is typically to be determined at the outset of the inquiry → courts should not quickly brand something as jurisdictional.
  - There is a strong PC in this legislation - the clauses state:
- 101(1) Except as provided in this Act, every order, award, direction, decision, declaration, or ruling of the Board, the Arbitration Tribunal or an adjudicator is final and shall not be questioned or reviewed in any court
- 101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, certiorari, prohibition, quo warrant, or otherwise, to question, review, prohibit or restrain the Board, the Arbitration Tribunal or an adjudicator in any of its or his proceedings
- PC constitutes clear statutory direction by Leg that public sector labour matters be promptly and finally decided by the Board
- Here subject matter of dispute unquestioningly fell within the confines of the Act
- Labour board is specialized tribunal called upon to make decisions based on accumulated experience → interpretation of s.102(3) “would seem to lie logically at the heart of the specialized jurisdiction confided to the Board”
- He also admits that the provision is ambiguous – no one interpretation could be right. There are several plausible interpretations → the tribunal is in a better place to make the choice (b/c of expertise, etc)
- So Board’s decision cannot be branded as PU → at least as reasonable as alternative interpretations

**STAGE 3: FOLLOWING CUPE**

- **Continued trend towards more judicial deference and multiplying SOR; chipped away from Diceyan**
  - **Not a clean trend, still back and forth**
  - **Discussion topic: represents different conceptions of the rule of law, no clearly articulated conception of what the rule of law is.**
- In *Bibeault*, the court started “backtracking” (some called it “overly conservative”) from CUPE because Beetz J. introduced the “pragmatic and functional approach” (to decide the legislature’s intention) but then decided a question of statutory interpretation on a “correctness” standard
- In *National Corn Growers* the Court noted that it would not interfere with specialized tribunals decisions re: their areas of expertise if they were not PU and this was a shift away from the Dicey rules re: rule of law
- In her 1993 dissent in *Mossop*, L’H-D noted other reasons for deference (besides just the existence of a PC)
- In *Pezim* (1994) and *Southam* (1997) the court held that judicial deference can apply even in situations in which the court exercised an appeal jurisdiction and grounds for appeal include “error of law”
  - These are situations without PCs & both were in the economic sector
  - these cases had broad appeal provisions and nevertheless the court extends the notion of deference into the appeal context based on the notion of expertise → court further moving towards “functionalist” approach
  - The court created the “reasonableness simpliciter” SOR

*UES LOCAL 298 V. BIBEAULT (1988, SCC)*

- **Pointed court back to more traditional “rule of law” approach (more conservative than CUPE) and sets out PFA to determine what SOR to use.**
- **Facts:**
  - Issue re: successorship provision in the Quebec Labour Code. Section 45 of the Code stated: “the alienation or operation by another in whole or in part of an undertaking otherwise than by judicial
sale shall not invalidate any certification granted under this code, any collective agreement or any proceeding for the securing of certification or for the making or carrying out of a collective agreement." There was a strong privative clause in this case. The ADM had to decide how expansively this successorship provision be read.

**Issue:**
- What SOR should be used for this type of statutory interpretation question?

**Held:**
- The SOR is “correctness” and the Labour Board got it wrong.

**Analysis:**
- Beetz says preliminary question doctrine is dead; old doctrine was formalistic and allowed courts to turn JR under a PC to what is basically an appeal AND did not adequately consider legislative intent when PC in place
- Real Q: what did the legislature intend vis-à-vis the particular tribunal
- Use the pragmatic and functional approach – 4 factors:
  - Wording of the enactment that confers jurisdiction on tribunal
  - Purpose of the statutes that creates the tribunal and the reason for tribunal's existence
  - Area of expertise of the tribunal members
  - Nature of the problem before the tribunal
- Note: This is the predecessor to the PFA from Pushpanathan (that was adopted for the SOR analysis post-Dunsmuir)
- Used the PF approach to distinguish between 2 categories of “questions of law” [where there’s a PC] that will draw the two different SORs: questions within the core jurisdiction of the tribunal and outside core jurisdiction of the tribunal.
- Similar to the Preliminary Question Doctrine, only difference is that jurisdictional questions are reviewable on PU standard instead of not reviewable at all:
  - Core: SOR = P/U - There will only be a jurisdictional error if the decision was PU
  - Outside: SOR= correctness - There will be a jurisdictional error if the decision was incorrect in the eyes of the court

**NATIONAL CORN GROWERS ASSOCIATION V. CANADA (IMPORT TRIBUNAL)**

**Issue:**
- Should the court interfere with the decision of the tribunal?

**Held:**
- No.

**Analysis:**
- Gonthier
  - Applied CUPE and noted that the adoption of a “reasonableness” test marked an important shift away from Dicey’s conviction that tribunals should be subject to the same standard of review as courts.
• Court not prepared to interfere with a specialized tribunal’s interpretation of its constitutive legislation where the interpretative exercise was one that was within the tribunal’s area of expertise and where the impugned interpretation was not PU

Wilson (concurring)
• In contrast to Gonthier, who assessed whether the Tribunal had made a PU error with respect to each issue before the Court, Wilson wrote that a proper application of the approach required a more general assessment of the Tribunal's decision.
• The court’s job, she noted, was to determine whether the Tribunal had made a PU error in the sense that it exceeded the statutory mandate given to it by Parliament.
• Cautioned engaging in probing/detailed examination risked sanctioning judicial intervention rather than the restraint required by CUPE – risked reintroducing correctness standard under the guise of reasonableness and displacing PU standard
• In face of privative clause, courts must not engage in wide-ranging review concerning whether or not the Tribunal’s conclusions are unreasonable
• Courts must recognize that (1) admin agencies bear primary statutory responsibility for their legislative mandate in the area of regulation (2) possess expertise, experience and contextual knowledge about which courts know very little (3) statutory provisions do not admit of only one uniquely correct interpretation

PEZIM V. BC (1994, SCC)

• Extends deference even on questions of law in the face of a statutory right of appeal.
• Expresses the idea of a spectrum and sees this set of facts as falling in the middle:
  ➢ “Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialised tribunals on matters which fall squarely within the tribunal’s expertise.”
• Note particular context: Securities, public interest, proactive context.
• Note contribution: Introduced the third SOR as “considerable deference”

CANADA V. SOUTHAM (1997, SCC)

• Affirmed Pezim’s extension because of importance of expertise, statutory purposes and nature of problem; note economic context
• Expertise identified as most important factor
• Labeled third SOR as “reasonableness simpliciter”

STAGE 4: INCREASING COMPLEXITY IN SOR DETERMINATION

• The Pragmatic and Functional Approach from Bibeault is restated in Pushpanathan and exemplified in Ryan
  ➢ After Southam, administrative law was unpredictable.
  ➢ All the approaches were unified in Pushpanathan (1998)
    ▪ Judicial focus on when a deferential SOR applied and, if deference was called for, which deferential SOR would apply: PU or RS
    ▪ Courts came to consider a number of factors that were said to indicate the “legislative intent” as to whether or not the court should adopt a deferential approach in JR
The SCC consolidated and summarized the factors to consider in the “Pragmatic and Functional” approach to standard of review = Pushpanathan factors

The central inquiry: did the legislator intend that the courts defer to the agency with respect to the disputed issue?

This SoR analysis was called: The Pragmatic and Functional Approach; it involves considering four factors

- Bastarache says you MUST ALWAYS determine the appropriate SOR
- MUST always go through this multi-factor test to determine that the SOR
- Note: the P&F approach is discussed and restated in this case, but it is based upon factors already considered by courts – dating back to Bibeault

In Pushpanathan, Bastarache states that now questions of jurisdiction are to be determined backwards “if the standard of review is correctness (based on the P&F approach) then necessarily it will be a question of jurisdiction (ipso facto – determined by looking backwards)

- This case emptied “jurisdiction” of meaning.
- “Jurisdiction” is now of no consequence in the analysis.
- After going through the four factor P&F approach, if you pick a correctness standard, you can say it is a jurisdictional question

Having to always determine SOR and consider all factors added complexity and time to cases – this increasing complexity gave rise to calls for simplification

- For example Justice LeBel’s “cri de Coeur” in cases such as Toronto v. CUPE Local 79 (see Stage 5)

### THE PRAGMATIC AND FUNCTIONAL APPROACH (PUSHPANATHAN)

- 4 categories of factors to be taken into account (none are themselves determinative)
- **Privative Clause/Appeal Provision:**
  - NOT as important as it used to be
    - The existence/non-existence is now only one factor
  - Strong PC = deferential; AP = less deferential
    - Note: a strong PC is one that shows the direct intention of parliament
  - A weak PC does not really point in either direction (neutral)
- **Expertise**
  - Court says that this is the RELATIVE (compared to the court) expertise on the SPECIFIC question at issue
  - This is the MOST important factor
  - Look at the composition of the tribunal:
    - Appointed for their expertise?
    - Bring something different than expertise? A non-legal perspective, which is something the court cannot really replicate – points to deference
    - Process: do they follow a significantly different process than a court
- **Purpose of the Act** as a whole and of the provision in particular [the “polycentricity principle”]
  - Is the activity similar to what a court does?
    - Is it adjudication between 2 parties where solving the dispute on the basis of law (quasi-judicial) – points to less deference
    - Or is it a polycentric model about interest balancing, policy and protecting public interest – points to deference
- **Nature of the problem:**
  - Question of law: points to correctness
- Especially in cases of pure questions of law, there is a strong presumption in favour of a standard of correctness
  - Question of fact: points to deference
  - Question of mixed fact and law: tends to point to deference
  - Level of deference depends on how fact laden the issue is.
  - If you can pull out a question of law, this will point to less deference

**PUSHPANATHAN V. CANADA (SCC, 1998)**

*Introduction of the mandatory “pragmatic and functional” approach to determine SOR*

*Emptied “jurisdiction” of meaning*

**Facts:**
- Push had made a refugee claim in Canada, he was convicted in Canada of the offence of conspiracy to traffic in a narcotic, was thus excluded from refugee protection under article 1F(c) of the UN Convention Relating to the Status of Refugees – this article was incorporated into the Immigration Act by a provision that said “acts contrary to the purposes and principles of the UN” excluded people from refugee status. The decision to exclude Push was made by the Refugee Determination Division (RDD). Appeal to the FCTD: they dismissed the application for JR. Appeal to the FCA: Push was allowed to appeal to the Federal Court of Appeal because the trial judge certified a “serious question of general importance” – did the criminal conviction for drug trafficking in the country of asylum constitute an act contrary to the purpose and principles of the UN? The FCA said ‘no” and dismissed Push’s appeal. Push appealed to the SCC.
  - Note: there was NO appeal provision from RDD to the Court in the *Immigration Act*
  - Note: there was a weak privative clause in the *Immigration Act*
  - S.67(1) gave the RDD “sole and exclusive jurisdiction” to determine all questions of law and fact, including questions of jurisdiction
  - Note: judicial review under the Federal Court Act could only be made to the FCTD
  - Note: s. 83(1) restricts appeals to the FCA from the FCTD to those that involve “serious questions of general importance”

**Issue:**
- What is the standard of review for the decision?

**Held:**
- Standard is “correctness” (and the RDD was incorrect – matter remitted)

**Analysis:**
- Court must always determine the appropriate SOR using the P&F approach
- Bastarache J. organized the factors relevant to the standard of review:
  - **Privative clause**
    - Appeal from the federal court to the federal court of appeal is possible if the trial judge certifies a question of general importance → this weighs in favour of less deference
    - Weak privative clause → neutral
  - **Expertise**
    - The board does not have relative expertise in this matter → it is a matter about human rights. This weighs in favour of less deference.
    - The court has often held that deference should not be shown by courts to human rights tribunals → this board has even less expertise on human rights matters than human rights tribunals
    - Illustrates the court’s unwillingness to defer to admin tribunals on human rights issues – they feel they have the expertise in these matters.
Purpose of the statute, as a whole and the provision in particular

- The purpose of the UN Convention is not the management of flows of people, but rather the conferral of minimum human rights’ protection.
- Moreover, the purpose of Art. 1F(c) of the Convention is to protect human rights and the Board appears to enjoy no relative expertise in that matter.
- The context in which the adjudicative function takes place is NOT a "polycentric" one of give-and-take between different groups, but rather the vindication of a set of relatively static human rights, and ensuring that those who fall within the prescribed categories are protected.
- This weighs in favour of less deference.

Nature of the problem

- It is a question of law – weighs in favour of less deference.
- The legal principle here is easily separable from the undisputed facts of the case and would undoubtedly have a wide precedential value. The factual expertise enjoyed by the Board does not aid it in the interpretation of this general legal principle.
- The use of the words “a serious question of general importance” in s. 83(1) of the Act is the key to the legislative intention as to the standard of review.
- The general importance of the question -- that is, its applicability to numerous future cases -- warrants the review by a court of justice.

Ultimately found that conspiring to traffic a narcotic NOT a violation of the Act – RDD was incorrect

LAW SOCIETY OF NEW BRUNSWICK V. RYAN (2003, SCC)

- Said only three standards for SOR, reasonableness simpliciter does not float. Even though it does. But apparently it doesn’t.
- No one right answer on reasonableness standard, it’s a range.

Facts:

- R admitted to NB Bar, carried on private practice; complaint filed against him by two clients; Law Society Discipline Committee decided R should be disbarred; R appealed and said mental disability; CA ordered case be reopened before discipline committee for purpose of hearing/deciding on medical evidence; DC confirmed earlier decision; CA allowed appeal and substituted own sanction of indefinite suspension with conditions for reinstatement;

Issue:

- What standard of review should be applied to disciplinary bodies?

Held:

- The appeal should be allowed and the order of the Discipline Committee restored.

Analysis:

- Only 3 standards for judicial review (1) correctness (2) RS (3) PU → PFA will determine, in each case, which of these three standards is appropriate
- Additional standards should not be developed unless there are Qs of judicial review to which the three existing standards are obviously unsuited
- Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness → A consideration of these four contextual factors leads to the conclusion that the appropriate standard is reasonableness simpliciter.
- The reasonableness standard does NOT float along a spectrum of deference → would require that the court ask different questions of the decision depending on the circumstances → would be
incompatible with the idea of a meaningful standard which imposes deferential self-discipline on reviewing courts.

- Where the appropriate standard is reasonableness *simpliciter*, a court must not interfere unless the party seeking review has positively shown that the decision, taken as a whole, was unreasonable.

- A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.

- If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

- Means that a reviewing court should not seize on one or more mistakes, which do not affect the decision as a whole.

- There will not often be only one “right answer” to an issue reviewed against the reasonableness standard.

- Since the Discipline Committee provided reasons in support of its choice of sanction that were tenable and grounded in the evidence, its decision was not unreasonable and the Court of Appeal should not have interfered.

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**STAGE 5: PRE-DUNSMUIR CRITIQUES OF SOR JURISPRUDENCE & BC’S RESPONSE**

- In 2003, LeBel J. commented on the problems with the current approach to SOR in his “Cri de Coeur” in *CUPE 2003*
  - The framework had become too complex and lengthy – too difficult for lower courts to follow
  - Confusion between PU and RS standards

- In 2004, BC directly legislated the SOR for certain tribunals through the enactment of *ss. 58 and 59 of the ATA*
  - As with all provisions of the ATA, ss. 58 and 59 will establish the SOR for a particular matter ONLY if they have been expressly made applicable to the tribunal at issue through provisions of the enabling statute
    - Note: in *Lavender Co-operative Housing Association v. Ford* (2008, BCCA), the BCCA held that the SCC got the question re: the application of the ATA (ss. 58 and 59) wrong “they ONLY apply if they’ve been brought in by the enabling clause”
  - Note: the sections were drafted against the PRE-Dunsmuir CL backdrop – as a result, they preserve certain pre-Dunsmuir concepts. In particular, *PU* is the SOR for some tribunals in certain circumstances.
    - Therefore, where ss.58 and 59 have been made applicable, a PU SOR can apply
    - Because of the ATA provisions, BC administrative law can be expected to diverge from the national norm as established by the SCC for CL JR through Dunsmuir & post-Dunsmuir decisions
  - This was found to be constitutional in *Manz*: BCCA concluded that the PU standard lived on post-Dunsmuir and that the legislature can legislate HOW the courts carry out JR.
    - The courts power to review has not been lost under s.58 & 59 – the courts are just told how to review certain tribunals

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**TORONTO (CITY) V. CUPE LOCAL 79 (2003, SCC)**

- *This is where LeBel's “Cri de Coeur” comes in.*
- **In favour of return to “two-standard system of review, correctness and revised unified standard of reasonableness”**
- **5 years later, Dunsmuir case basically exercised LeBel’s statement.**

**Facts:**
- O worked for city; charged with sexual assault; pleaded not guilty; TJ found complainant was credible and O was not; conviction affirmed on appeal; city fired O; O appealed dismissal; at arbitration hearing, the City submitted the complainant’s testimony from the criminal trial and the notes of O’s supervisor; complainant was not called to testify; O testified, claiming he had never sexually assaulted the boy; arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy; No fresh evidence was introduced; The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been dismissed without just cause; Divisional Court quashed the arbitrator’s ruling; Court of Appeal upheld that decision.

**Issue:**
- What standard of review applies to the decision of the arbitrator to re-litigate the criminal conviction?

**Held:**
- Correctness.

**Analysis:**
- **LeBel (concurring)**
- **Cri de cœur ➔ criticized the SOR analysis and called for the courts to revisit the issue.**
- He agrees with the majority that the appropriate standard of review for the question of whether a criminal conviction may be re-litigated in a grievance proceeding is correctness – it is a question of law, the arbitrator must interpret the Evidence Act and rule on the applicability of a bunch of CL doctrines dealing with re-litigation. The Courts have more expertise doing this.
- As a matter of law, the arbitrator was required to give full effect to the conviction – could not re-litigate it. So arbitrator’s determination that criminal conviction could be re-litigated during grievance proceeding was incorrect.
- This was sufficient to render ultimate decision that O had been dismissed w/o just cause – a decision squarely w/in the arbitrator’s area of specialized expertise – PU, according to jurisprudence of the court.
- BUT not all questions of law must be reviewed under a standard of correctness.
- If the general question of law is closely connected to the adjudicator’s core area of expertise, the decision will typically be entitled to deference and standard will be one of reasonableness.
- Court noted that current SOR framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness simpliciter, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

**MANZ V. BC (2009, BCCA)**

- **PU standard lives on, post-Dunsmuir, in s. 58 of the ATA, takes its meaning from CL pre-Dunsmuir**

**Facts:**
- M was EE of BC Ferries; leaving work on motorcycle; on public road on BC Ferry property was hit by dump truck; Workers Compensation Appeal Tribunal found injury arose “in course of employment”; M sought judicial review b/c wanted to maintain action for damages vs. truck driver; judge found decision of Tribunal PU; WCAT and truck driver filed appeal; in meantime Dunsmuir was decided where it was decided SOR was either correctness or reasonableness; M argued ss. 58 and 59 of ATA
were unconstitutional and ultra vires the province b/c set standard of review of PU which was no longer CL standard

**Issue:**
- Did application judge err in finding decision of Tribunal PU? Are ss. 58 and 59 or ATA constitutional?

**Held:**
- Yes, judge erred – appeal allowed; YES – ss. 58 and 59 constitutional.

**Analysis:**
- BC leg had NOT stepped outside legislative competence
- Constitutional guarantee of judicial review did not require that the standard applied by a court in determining the legislative intent must be determined by the courts
- Nothing in ss.58 and 59 detracted from constitutional role of superior court → Determination of the standard of review by a legislature is guidance as to how this supervisory role of the superior courts is carried out, not a decree as to what role the courts must play
- **Effect of Dunsmuir was NOT to change meaning of PU** – definition of PU in ATA must be that immediately prior to its abolition in Dunsmuir
- Application judge, while referring to the correct approach to factual issues, impermissibly weighed the evidence and moved outside the definition of patently unreasonable.
- There being some evidence upon which Tribunal’s ultimate finding of fact could be made, decision cannot be said to be PU and judge erred in so concluding
- **Sets a very low threshold for the tribunal, if there is any evidence to base it on then it won’t be patently unreasonable.**

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**THE DUNSMUIR DECISION – A NEW DEPARTURE OR MORE OF THE SAME?**

### THE DECISION AND ITS REACH

**Whatever happened to the Privative Clause?**
- Up to and including CUPE, the privative clause operated as the legislative signal for deference
- Under pragmatic and functional test, the privative clause was demoted to one among many factors that a reviewing court would consider
- In **Dunsmuir**, the privative clause is arguably rendered otiose [useless]
  - Default position is deference, there is only a single standard of reasonableness, and the **privative clause does not trump** the force of the exceptions to the presumption of deference
  - Binnie J.’s concurring judgment: insistence on the distinctiveness of privative clauses is linked to his prediction of the inevitable emergence of a spectrum of deference under the rubric of reasonableness.
    - “a single standard of reasonableness cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court’s review. It signals the level of respect that must be shown.” [Dunsmuir, para 143]
  - Majority in **Dunsmuir** refuses to concede that the new standard of reasonableness should/will evolve into a sliding scale of reasonableness → must reject the role Binnie assigns to privative clauses in calibrating the level of deference
- **Khosa:** Rothstein J, in dissent, is against the detachment of deference from privative clauses
  - He defends primacy of legislative intent and the singularity of the privative clause by emphasizing the significance of its absence
He wants to “roll back the Dunsmuir clock” to era where everyone agreed that the “judge knows best” about questions of law and discretion, unless a suitably worded privative clause directed otherwise [para 25]

- A very Diceyan attitude
- Rothstein agreed with the majority that reasonableness was the standard of review, but insisted the basis for deference lay exclusively in the language of the statutory provision dealing with errors of fact, not in any broader deferential stance derived from the CL
- Majority: did not share “Rothstein ]’s nostalgia”, but nor did it resolve the question of how to assign unique weight to the privative clause.
  - The SOR structures residual judicial discretion to deny prerogative relief.
  - Majority determined that deference was warranted and the appropriate standard is reasonableness and also said:
    - “a privative clause is an important indicator of legislative intent. While privative clauses deter judicial intervention, a statutory right of appeal may be at ease with it, depending on its terms”
  - So basically, Khosa adds uncertainty about the weight that a statutory appeal [privative clause] exerts against deference
  - = unclear on whether Pushpanathan’s multifactor balancing approach can co-exist alongside Dunsmuir’s defeasible rule methodology/categorical analysis (Deckha). They remain difficult to reconcile methodologically.

**DUNSMUIR V. NEW BRUNSWICK (2008, SCC 9)**

- **Defines reasonableness standard.**
  - Reasonableness is “due consideration”.
- **Categorical analysis:**
  - Presumption of reasonableness, can be defeated or rebutted through categories.
- **Facts:**
  - employed by the DOJ for the Province of NB
  - Placed on an initial six month probationary term
  - The employment relationship was not perfect:
    - Probationary period extended twice, to the max of 12 months
    - Given performance review at end of each period. 1: identified four areas for improvement. 2: cited same four areas but noted improvements in two. 3rd [and last review]: he had met all expectations and employment continued on permanent basis
  - ER reprimanded him on 3 separate occasions
  - While preparing for a meeting just prior to performance review, they decided appellant was not right for the job → termination notice sent
  - Commenced grievance under Public Service Labour Relations Act, grievance denied, went to adjudication
    - “adjudicator has jurisdiction to make the determination described in s.97(2.1), ie that an EE has been discharged or otherwise disciplined for cause” [para 12]
    - A grieving EE is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause.
    - Adjudicator found that appellant entitled to procedural fairness and therefore termination was void and ordered reinstatement [appropriate notice period of 8 months]
- **Issue:**
Determining the appropriate standard of review:

Defeasible rule methodology (textbook)/categorical analysis (Deckha)

Questions of fact, discretion, and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. (some can attract reasonableness, however) [44]

Existence of a privative clause gives rise to a "strong indication of review pursuant to the reasonableness standard" but does not mean "that the presence of a privative clause is determinative" [45]

Where the question is one of fact discretion or policy, deference will usually apply automatically (Canada AG v Mossop). This same standard should apply to the review of questions where the legal and factual issues are intertwined and cannot be readily separated. [46]

"Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: CBC v Canada (LRB)" [47]
A consideration of the factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied. [48]

- **Privative clause**: statutory direction from Parliament or legislature indicating need for deference
- **Discrete and special administrative regime in which the decision maker has special expertise**
- **Nature of the question of law**:
  - A question of law that is of “central importance to the legal system ... and outside the ... specialized area of expertise” of the ADM will always attract a correctness standard (Toronto v CUPE)
  - A question of law that does not rise to this level may be compatible with a reasonableness standard when the above two factors so indicate

Consider these factors together.

An **exhaustive review is not required in every case to determine the proper SOR.** Existing jurisprudence may be helpful in identifying typical correctness standard questions. Ex:

- **WEI v Canada (National Energy Board)**: correctness review applies to constitutional questions regarding division of powers between Parliament and the provinces in the CA 1867
- Such questions, as well as other constitutional issues, are necessarily subject to correctness standard because of s.96 [ Courts as interpreters of the Constitution] (Nova Scotia WCB v Martin)

“Administrative bodies must also be correct in their determination of true questions of jurisdiction”

**[NOT PRE CUPE vires definition] [para 52]**

- Take a robust view of jurisdiction [no returning to the jurisdiction/preliminary question doctrine]
- Now = in the **narrow** sense of “whether or not the tribunal had the authority to make the inquiry”

Courts must also continue to substitute their own view of the correctness standard where the question at issue is one of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” (Toronto v CUPE) ⇒ require uniform and consistent answers. [para 53]

In **summary**! The process of judicial review involves two steps [para 55]

1) whether jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded
2) where first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review

The analysis must be contextual

**Application:**

This is a question of law ⇒ the question to be answered is whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

- Adjudicator was appointed and empowered under the statute
- Privative clause gives rise to strong indication of reasonableness standard
- Nature of regime also favours reasonableness [relative expertise of labour arbitrators]
- Legislative purpose also confirms reasonableness. Provides an alternative to judicial determination [plus, remedial nature and provision for timely binding settlements]
- Nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator ⇒ suggests reasonableness

**Appropriate standard is reasonableness**
• Adjudicator’s standard was not reasonable. The reasoning process was deeply flawed: relied on and led to a construction of the statute that feel outside the range of admissible statutory interpretations
  ♦ Contractual terms of employment could not be ignored
  ♦ “By giving the PSLRA an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide or even have such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with employment K → fatally flawed and does not fall within range of acceptable outcomes
  • The adjudicator reinstated based on PF concerns, and this is not addressed here!

Legal Principle:
  ➢ The standard of review varies: 2 Standards = correctness and reasonableness
  ➢ “The analysis must be contextual. It is dependent on the application of a number of relevant factors, including:
    1) the presence or absence of a privative clause
    2) the purpose of the tribunal as determined by interpretation of enabling legislation
    3) the nature of the question at issue, and
    4) the expertise of the tribunal.
  ➢ In many cases, it will not be necessary to consider all of these factors, as some of them may be determinative in the application of the reasonableness standard in a specific case” [para 57]

DUNSMUIR’S CONCURRING JUDGMENTS

Binnie
  ➢ Para 74, quotes Romeo and Juliet in saying just changing the name hasn’t done anything…: “What’s in a name? that which we call a rose, By any other name would smell as sweet;”
  ➢ Para 76: “the court ought to generally respect the exercise of the administrative discretion, particularly in the face of a privative clause;”
  ➢ Para 81: distraction to unleash whether or not a particular question of law is “of central importance to the legal system as a whole” It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker. Apart from that exception, we should prefer clarity to needless complexity, and hold that the last word on questions of general law should be left to judges.
  ➢ para 88: the distinction between PU and RS recognized that different administrative decisions command different degrees of deference, depending on who is deciding what
  ➢ para 91: “nature of the question” plays a more important role in terms of substantive review
    • helps to define the range of reasonable outcomes within which the ADM is authorized to choose.
  ➢ Para 92: making two standards instead of three has done “no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.”
    • Just switching from choosing between two standards of reasonableness to a deference debate within a single standard
    • Underlying issue of degrees of deference remains
  ➢ Para 94: He is worried about the labeling of the most deferential standard as “reasonableness”. They may not be given the deference they would normally get when labeled as patent unreasonableness
    • “A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another “factor” in the hopper of pragmatism and
functionality. Its existence should presumptively foreclose judicial review on the basis of outcome on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect” [para 96]

- A single reasonableness standard will now necessarily incorporate both the degree of deference formerly reflected in the distinction between PU and RS and an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given. Our approach should recognize these different dimensions to reasonableness! [102]

- **Judging reasonableness:**
  - What is required is a more easily applied framework [para 104]
  - Single reasonableness will require court to juggle a number of variables that are necessarily to be considered together [106]
  - Adoption of a single reasonableness should not be seen as a lowering of the bar to judicial intervention [108]

- **Decision:**
  - “home statute”, “home turf”, privative clause = reasonableness
  - Essentially legal in nature, basic facts not in dispute, but he stretched the law too far in coming to his rescue [conscious of impact on appellant].
  - Dismiss appeal

- **Deschamps, Charron, and Rothstein – Concurring with a Diceyan approach**
  - Privative clauses cannot totally shield an administrative body from review [116]
  - Deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions [116]
  - When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court [117]
  - Deference is owed to an exercise of discretion unless the body has exceeded its mandate [118]
  - PARA 125: “In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.”

- **Concurring Minority Opinion - Deschamps J.’s Judgment (w/ Charron & Rothstein JJ.)**
  - Want the SOR determination to focus solely on nature of the question and to be more straightforward as follows:
    - **Deference would apply to:**
      - questions of fact
      - questions of mixed fact and law
      - exercises of discretion (unless the d/maker has exceeded its mandate)
      - question of law (if there is a privative clause and the question is within the body’s expertise)
    - **Correctness would apply to:**
      - question of law where body has no expertise (questions that are outside the enabling Act)
      - questions of law of general application (Constitution, common law, civil law)
      - All question of law where there is an appeal (this would “undo” the law developed in Pezim, Southam, etc.)
Decision:
- Adjudicator had to identify the rules governing the contract [grievance of a non-unionized employee]
  - Identifying those rules is a question of law
  - The CL rules relating to dismissal of an EE differ completely from the ones provided for in the PSLRA
  - Since the CL, not the home statute of the adjudicator, is the starting point, and adjudicator does not have specific expertise in interpreting the CL, the reviewing court does not have to defer to his decision on the basis of expertise
  - Therefore, the applicable standard is correctness: the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized EE’s contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. [121]
    - Adjudicator did not even consider the common law rules!
- Agree on the result, that appeal should be dismissed

BASTARACHE, “MODERNISING JUDICIAL REVIEW”
- “Dunsmuir provided the court with an opportunity to establish a new framework for the analysis and hopefully provide real guidance for litigants, counsel, administrative decision makers and judicial review judges”
- “the notion of a spectrum of reasonableness is a red herring. Reasonableness is a concept used in many other areas of the law and there is never an argument that there is a sliding scale; there is undoubtedly a context in which the notion applies, but the notion is always the same.”
- “In writing Dunsmuir, we set out to create a simpler and more coherent framework”

CANADA V. KHOSA (2009, SCC)
- Applied Dunsmuir, Legislature actually has the power to specify a standard of review if it manifests a very clear intention to do so.
- Federal Courts Act sets out grounds, not standards of review.
- Facts:
  - discretionary decision by Immigration Appeal Division of the IARB not to stay the deportation order of a non-citizen convicted of dangerous driving causing death.
  - The grounds for judicial review were in s.18.1(4) of Federal Courts Act. The statute was silent about the applicable standard of review, except to state that the erroneous findings of fact warranted relief if made “in a perverse of capricious manner or without regard for the material before it”
  - Removal order issued: return to India (36(1) of IRPA)
    - Appealed this order, but IAB denied special relief (humanitarian and compassionate grounds)
    - Appealed to FC, then FCA, now SCC
  - Argues that s.18.1 codifies the standard of review in this case
- Issue:
  - Extent to which, if at all, the exercise by judges of statutory powers of judicial review [like those in s.18 and 18.1 of the Federal Courts Act] is governed by the common law principles in Dunsmuir?
- Decision:
  - Not roll back the Dunsmuir clock!
    - IAB upheld (split decision)
  - s.18.1 codifies the grounds, not standards of review.
It sets out threshold grounds which permit, but do not require the court to grant relief. Wording: “may”

The court is clearly given discretion

- If the standard of review is legislated [the government can do this], it has to be very clearly legislated. If s. 18 was to change the CL, it would have been very clear. It cannot have been Parliament’s intent to create by s.18.1 a single, rigid standard of decontextualized review. Therefore, apply Dunsmuir!
- Dunsmuir recognized that with or without PC, a measure of deference has come to be accepted as appropriate where a particular decision has been allocated to an ADM rather than the courts.

Side note on s. 58(3) of BC ATA – the PU standard survives [no longer in CL]. But the definition/meaning of this standard is informed by common law principles of administrative law

Legal Principle:

- A legislature has the power to specify a standard of review, if it manifests a clear intention to do so.
- Where legislative language permits, the courts (a) will not interpret grounds of review as standards of review,
  - (b) will apply Dunsmuir principles to determine the appropriate approach to judicial review in a particular situation and (c) will presume the existence of a discretion to grant or withhold relief based on the Dunsmuir teaching of restraint in judicial intervention in administrative matters (as well as other factors such as an applicant’s delay, failure to exhaust adequate alternative remedies, mootness, prematurity, bad faith, and so forth) [para 51]

**FEDERAL COURTS ACT, SS. 18, 18.1-18.5, S. 28**

See Appendix II.

**IMPACT ON ATA**

**LAVENDER CO-OPERATIVE HOUSING**

- In every case, the first step is to look at the legislation.
  - ATA only applies to the extent that an enabling act provides. [40]

Facts:

- Concerned a decision of the HRT. S.32 of the HRC provides that s.59 of the ATA applies to the HRT
- “59(1): In a judicial review proceeding, the SOR to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness”

Issue:

- What SOR is applicable to decision of the BC HRT on a question of mixed fact and law?

Discussion:

- the standard of review is correctness.
  - The HRC makes s.59 of the ATA applicable → the decision under review is QMFL → under catch-all provision of s.59(1) of the ATA the applicable standard is correctness
  - “in every case, the first step is to determine whether there are any applicable legislative provisions: Khosa at para 18. The legislation to be examined includes both the ATA, and the enabling legislation...” [para 39]
**ATA only applies to the extent an enabling act provides [40]**

- Prior decisions hold that questions of mixed fact and law attract of correctness under s. 59 of the ATA (catch all). [para 45]

**Legal Principle:**
- Para 57 summary on the SOR:
  1) Legislative provisions are paramount and must be examined first. A tribunal’s enabling act specifies which provisions of the ATA apply
  2) If s.58 or 59 of the ATA is applicable that section represents a complete code of the possible standards of review
  3) If s.58 or 59 apply, then the next step is to identify the type of question at issue.
  4) Once the type of question has been identified the reviewing judge must apply the mandated SOR
  5) If by the enabling statute neither s.58 nor 59 is applicable, then the court must apply the common law jurisprudence, as described in *Dunsmuir*

### J.J. V. COQUITLAM SCHOOL DISTRICT NO. 43

**Courts can parse out questions of mixed fact and law.**
- *Subsequent cases haven’t really adopted this approach.*

**Analysis:**
- Per ATA: The non-deferential standard of review for questions of mixed fact and law [like Lavender Co-op] contrasts with the standard that applies at common law. [26]
  - *Dunsmuir*: a tribunal will normally be entitled to deference when deciding a question of mixed fact and law
  - Para 27: In Lavender the court was considering application of a legal standard to uncontroversial facts, no extricable issues of fact that needed to be considered, so correctness standard was well suited.
- Rejected idea that court limited to examining QMFL under s.59 [correctness] → *courts can “parse”* decisions of QMFL where “extricable” QOF [by asking whether tribunal had made a finding of fact that was unsupported by the evidence]
- Para 31: “If there is a readily extricable finding of fact or law underlying the discretionary decision, that finding will be reviewed on the standard applicable to issues of fact or law as the case may be. On the other hand, if the issues of fact and law are inextricably intertwined with issues of discretion, the review must take place on the standard applicable to discretionary decisions”

### JESTADT

**Analysis:**
- Whether ADM has “exclusive jurisdiction” under ATA s. 58?
  - “Extent of the exclusive jurisdiction of a particular administrative tribunal is determined by the wording of the privative clause, if any, in its enabling statute. The issue is fundamentally a matter of statutory interpretation...” [para 30]

### BRITISH COLUMBIA FERRY AND MARINE WORKERS

**Analysis:**
- **Meaning of the phrase “patently unreasonable?”** [post ATA and *Dunsmuir*]
“The phrase continues to have effect in BC because of s.58 of the ATA invokes it in respect to an expert tribunal in an area of its expertise [Khosa]” [para 53]

• PU is at the high end of the deference spectrum and it retains its pre-Dunsmuir character [para 53] “considerable deference”

Note: The language of considerable deference was first used in Pezim as a way of talking about the RS standard, not PU standard.

As a result, this case may be conflating the two standards, which was a concern pre-Dunsmuir.

Analysis:

Para 47: “the parties are in agreement that the Commissioner is owed deference in respect of his interpretation of the provisions of the Coastal Ferry Act. Accordingly, the standard of review in respect of the substantive issues on this appeal is that of reasonableness.”

• Goes on to discuss the SOR that should be applied to PF issues... usual SOR analysis not applicable to matters of procedural fairness.

“where a court concludes that the procedures met the requirements of PF, it will not interfere with the tribunal’s choice of procedures” [52] ... not sure why this excerpt is relevant to SOR.

POST-DUNSMUIR DEVELOPMENTS IN THE SCC ON STANDARD OF REVIEW

Whatever happened to jurisdiction?

• RECALL: “jurisdictional question” arose as a judicial escape hatch from the strictures of privative clauses: a decision that exceeded the jurisdictional boundaries conferred by statute was a nullity and, therefore not a genuine decision insulated from judicial review

  ▪ After Southam a court could both justify deference in the absence of a privative clause and justify correctness scrutiny in the presence of a privative clause... eventually, serious attention to formal attributes of jurisdiction (authority over subject matter, parties, or remedy) virtually disappeared.

  ▪ “became merely a label affixed to the outcome reached by a judicial balancing of the four factors summarized by Pushpanathan” [page 307]

  Dunsmuir revived the formal idea of jurisdiction as a boundary-drawing concept capable of rebutting a presumption of deference.

  ▪ But Dunsmuir refrained from posing the question in jurisdictional terms [instead used “does the statute authorize the ADM...”]

  ▪ The adjudicator had jurisdiction over parties and subject matter, and that sufficed. End of story.

• THUS FAR, post-Dunsmuir SCC seems committed to exercising restraint in labelling an issue as jurisdictional and thereby subject to the stricter standard of correctness

• Alberta Teachers’ Association: directly confronted the post-Dunsmuir endurance of jurisdictional questions in the context of the SOR analysis

  ▪ “unable to provide a definition of what might constitute a true question of jurisdiction”

  ▪ In a technical sense, the majority leaves the issue unresolved, concluding instead that jurisdictional questions are exceptional and none have come before it since Dunsmuir.

  ▪ Hypothesis re: sympathetic reading of majority judgment: “the other post Dunsmuir grounds for correctness review really amount to examples of situations typically regarded as “jurisdictional” in pre-Dunsmuir case law.
• Cromwell J disagrees with the majority on the fate of jurisdiction, warning that the position “threatens to undermine the foundation of judicial review of administrative action”
  • Cromwell fails to take into account the bases for application of a correctness standard apart from the jurisdictional question
  • Binnie stakes out middle position: agrees with Cromwell that jurisdiction is fundamental, but endorses the majority’s initiative to euthanize the issue on account of its “practical disutility”.
    ➢ (1) wants reasonableness as a spectrum, and
    ➢ (2): enlarge the “question of central importance to legal system as a whole” exception

➢ “Remains unclear whether the jurisdictional question will die a peaceful death or simply lay dormant until the SC decides to resurrect it.” [page 309]

❖ Whatever happened to patent unreasonableness?
  ➢ Dunsmuir got rid of it...
    • “Despite Dunsmuir, "PU" will live on in BC, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. ... the legislature in s.58 was and is directing the BC courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.” [Khosa para 19]

➢ How have courts interpreted it since Dunsmuir?
  • BC (WCB) v Figliola: not required to interpret PU because the ATA had already defined it according to the traditional indicia of abuse of discretion [HRT exercised its discretion in a PU way when it decided to adjudicate a HRC complaint that had already been rejected by a review officer of BC WCB]
  • Shaw v Phillips: PU in Ontario HRC should be interpreted against the legislative intent at the time of enactment. Intent was to confer highest level of deference [in 2006, that standard was PU]
  • The SCC subsequently declared the highest level of deference available under general principles of admin law to be reasonableness.
    • So according highest degree of deference = respecting those “questions within the specialized expertise of the Tribunal unless they are not rationally supported – in other words, they are unreasonable”

❖ What is a question of Central Importance to the Legal System as a whole? (and outside the decision maker’s area of expertise)
  ➢ SOR in Dunsmuir does not place expertise in the foreground as a discrete focus of the evaluation.
  ➢ Questions of “central importance to the legal system as a whole” are assigned to correctness review only if they are also “outside the specialized area of expertise of the administrative decision maker.” [page 312, Dunsmuir para 60]
    • Such questions require uniform and consistent answers [b/c of impact on administration of justice as a whole]
  • Toronto v CUPE: SOR applicable to re-litigation of a criminal conviction in the course of a grievance arbitration → question concerned the CL doctrines that went to the administration of justice [PRE DUNMSUIR CASE!] therefore appropriate SOR was correctness [central importance and outside area of expertise]

➢ The Dunsmuir methodology presumes that the outcome of the pre-Dunsmuir PFA will align with the outcome of the post-Dunsmuir SOR analysis.
  • Issue/"gives SCC pause": Human rights tribunals → typically attracted little deference
- Steered a path that would enable it to arrive at reasonableness with regard to costs [not central importance to legal system, and it makes such factual findings on a routine basis] *Mowat*
  - SCC: HRT inclusion of costs as legal expenses was unreasonable.

- **QUESTION:** If you were a member of a tribunal, would you prefer that it be left to your peers to address divergent interpretations through institutional consistency mechanisms, or would you rather that the courts reasonably the matter definitively by asserting a correctness standard?
  - [SCC was silent on issue of conflicting interpretations of same statute in *Mowat*]

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**SMITH V. ALLIANCE PIPELINE (2011, SCC)**

- **Must look at categories from Dunsmuir to determine whether there’s a presumption of reasonableness or correctness.**

- **Facts:**
  - Alliance is supposed to do work on a pipeline on Smith’s land – they have an easement. Alliance doesn’t do the work they were supposed to. Smith, the next spring, finds the mess that Alliance left and, since Alliance wasn’t there, he did the work himself and he bills Alliance for it. Alliance agrees to pay only part of the bill.
  - Smith seeks arbitration to deal with the dispute. ... problems...
  - A second arbitration committee is struck:
    - The committee gives Smith 85% of the amount he was claiming, so he is entitled to get costs (including legal costs) reasonably incurred in relation to the matter
    - In doing this, the arbitration gives Smith costs associated with the QB matter (the suit that was abandoned)
    - This triggers the legal case.
    - Alliance believes the only costs the committee should take into account are those associated with their own proceedings, not costs associated with some extraneous lawsuit.

- **Issue:**
  - Whether ADM had ability to award costs outside the costs associated incurred during the arbitration committee?
  - **Not a true jurisdictional issue**

- **Discussion:**
  - **SOR?**
    - Tribunal is interpreting its home statute → SOR is reasonableness
    - **Privative clause:** weak PC?
    - **Statutory purpose:** parliament gave the arbitration committee a wide degree of discretion
    - **Nature of problem:** Question of mixed fact and law – the committee must interpret the costs provision and apply it to the facts that it has found (note: Alliance would argue that you can extract from this a pure legal question)
    - **Expertise:** high expertise
  - **SOR = reasonableness → and it was met.**
    - Court swiftly disposed of an argument that the definition of costs under an expropriation statute is jurisdictional.
    - Doubt as to reasonableness? [paras 30-33 considerations that usually fall into reasonableness standard:]
    - It’s a home statute interpretation involving cost – issues about costs are fact sensitive and are usually discretionar y → this bolsters the idea that the SOR should be reasonableness
If you consider the wording of the provision, it shows that parliament gave the arbitration committees a wide degree of discretion

This looks like mixed fact and law – the committee must interpret the costs provision and apply it to the facts that is has found

Note: Alliance would argue, in response to this, you can extract the legal question

Para 38: nothing unprincipled in the fact that some questions of law will be decided on this basis (reasonableness standard) [Toronto City v CUPE] and Dunsmuir: questions of law that are not of central importance to the legal system “may be compatible with a reasonableness standard”

Legal Principle:

SCC applies Dunsmuir [extensive and formulaic inquiries of the past are gone!]

Para 25: reviewing judges can usually begin their judgments by determining whether the issue falls within one of the non-exhaustive categories identified in Dunsmuir. They are...

Correctness:

(1) constitutional issues,

(2) a question of general law that is of central importance to the law in general and the specific area of expertise,

(3) where two tribunals claim jurisdiction,

(4) a true question of jurisdiction

Reasonableness:

(1) relates to the interpretation of the tribunals enabling or home statute or statutes closely related to its function,

(2) questions of fact, discretion or policy,

(3) mixed fact and law

Alberta Teachers’ Association v. Alberta (Information and Privacy Commissioner)

Affirms that the SOR for constitutional questions is correctness.

Questioned whether jurisdictional questions even exist.

Holds that jurisdictional questions are “exceptional”.

Facts:

The judicial review of a decision of an adjudicator delegated by the appellant, the Information and Privacy Commissioner (the “Commissioner”), finding that the respondent, the Alberta Teachers’ Association (the ATA), had disclosed certain private information in contravention of the Personal Information Protection Act.

In response to a number of complaints about an ATA publication of private information, the Commissioner started an investigation.

the Commissioner’s enabling statute provided that an inquiry “must” be completed within 90 days of the complaint being received by the Commissioner, unless the Commissioner notifies the parties concerned that he is extending the period and provides an anticipated date for completing the inquiry.

the Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded.

The adjudicator delegated by the Commissioner subsequently issued an order against the ATA before the anticipated date for completion and 29 months after the initial complaint was made.

Issues of compliance and statutory timelines was not raised before the Commissioner or the adjudicator.
The ATA applied for judicial review of the adjudicator’s order, arguing that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days.

The chambers judge granted the ATA’s application on this basis, quashing the adjudicator’s decision. This decision was upheld by the majority of the CA.

Appeal to SCC

**Issue:**

- This appeal provides an opportunity for the Court to address the question of how a court may give adequate deference to a tribunal when a party raises an issue before the court on judicial review, which was never raised before the tribunal and where, as a consequence, the tribunal provided no express reasons with respect to the disposition of that issue.

- Three questions at issue:
  - Should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator?
  - If the timelines issue should be considered, what is the applicable standard of review?
  - On the applicable standard of review, does the adjudicator’s continuation and conclusion of the inquiry, despite the Commissioner having provided an extension after 90 days, survive judicial review?

**Held:**

- Find that the timelines issue was subject to judicial review. Although the issue was not raised before the Commissioner or the adjudicator, it was implicitly decided by both the Commissioner and the adjudicator, and there was no evidentiary inadequacy or prejudice to the parties in this case. Commissioner’s appeal should be allowed and the adjudicator’s order against the ATA reinstated.

- **Judicial Review of an Issue that Was Not Raised Before the Tribunal**
  - Just like a court, the tribunal has discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so.
  - Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal.
    - Rationale: courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
  - This is particularly true where the issue raised for the first time on judicial review relates to the tribunal’s specialized functions or expertise.
  - Raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue.
  - Do not think the Court of Appeal erred in refusing to disturb the exercise of the reviewing judge’s discretion to consider the timelines issue.
  - In this case, the rationales for the general rule have limited application.
  - Both parties agree that the Commissioner has expressed his view on several other decisions.
  - Therefore, the Commissioner has had the opportunity to decide the issue at first instance and we have the benefit of his expertise, albeit without reasons in this case.
  - No evidence was required to consider the timelines issue and no prejudice was alleged.
  - Rather, it involved a straightforward determination of the law, the basis of which was able to be addressed on judicial review, irrespective of what is the appropriate standard of review.

  - This question involves the interpretation of the Commissioner’s home statute.
  - There is authority that deference will usually result where a tribunal is interpreting its own statute or statutes closely connect to its function, with which it will have particular familiarity."
This principle applies unless the interpretation of the home statute falls into one of the
categories of questions to which the correctness standard continues to apply i.e. constitutional
questions, questions of law that are of central importance to the legal system as a whole and that
are outside the adjudicator's expertise, questions regarding the jurisdictional lines between two
or more competing specialized tribunals [and] true questions of jurisdiction or vires”

Timelines question is not a constitutional question; nor is it a question regarding the
jurisdictional lines between two or more competing specialized tribunals.

It is not a question of central importance to the legal system as a whole, but is one that is specific
to the admin regime for the protection of personal information.

The timelines question engages considerations and gives rise to consequences that fall squarely
within the Commissioner’s specialized expertise.

The timelines question does not fall within the category of a “true question of jurisdiction or
vires”.

**Dunsmuir expressly distanced itself from the extended definition of jurisdiction.**

- Experience has shown that the category of true questions of jurisdiction is narrow indeed.
  Since Dunsmuir, this court has not identified a single true question of jurisdiction.

- The direction that the category of true questions of jurisdiction should be interpreted narrowly
takes on particular importance when the tribunal is interpreting its home statute.

**Unless the situation is exceptional, and we have not seen such a situation since Dunsmuir,
the interpretation by the tribunal of “its own statute closely connected to its function, with
which is will have particular familiarity” should be presumed to be a question of statutory
interpretation subject to deference on judicial review.**

- The “true questions of jurisdiction” category has caused confusion to counsel and judges alike
and has unnecessarily increased costs to clients before getting to the actual substance of the case.

- Avoiding using the label “jurisdictional” only to engage in a search for the legislators’ intent, as
my colleague suggests simply leads to the same debate about what constitutes a jurisdictional
question.

- True questions of jurisdiction are narrow and will be exceptional. When considering a decision of
an administrative tribunal interpreting or applying its home statute, it should be presumed that
the appropriate standard of review is reasonableness. As long as the true question of
jurisdiction category remains, the party seeking to invoke it must be required to demonstrate
why the court should not review a tribunal’s interpretation of its home statute on the deferential
standard of reasonableness.

- As I have explained, I am unable to provide a definition of what might constitute a true question
of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is
that without a clear definition or content to the category, courts will continue, unnecessarily, to
be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system,
counsel raising an argument that might satisfy a court that a true question of jurisdiction exists
and applies in a particular case.

- Do not wish to retreat to the application of a full standard of review analysis where it can be
determined summarily.

**Since Dunsmuir, for the correctness standard to apply, the question has to not only be one
of central importance to the legal system but also outside the adjudicator’s specialized area
of expertise.**

Once it is determined that a review is to be conducted on a reasonableness standard, there is no
second assessment of how intensely the review is to be conducted. The judicial review is simply
concerned with the question at issue.
The Commissioner’s interpretation of s. 50(5) PIPA relates to the interpretation of his own statute, is within his expertise and does not raise issues of general legal importance or true jurisdiction. His decision that an inquiry does not automatically terminate as a result of his extending the 90-day period only after the expiry of that period is therefore reviewable on the reasonableness standard.

The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.

Application of the Reasonableness Standard in this Case

In this case, a review of the reasons of the Commissioner and the adjudicators in other cases allows this Court to determine without difficulty that a reasonable basis exists for the adjudicator’s implied decision in this case.

Concurring and Dissenting Judgments:

Binnie and Deschamps (concurring):

Middle ground. Agree with Cromwell that the concept of jurisdiction is fundamental to judicial review and rule of law.

Just because the notion of a “true question of jurisdiction or vires” works well at the conceptual level does not mean that it is helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular admin decision.

Cromwell J (dissenting)

Disagrees that a tribunal’s interpretation of its “home” statute will not often raise a jurisdictional question.

Creating a presumption without providing guidance on how one could tell whether it has been rebutted does not provide any assistance to reviewing courts.

Suggesting that jurisdictional questions do not exist at all undermines the foundation of judicial review.

I agree that the use of the terms “jurisdiction” and “vires” have often proved unhelpful to the standard of review analysis. This, however, should not distract us from the fundamental principles: as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is “correct”.

I therefore can neither agree with my colleague that the fact that a legislative provision is in a “home statute” has become a virtually unchallengeable proxy for legislative intent nor join him in speculating about whether jurisdictional review even exists. The standard of review analysis not only identifies the limits of the legality of the tribunal’s actions, but also defines the limits of the role of the reviewing court. The reviewing court cannot consider the “substantive merits” of a judicial review application or statutory appeal unless it identifies and applies the appropriate standard of review. That is what defines those “substantive merits”.

True questions of jurisdiction or vires exist.

However, for the purposes of the standard of review analysis, attach little weight to those terms. They add little to the analysis and can cause problems.

Touchstone of judicial review is legislative intent.

This focus means that whether a question falls into the category of “jurisdictional” is largely beside the point. What matters is whether the legislature intended that a particular question be left to the tribunal or to the courts.

Where the existing jurisprudence has not already determined in a satisfactory manner the degree of deference to be accorded to an administrative decision-maker operating in a particular statutory scheme, the courts are to apply a number of relevant factors to the case at hand, factors which include the presence or absence of a privative clause, the purpose of the tribunal as
determined by interpretation of its enabling legislation, the nature of the question at issue and the expertise of the tribunal. These are the concrete criteria, clearly established by the Court's jurisprudence, which are used to identify questions that are reviewable for correctness because the legislature intended the courts to have the last word on what constitutes a “correct” answer. These questions may be called “jurisdictional”

- However, labeling them as such does nothing to assist the analysis. I therefore agree with Rothstein J. to the extent that he considers that, as analytical tools, the labels of “jurisdiction” and “vires” need play no part in the courts’ everyday work of reviewing administrative action.
- But there are legal questions in “home” statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal’s delegated power are more likely to be set out
- The point is this. The proposition that provisions of a “home statute” are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in “home” statutes are “exceptional” is not an answer to a plausible argument that a particular provision falls outside the “presumption” of reasonableness review and into the “exceptional” category of correctness review. Nor does it assist in determining by what means the “presumption” may be rebutted.
- I do not join my colleague in asking whether the category of true questions of jurisdiction exists. I have signaled above that the language of “jurisdiction” or “vires” might be unhelpful in the standard of review analysis. But I remain of the view that correctness review exists, both as a matter of constitutional law and statutory interpretation. This will be true, on occasion, with respect to a tribunal’s interpretation of its “home” statute.
- As the Court affirmed in Dunsmuir, “judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits”: para. 31.
- In the face of such a clear and recent statement by the Court, I am not ready to suggest, as my colleague does, at para. 34, that this constitutional guarantee may in fact be an empty shell. To be clear, this constitutional guarantee does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard. Dunsmuir was clear and unequivocal on this point as the passage I have just cited demonstrates.

**CHRC V. MOWAT**

- **Post-Dunsmuir, questions which may have previously been considered jurisdictional should now be dealt with under the SOR analysis.**
  - **Previously, if jurisdictional, would have been correctness or not at all.**
- **Facts:**
  - HRT may order ... to compensate for ... “any expenses incurred by the victim as a result of the discriminatory practice”
  - Federal court reviewed on reasonableness, FCA set aside decision, using correctness as standard of review
- **Issue:**
  - Two issues:
    1) What is the appropriate SOR of the decision of the Tribunal as to the interpretation of its power to award legal costs under ss.53(2)(c) and (d) of the Act?
    2) Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?
Discussion:
- First consider case law:
  - Generally, courts have shown deference to the findings of fact of human rights tribunals
  - But, at the same time, they have granted little deference to their interpretations of laws, even of their own enabling statutes
  - Courts have not shown deference to human rights tribunals in respect of their decisions of legal questions
  - Para 21: we must discuss “whether all decisions on questions of law rendered by the Tribunal and similar bodies should be swept under the standard of correctness”
  - Consider the nature of these tribunals & home statute
    - Dunsmuir says deference re interpretation of home statute
    - But, correctness for general questions of law that are of central importance to the legal system [discrimination in Canada AG v Mossop]
  - Para 23: not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance of the legal system or fall outside the adjudicator’s specialized area of expertise.
  - “the question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute” [para 24]
    - As an administrative body that makes factual findings relating to discrimination on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under 53(2)
    - Legal costs can hardly be said to be a question of central importance to the legal system and outside the specialized expertise of adjudicator
  - In Smith SOR was reasonableness since the Tribunal was interpreting a provision of its home statute, and “awards for costs are invariably fact sensitive and generally discretionary” [para 30]
- Dunsmuir Analysis:
  - Issue of whether legal costs may be included in the Tribunal’s compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside of the Tribunal’s area of expertise. As such, SOR = reasonableness → decision unreasonable
    - application of Dreidger approach to statutory interpretation
  - Para 63: “The text, context, and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting authority, the Tribunal adopted a dictionary meaning of “expenses” an articulated what it considered to be a beneficial policy outcome rather than engage in an interpretive process taking account of the text, context and purpose of the provisions in issue.”
    - Led to the tribunal adopting an unreasonable interpretation of the provisions. CA was justified in reviewing and quashing the order of the Tribunal.
- Legal Principle:
  - SOR = Dunsmuir Analysis
  - + Continue to narrowly interpret questions of “jurisdiction”
    - “Indeed, our Court has held since Dunsmuir that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or reasonableness should apply” [para 24]
REASONABLENESS POST-DUNSMUIR

- **Dunsmuir reasonableness in theory**
  - Dunsmuir majority makes tentative attempts to offer clearer guidance about what it means to express deference on review
  - It builds on the prior case law on deference, including Iacobucci’s descriptions of reasonableness review in *Southam* and *Ryan*, and Dickson in CUPE
    - Those centered on the idea that judges applying a reasonableness standard should closely attend to administrative reasoning, and that the decision should stand unless it “cannot be rationally support by the relevant legislation” or the evidence [Dyzenhous]
  - So question: does Dunsmuir ease the historical tensions?
    - Instability in the case law applying a deferential standard as between:
      - Attitudes of judicial supremacy (setting strict limits of legality within which administrative reasoning is closely hedged), and
      - Attitudes of judicial abdication (for example, refusing to peer “too deeply” into the reasoning or evidentiary record, or to revisit administrative assessments of the relative weight of competing factors, including statutory objectives or legal values)
  - Romantic’s: law on substantive review should help coordinate the work of judges and ADM in a culture of justification, the principles of reasonableness review in and after Dunsmuir are a step in the right direction [page 350]

- **Defence as respect**
  - Focuses on deference as “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”
  - Deference imports respect for the decision making process of adjudicative bodies with regard to both the facts and the law.
  - The notion of deference “is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers.”
  - David Mullan: according deference to tribunals recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime.
  - Certain questions that come before admin tribunals do not lend themselves to one specific, particular result. Instead they may give rise to a number of possible, reasonable conclusions.
    - That acknowledgment of the place of judgment, or discretion, in (at least some instances of) statutory interpretation is accompanied by the majority’s recognizing the imperative that admin decision makers be accorded a “margin of appreciation within the range of acceptable and rational solutions” to interpretive problems.

- **Targets of reasonableness review: Reasons and outcomes**
  - A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.
  - In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law.
  - Abella in *Newfoundland and Labrador Nurses’ Union* → Dunsmuir does not advocate “that a reviewing court undertake two discrete analyses – one for reasons and a separate one for the result.
Rather, the assessment of reasonableness “is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.

Not saying that the reviewing court is in error if it begins with an examination of the decision-maker’s reasoning process.

Rather, it affirms the common sense point that any inquiry into substantive reasonableness must evaluate whether the reasons support (justify) the outcome.

Courts should not indulge in a reasons-independent assessment of the outcome in a manner that privileges the court’s determination of the “right answer.”

Criteria of Dunsmuir Reasonableness

Dunsmuir replaces the preoccupation with depth of probing and magnitude of error with:

- justification, transparency, and intelligibility.

Post Dunsmuir developments

1) The effort to give content to the idea that reasonableness “takes its colour from the context”

- No reasons v. substantive (un)reasonableness:
  - Question at the heart of Newfoundland Nurses’ Union: how is a court to proceed where it is alleged that there are gaps in administrative reasoning?
  - The allegation may be that the dm has not addressed matters that would be determinative of the outcome, or that the dm has failed to lay down a clear reasoning path linking the evidence or law to the conclusions reached.
  - First dimension of this problem: whether claims about the incompleteness or inadequacy of reasons should be decided through an inquiry into substantive reasonableness, or alternatively, through an inquiry into whether the duty to provide reasons has been met as a matter of procedural fairness.
  - Abella J: a low threshold should apply in determining whether reasons have been provided as a matter of procedural fairness
  - AND where question arise concerning “the quality” of reasons provided, this is a matter for substantive review.
  - Leaves some uncertainty around what it takes to qualify as even minimally adequate reasons for the purposes of procedural fairness.
  - Overall effect is to shift questions about whether reasons adequately support or justify a decision to substantive review.
  - Second dimension of the problem addressed in the Newfoundland Nurses’ Union case: goes to how a court is to exhibit deference on reviewing a decision alleged to have fatal gaps in reasoning.
  - Abella J in Newfoundland: respect for “the reasons offered or which could be offered in support of a decision” may require looking beyond the reasons to the wider record of evidence and argument, “for the purpose of assessing the reasonableness of the outcome”
  - On this approach, it is recognized that “a decision maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its conclusion.

Contextual dimensions of reasonableness:

- Binnie’s concurring reasons in Dunsmuir included a suggestion that the simplicity introduced by the shift to a single reasonableness standard was likely to be accompanied and perhaps undermined, by the emergence of distinct grades or shade of reasonableness review at the stage of applying the standard.
▪ Binnie observed that this fracturing of reasonableness review was likely to occur by way of judicial consultation of contextual factors, including the factors traditionally canvassed at the stage of identifying the standard, to inform the expectations of reasonableness appropriate to the decision at hand.
▪ Binnie elaborated in Roncarelli: there is always a perspective within which a statute is intended by the legislature to operate.
▪ The post-Dunsmuir jurisprudence has sought to give more determinate content to the idea that reasonableness “takes it colour from the context.”
▪ Alberta (Information and Privacy Commissioner): Rothstein for the majority rejects those statements in Binnie’s concurring reasons, both in that case and in Dunsmuir, which raise the spectre of “variable degrees of deference.”
▪ Echoing the approach taken to reasonableness simpliciter review in Ryan, Rothstein J. states that “once it is determined that review is to be conducted on reasonableness standard, there is no second assessment oh how intensely the review is to be conducted.
▪ Rothstein continues, each instance of reasonableness review is nonetheless “governed by the context,” in the sense that it must be informed by contextual factors such as the nature of question.

**NOR-MAN REGIONAL HEALTH**

**Facts:**
- An experienced labour arbitrator endorsed in this case the union’s interpretation of vacation benefit clauses in its CA with the ER – but imposed an estoppel on the union’s claim for redress
- Arbitrator held that the union was barred by its long-standing acquiescence from grieving the ER’s application of the disputed provisions
  - It would now be unfair for the union to hold the ER to the strict terms of the CA in that regard
- Union’s application for judicial review was dismissed in the MB Court of QB → MBCA held that correctness, not reasonableness was the correct SOR and set aside estoppel imposed by arb.

**Issue:**
- Court of appeal err in reviewing the arbitrator’s decision for correctness?
- Narrowly: whether the arbitrator’s imposition of an estoppel brings his award within an exception to general rule of reasonableness standard [re arbitral awards]?
  - More broadly: whether arbitral awards that apply CL or equitable remedies are for that reason subject to judicial review for correctness?

**Discussion:**
- Reasonableness is the appropriate standard
- Para 5: Labour arbitrators are not legally bound to apply equitable and CL principles – including estoppel – in the same manner of courts of law. Theirs is a different mission, informed by the particular context of labour relations.
- Para 6: must exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the decision
  - Arbitrator’s decision in this case falls well within those bounds
- 31: prevailing case law clearly establishes that arbitral awards under a CA are subject, as a general rule, to the reasonableness standard of review
- 45: Labour arbitrators may properly develop doctrines and fashion remedies appropriate in their field; this flows from the broad grant of authority vested in labour arbitrators by CA and statutes

**Legal Principle:**
Administrative Law Process

- SOR applicable is governed by Dunsmuir
  - Reviewing courts must remain alive to these distinctive features of the collective bargaining relationship, and reserve to arbitrators the right to craft labour specific remedial doctrines. Within this domain, arbitral awards command judicial deference. *but this domain is by no means boundless! [51-52]

**ROGERS V. SOCAN**

- **Facts:**
  - Copyright Board was of the opinion that downloads and streams come within the scope of the exclusive right of copyright holders to communicate to the public by telecommunication provided by the Copyright Act
  - So, found that a claim for communication royalties by the holders of copyright in the communicated works was well founded, in addition to any reproduction royalties received when a work is copied through the internet
  - Application for judicial review dismissed by FCA: SOR = reasonableness and the Board’s determination of what constitutes a “communication to the public” under the Act to be reasonable.

- **Issue:**
  - Meaning of the phrase “to the public” in s.3(1)(f) of the Act
  - Does streaming of files from the internet triggered by individual users constitute “to the public” of the musical works contained?
  - Appropriate SOR?

- **Discussion:**
  - **First Step:** Has jurisprudence already determined question?
    - Looks at SOCAN v CAIP re: SOR for determining board’s determinations on points of law [correctness]
      - But that was 2004, Dunsmuir has changed the analysis.
        - Interpreting and applying home statute should normally be accorded deference
        - But rebuts this by noting concurrent jurisdiction of the Board and the court at first instance in interpreting Copyright Act
        - Shared primary jurisdiction between the administrative tribunal and the courts
        - Courts can review the same question as per the Act on appellate standard [correctness] (on appeal from a decision of a court at first instance) → so it would be inconsistent to select reasonableness as the SOR as used in reviewing the Board’s decision
    - SOCAN v CAIP SOR of correctness is correct!
  - **ATA** is not to be interpreted to mean that the “reasonableness standard applies to all interpretations of home statutes. Yet, ATA and Dunsmuir allow for the exceptional other case to rebut the presumption of reasonableness review for questions involving the interpretation of the home statute.” [para 16]
    - it was the fact that both the tribunal and the courts “may each have [had] to consider the same legal question at first instance” that “rebut[ted] the presumption of reasonableness review” (para. 15)
  - Para 20: this is not a mixed fact and law question, it is an extricable question of law
    - Board’s application of correct legal principles to the facts [QMFL] should be treated with deference, but this is question of law

- **SOR = Correctness**
LP: a contextual analysis can “rebut the presumption of reasonableness review for questions involving the interpretation of the home statute” [para 16]

Abella J in dissent: (with reasonableness)

- Application of Dunsmuir leads to straightforward application of reasonableness standard.
  - The Board is interpreting its home statute [entitled to presumption of deference when interpreting their home statute] ATA
  - Applying a correctness standard on sole basis that a court might interpret the same statute, takes us back to PRE- DUNSMUIR focus on relative expertise between courts and tribunals and view that courts prevail whenever it comes to questions of law [para 60]
    - Doesn’t want the majority to add a new exception to the presumption of home statute deference: “shared jurisdiction with courts”
    - Examples of application of reasonableness standard notwithstanding shared jurisdiction between tribunals and courts [CHRC v Canada (AG) “costs” could arise before other adjudicative bodies, including courts, and Dore]
  - Even if shared jurisdiction is accepted as a justification for reviewing on correctness, the question was one of mixed fact and law => deference
    - Review decision as a whole, court should avoid the application of multiple standards of review [para 78]
    - Mattel: refused to extricate a definitional legal question from the mixed question of whether the word “Barbie” created “confusion” in the marketplace... [definition of confusion in the Act]
  - “Segmenting the definition of each word or phrase in a statutory provision into discrete questions of law is a re-introduction by another name – correctness – of the unduly interventionalist approach championed by jurisdictional and preliminary question jurisprudence, jurisprudence which this Court definitively bashed in ATA.” [para 87]
    - Concerned with breaking up “communication” and “to the public” and definitively/separately defining them
  - “CB’s conclusion that a music download is a “communication ... to the public” was a decision entirely within its mandate and specialized expertise, involving a complex tapestry of technology, fact, and broadcast law” [para 88]

**MCLEAN V. BRITISH COLUMBIA (SECURITIES COMMISSION)**

- Courts will show deference to a tribunal when interpreting its home/enabling statute.
- Under reasonableness review, the reviewing court will defer to any reasonable interpretation adopted by the ADM, even if other reasonable interpretations may exist.
  - Reason for not having correctness too.
- Facts:
  - McLean challenged the BC Securities Commission’s 2010 decision to temporarily ban her from trading securities (with exceptions) or being a director or officer of a BC public company.
  - 2008: McLean accepted the same restrictions in a settlement with the Ontario Securities Commission (the “OSC”) based on her involvement in events that ended in 2001.
  - 2010, the BC Securities Commission informed her that it intended to impose its own restrictions, but the general limitation period in the BC Securities Act requires that process to start within 6 years after the events that motivated the proceedings.
The BC Court of Appeal decided this was correct
- Applied a correctness standard because it involved the interpretation of a limitation period

**Issue:**
- Whether, for purposes of s. 161(6)(d), “the events” that trigger the six-year limitation period in s. 159 are (i) the underlying misconduct that gave rise to the settlement agreement or (ii) the settlement agreement itself. The Commission takes the position that the settlement agreement is the triggering event. [para 3]

**Discussion:**
- SCC applies reasonableness standard:
  - The statutory interpretation by the Commission is a reasonable construction of the relevant statutory language
  - supports the legislative objective of facilitating inter-jurisdictional cooperation in secondary proceedings and does so without undercutting the crucial role of limitation periods.
- *Dunsmuir:* deference with respect to “home statutes”
  - *ATA* para 34: “should be presumed to be a question of statutory interpretation subject to deference on judicial review”
  - This can be rebutted by certain categories of questions (even when involving the home statute) and a contextual analysis can rebut the “rebut the presumption of reasonableness review for questions involving the interpretation of the home statute” SOCAN, para 16
  - To rebut the home statute presumption, the BCCA used the “central importance” question exception because it was a limitation period
    - BUT, limitation periods, even though generally of central importance to the administration of justice, it does not follow that the Commission’s interpretation of this LP must be review for correctness. *Therefore no question of law that is of central importance to legal system as a whole, let alone one that falls outside the Commission’s expertise* [para 28]
    - Argument: may create inconsistency between provinces → federalism problem not to be addressed by SOR [para 29]
  - Legislation can be unclear and can be susceptible to multiple reasonable interpretations... so who decides? = ADM [as per *Dunsmuir*] (paras 32-33)
  - Both the appellant’s and respondent’s interpretation was reasonable → “when faced with two competing reasonable interpretations that result from a lack of clarity in its home statute, the Commission, with the benefit of its expertise, is entitled to choose between them. Courts must respect that choice.” [para 70]
  - *Karakatsanis J:*
    - Agrees that the Commission was reasonable in interpreting the limitation period but does not agree that the opposite interpretation urged by the appellant (limitation period runs from time of underlying misconduct, not the OSC order) is reasonable.
    - legislative objective of facilitating inter-jurisdictional cooperation weighs heavily against the appellant’s interpretation.
    - “In this context, I am not persuaded that it would have been open to the Commission to reasonably interpret the limitation period as the appellant urges. It is at odds with a purposive interpretation.” [para 79]
    - Conclusion that both interpretations are reasonable would permit securities commissions in different jurisdictions across the country to come to completely opposite conclusions about the application of essentially equivalent statutory provisions enacted for the same purposes [para 80]
[81] As my colleague notes, the disposition of this appeal does not require us to decide whether the appellant’s alternative interpretation is reasonable.

Karakatsanis too would dismiss the appeal

Principles:

Para 25: One wave of cases focuses on whether the question raised is a “true” question of vires or jurisdiction; see Alberta Teachers, at paras. 37-38 (citing various cases). In that case, the Court expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law, but ultimately left the door open to the possibility (para. 34).

Para 40 The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with “administer[ing] and apply[ing]” its home statute (Pezim, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

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Deference to arbitral case law.

Analysis:

The majority of the Court stated that judicial decisions related to non-unionized environments were “of little conceptual assistance” (at para. 17), and instead relied upon what the majority viewed as an arbitral consensus that rejected unilaterally imposed random drug and alcohol testing policies.

In short, it confirms one approach in Canadian arbitral case law rather than establishing wholly new rules for drug and alcohol testing.

For the majority, Canadian arbitral case law permits drug and alcohol testing in inherently dangerous work environments as an exercise of management rights in two sets of circumstances:

- "for cause" testing of individual employees where there are reasonable grounds to consider they may be under the influence of drugs or alcohol; where an employee has been involved in an accident or other incident causing safety concerns; and as part of a return to work agreement negotiated with a union. In this case, the agreement can include random drug and alcohol testing of the individual employee.

- if an employer can demonstrate that there is a generalized problem of drug or alcohol abuse in a particular workplace that is an inherently dangerous working environment, random drug or alcohol testing can be permissible.

The majority of the Supreme Court found that the arbitration board’s decision was a reasonable application of these principles of arbitral case law. Hence, the courts below should not have intervened and set aside the board’s decision. The majority relied to a large degree on what it found was the employer’s failure to demonstrate in Irving Pulp & Paper Ltd. a general problem of alcohol abuse in its workforce.
JUDICIAL REVIEW OF DISCRETIONARY DECISIONS

HISTORICALLY

- Discretion was considered outside of the legal sphere – discretionary decisions (i.e., administrative decisions) were seen as political decisions and thus not subject to the rule of law = BINARY
- Quasi-judicial or judicial questions (i.e., non-discretionary decisions) were subject to the rule of law
  - Quasi-judicial decisions were those that applied rules, led evidence, and were decided by precedent
- SO: discretion was considered to be “untrammelled” and “unfettered”

TRADITIONALLY – ABUSE OF DISCRETION DOCTRINE

RONCARELLI V. DUPLESSIS

- Even discretionary decisions subject to Rule of Law
  - No separate legal and political spheres
- Analysis:
  - Rand J: Every decision must be made according to the parameters of the statute
  - There is no thing as absolute and untrammelled discretion → discretionary decisions can be reviewed
  - Cartwright (dissent): d/m endowed with broadly worded delegation of discretionary power that could not be subject of control by courts as long as acted within limits explicitly set forth in statute – “a law unto itself”
- Principles
  - For discretion to be legally exercised – has to pursue legitimate purpose and take into account situation of the individual affected by decision
  - Discretion cannot be exercised of “irrelevant” considerations or in failing to take into account relevant considerations
  - “Discretion necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate”
  - Presumption that when parliament chooses to delegate discretion to particular d/m only they can actually exercise it
  - ADM cannot decide in advance how they will exercise their discretion – “fettering of discretion” – if directives or guidelines are applied in a way that prevents the d/m from using margin of manoeuvre, transforms discretionary power into non-discretionary one

MODERN APPROACH

BAKER V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

- Rejection of the binary/dichotomy of discretionary and non-discretionary decisions
- Analysis:
  - There is no strict dichotomy between discretionary and non-discretionary decisions – decisions usually composed of mixture of characteristics
  - Exercise of discretion and interpretation of rules of law both involve making choices between various options - not intrinsically different – should both be subject to some form of control
Discretionary decisions now reviewed under the PFA approach ➔ If a decision is highly discretionary, this will be factored in the “statutory purposes” and “nature of the problem” factors of the PFA.

PFA will therefore take into account that discretion inherently requires leeway while recognizing that “discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter”

L’H-D stressed that this new approach would not reduce the level of deference accorded to highly discretionary decisions

“deferential standards of review may give substantial leeway to the discretionary d/m in determining the ‘proper purpose’ or ‘relevant considerations’ involved in making a given determination”

BUT In this case, officer failed to give “serious weight and consideration to the interests of the children” ➔ contextual interpretation of statute indicates that children’s rights are central humanitarian and compassionate values ➔ reasonable exercise of discretion “in a humanitarian and compassionate manner” required consideration of these interests

NOTE: L’H-D appeared to decide the d/m erred in not giving enough weight to a particular factor that had to be taken into account (therefore, L-HD appeared to re-weigh the relevant factors) ➔ clarified in Suresh

NOTE: Baker moves away from Dicey’s conception of discretion and closer to perspective of Robson/Jennings/Willis ➔ discretion as exercised in a “space controlled by law” rather discretion as inherently political or as giving executive “free reign within legal limits”

Suresh v. Canada (Minister of Citizenship and Immigration) (2002, SCC)

-about re-weigh the relevant factors or interfere with discretionary decision on the basis that it would have come to a different decision.

-Not re-weighing, just saying what should be weighed.

Facts:

-Post 9/11 context; S is Convention Refugee from Sri Lanka who has applied for landed immigrant status in Canada; Canadian government detained him and commenced deportation proceedings based on opinion of CSIS that he is a member/supporter of the “Tamil Tigers” (classified as a terrorist organization); S.53(1) (b) of IRPA allows deportation of a Convention Refugee if the person is (1) a member of an “inadmissible class” [includes terrorists and those associated with terrorist groups, past and present] AND (2) the Minister is of the opinion that the refugee constitutes a “danger to the security of Canada” [the “danger assessment”]. Multi-stage process involves, among other things, two discretionary decisions made by the Minister:
  -the Minister’s discretionary decision re whether Suresh’s presence in Canada constitutes a danger to national security [Minister must be “of the opinion that the person constitutes a danger to the security of Canada”]
  -the Minister’s decision on whether Suresh faces a substantial risk of torture upon return to Sri Lanka

-Though S presented written submissions and documentary evidence to Minister, not provided with copy of immigration officer’s memo and not provided with opportunity to respond; S applied for JR alleging that (1) Minister’s decision unreasonable (2) procedures under the Act were unfair (3) Act infringed s. 7 and s. 2 of Charter; application for JR dismissed; FCA upheld decision

Issue:

-What is the standard of review to be applied in reviewing a Ministerial decision to deport?
Held:
- SOR is PU both discretionary decisions.

Analysis:
- The ultimate question is always what the legislature intended → Here the language of the Act (the Minister must be “of the opinion” that the person constitutes a danger to the security of Canada) suggests a standard of deference.
- Goes through Pushpanathan 4 factors and finds that Parliament intended to confer on Minister broad discretion – opinion reviewable only where Minister makes PU decision
- Court said that a decision would be PU where:
  - Made arbitrarily or in bad faith
  - Cannot be supported on the evidence
  - Minister failed to consider the appropriate factors (note: the court will decide what the relevant/irrelevant factors and determine if the d/m reviewed those factors appropriately – draws on pre-Baker case law)
- “It is true that the question of whether a refugee constitutes a danger to the security of Canada relates to human rights and engages fundamental human interests. However, it is our view that a deferential standard of ministerial review will not prevent human rights issues from being fully addressed, provided proper procedural safeguards are in place and provided that any decision to deport meets the constitutional requirements of the Charter.”
- Reviewing courts should limit themselves to ensuring that only relevant considerations have been taken into account BUT a court should not re-weigh the relevant factors or interfere on the basis that it would have come to a different decision
- Court explained that Baker did NOT constitute a re-weighing of factors by the court, rather the statute in Baker was found to implicitly require that the interests of the children be viewed as a primary factor and because the d/m had not treated those interests as a primary factor, the decision was unreasonable.
- Ultimately court found Suresh made a prima facie case showing a substantial risk of torture if deported to Sri Lanka (in violation of s.7), and that his hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death → case remanded to the Minister for reconsideration on these grounds

LAKE V. CANADA (MINISTER OF JUSTICE) (2008, SCC)

- SOR of reasonableness when fugitive’s Charter interests engaged
- Facts:
  - In 1997, Lake committed many offences related to drug trafficking in Canada. He also sold drugs in Detroit. While he was charged, and pleaded guilty, with the Canadian offences, but not charged in relation to Detroit transaction; Crown counsel and the defense attorney jointly recommended a relatively lax sentence in the circumstances, because of a strong likelihood that Lake would eventually be charged, convicted and sentenced with the offence of trafficking in the US. Indeed, after serving his jail sentence in Canada, the US requested his extradition; CA dismissed application for judicial review of Minister’s surrender order; Lake appeals; argues that the extradition unjustifiably infringes his rights under s. 6 (1) of the Charter; argues that the Minister erred in his assessment of the factors set out by the Court in USA v. Cotroni and in his conclusion that extradition was preferable to prosecution in Canada; Also argued that the Minister failed to provide adequate reasons as to why extradition was preferred.
- Issue:
1) What is the appropriate standard of review for the Minister's decision when a fugitive's Charter rights are engaged and

2) Whether, in light of that standard, the Minister's decision should be upheld or set aside.

✧ Held:
   - Appeal should be dismissed – appropriate standard is reasonableness and Minister's decision not unreasonable.

✧ Analysis:
   - The court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition.
   - Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the Charter.
   - To ensure compliance with the Charter in the extradition context, the Minister must balance competing considerations, and where may such considerations are concerned, the Minister has superior expertise.
   - Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion.
   - The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes.
   - It is clear that a reviewing court owes deference to a decision by the Minister to order surrender, including the Minister's assessment of the individual's Charter rights. Although the Minister must apply the proper legal principles, his decision should be upheld unless it is unreasonable.
   - In the case at bar, the Minister identified the proper test and provided reasons that were sufficient to indicate the basis for his decision to order the appellant's surrender. Decision to extradite the appellant rather than pursue prosecution in Canada was not unreasonable.
   - NOTE: difficult to reconcile the idea in Baker that both law and discretion should be subject to evaluation of reasonableness and the position in Suresh and Lake that court should not reweigh the considerations at play

**AGRAIRA V. CANADA (2013, SCC)**

✧ Two-step inquiry for proper SOR

✧ Facts:
   - A was citizen of Libya residing in Canada since 1997 despite having been found to be inadmissible on security grounds in 2002; finding based on membership in Libyan National Salvation Front (LNSF) – considered terrorist organization; applied 2002 for Ministerial relief from determination of inadmissibility; application denied; Minister concluded that not in national interest to admit individuals who have had sustained contact with known terrorist organizations; application for PR denied; A applied to FC for JR of Ministers decision regarding relief; application granted; FCA allowed appeal, dismissed application for JR and concluded Minister’s decision was reasonable

✧ Issue:
   - What is the proper standard of review of the Minister's decision and should the decision be allowed to stand?

✧ Held:
   - SOR is reasonableness; appeal should be dismissed and the Minister's decision under s. 34(2) of the IRPA allowed to stand.

✧ Analysis:
   - **Two-step process** to identify the proper standard of review:
(1) Consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence.

(2) IF first inquiry is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the CL principles of JR, court performs a full analysis in order to determine what the applicable standard is.

The standard of review applicable in the case at bar has been satisfactorily determined in past decisions to be reasonableness.

The Minister’s interpretation of the term “national interest” is reasonable.

The plain words of the provision favour a broader reading of the term “national interest” rather than one which would limit its meaning to the protection of public safety and national security. The words of the statute, the legislative history of the provision, the purpose and context of the provision, are all consistent with the Minister’s implied interpretation of this term.

The Minister’s decision falls within a range of possible acceptable outcomes, which are defensible in light of the facts and the law. The burden was on A to show that his continued presence in Canada would not be detrimental to the national interest.

Courts reviewing the reasonableness of a minister’s exercise of discretion are not entitled to engage in a new weighing process.

The Minister reviewed and considered (i.e. weighed) all the factors set out in A’s application which were relevant to determining what was in the “national interest” in light of his reasonable interpretation of that term.

FURTHER CONSTITUTIONAL ISSUES RELATED TO STANDARD OF REVIEW ANALYSIS

SOR FOR CONSTITUTIONAL DETERMINATIONS

OLD FRAMEWORK

SLAIGHT COMMUNICATIONS INC. V. DAVIDSON

Facts:

- D worked for S for 4 years before terminated; labour adjudicator found D dismissed unjustly; made positive order for factual letter of reference and negative order prohibiting S from making negative comments to future ERs about D’s work performance; S sough JR saying this violated freedom of expression under s. 2(b) of Charter.

Issue:

- What is the appropriate analysis of an administrative decision that infringes a protected right?

Held:

- Below.

Analysis:

- Although orders infringed s. 2(b), saved under s.1 b/c both rationally connected to laudable purpose and proportionate to ultimate end of remedying inequality of bargaining power between EE and ER

Analysis: Determine whether the disputed order made pursuant to legislation that confers either expressly or by implication, the power to infringe a protected right”. If YES → legislation itself must satisfy requirement s.1. If the authority to infringe is NOT express but rather provides broad or imprecise discretion then the order itself must be justified in accordance with s.1. If cannot be justified → admin tribunal has exceeded jurisdiction.
NEW APPROACH

DORÉ V. BARREAU DU QUEBEC

- Oakes test does not apply to admin law decisions; question is whether decision reflects proportionate balancing of Charter rights and values
- Facts:
  - D was lawyer practicing in Quebec; appeared before judge of superior court of Quebec; judge criticized D; D then wrote strongly-worded private letter to judge criticizing him and questioning his suitability as judge; Barreau found D violated s.2.03 of Code of Ethics which states that conduct of advocates “must bear the stamp of objectivity, moderation and dignity”; suspended D for 3 weeks; D appeals and argues that s. 2.03 violated freedom of expression under s. 2(b) of Charter; Tribunal, JR and CA all upheld decision
- Issue:
  - What is the proper analysis to be applied to an admin decision that engages Charter interests?
- Held:
  - Decision to be reviewed on reasonableness standard; rejection of Oakes test.
- Analysis:
  - To determine whether administrative ADMs have exercised their statutory discretion in accordance with Charter protections, the review should be in accordance with an administrative law approach, not a s. 1 Oakes analysis
    - Though there is “conceptual harmony” between reasonableness and Oakes framework
  - Where law expressly confers authority to infringe protected right and this GENERAL authority can be justified under s.1
    - Only necessary to determine whether particular exercise of that authority is reasonably in admin law sense.
  - Question is whether the administrative decision is reasonable, in that it reflects a proportionate balancing of the implementation of statutory purposes with Charter protection
    - SO “Reasonableness” analysis captures s. 1 considerations
  - An administrative d/m exercising a discretionary power under his or her home statute will generally be in the best position to consider the impact of the relevant Charter guarantee on the specific facts of the case. Under a robust conception of administrative law, discretion is exercised in light of constitutional guarantees and the values they reflect.
  - On judicial review, the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter rights and values at play.
  - Critique: decision is reasonable only when the d/m has struck the “appropriate balance” between its mandate and the Charter rights at issue but this necessarily involves inquiry into the weighing of different considerations (may put pressure on Baker mandate that courts should not reweigh factors)
  - Critique: does not distinguish between requirements of s.1 and requirements of Oakes
    - Government actor appears to be relieved of considerable burden of explicitly justifying decision in accordance with s. 1. Moreover Charter remedies not available to applicant who succeeds on admin law grounds alone.
If authority to infringe is explicit, standard of review is correctness; if authority is imprecise or discretionary the SoR is reasonableness

- Oakes test is suitable for assessing “principles of general application” no “individualized administrative decisions” that are “in relation to particular set of facts
- Critique: if express authority to infringe a Charter right requires the Oakes analysis but imprecise authority does not, one can question why, when the Constitution is the supreme law of Canada, there would be two different approaches to determining the constitutionality of government action depending on whether it is expressly authorized by legislation or not.
- This case involved balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession
  - Here displeasure of D with the judge was justifiable, but the extent of the response was not
  - Council’s decision that letter warranted reprimand represented a proportional balancing of D’s expressive rights under the charter with the statutory objective of ensuring lawyers behave with “objectivity, moderation and dignity”
  - Decision was reasonable

**DORÉ: RECONCILING THE CHARTER AND ADMINISTRATIVE LAW**

**Singh:**
- SCC concluded that, notwithstanding the Charter, the Bill of Rights would continue to offer overlapping but distinct protections.

**Baker:**
- Since the rights of the affected person could be resolved under administrative law, it would be inappropriate to determine whether the Charter was breached although the Charter issues were extensively argued at trial.

**Suresh:**
- SCC confirmed that the procedural fairness protection contained in s. 7 of the Charter would follow the same contextual approach as the Court had set out in Baker for determining procedural fairness protections.

**Slaight:**
- First attempt at reconciling the Charter and Administrative Law protections where they overlap.
- Court reasoned that no legislature could grant discretionary authority to act in violation of Charter rights, therefore all such authority should be interpreted by Courts in a manner consistent with Charter protections unless the authorising statute is inconsistent with a Charter right.
  - Unless justifiable under s. 1, if not, then struck down.
- SCC decided that when reviewing an exercise of discretion, Courts should look to the Charter if necessary but not necessarily the Charter.

**Dore:**
- Challenged a reprimand that was upheld by the professional tribunal.
- Claimed that it violated freedom of expression under s. 2(b).
- SCC held that, in determining whether ADMs exercise their statutory discretion in accordance with Charter protections, the administrative law approach is appropriate.
- Standard of review a puzzle, where discretion is at issue, the SoR ought to be reasonableness.
  - Where Charter right is at issue, standard ought to be correctness.
  - So what if discretionary and on Charter values?
    - Abella says: “What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with Charter values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of
review is correctness (Dunsmuir, at para. 58). It is not at all clear to me, however, based on this Court’s jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of Charter values in making a discretionary decision.”

- **SCC concludes** the proper SoR is reasonableness, discipline committee’s decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure lawyers behaved properly with the lawyer’s expressive rights.
- **Found reasonable, appeal dismissed.**
- **The broader implications** of Abella’s reasons suggest a new way of understanding relationship between the Charter and administrative law.

- **Similar rationale of deference** underlying standard of review and the proportionality approach in Oakes test.
- Abella emphasizes a more “robust” approach to administrative law incorporates the same fundamental rights as those animating the Charter.

- These cases emphasize that administrative bodies are empowered/required to consider Charter values that are within their scope of expertise.
- Charter values infuse administrative justice in a way that may have a much broader significance than the application of the Charter itself.
- Courts must then acknowledge the tribunal DM’s expertise in adapting Charter values to the matters within the tribunal’s expertise.
  - Important affirmation of judicial deference and respect for ADMs.
- Integrating Charter values into the administrative approach opens “an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship” (Liston, p 100)

- **Doré is a major step forward** BUT still unsettled questions:
  - Should tribunal statutory remedies be informed by Charter values?
  - Who has onus in determining whether a breach is reasonable?
  - How can charter rights be adapted to diversity and practical dynamics of discretionary ADMing?

**“JURISDICTION” AND ABILITY TO CONSIDER CONSTITUTIONAL ISSUES**

- **The Old Trilogy and “Jurisdiction over the Whole Matter”**
  - La Forest found that because s. 52(1) declares Constitution to be supreme law of the land, ADMs with the power to interpret the law must also interpret and respect the supreme law
  - Although admin agencies cannot declare infringing statutory provisions to be invalid (power reserved for courts), s. 52(1) authorizes them to both apply the Charter to their enabling legislation and refuse to give effect to provisions they determine to be inconsistent with it
  - Restrictive understanding of what it would mean for agency to have authority to interpret law – agency had to have “jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought” (Cuddy Chicks)
  - Concerns that recognizing agency jurisdiction over Charter undermined separation of powers: permitting agencies to apply Charter appeared to let executive decide limits of own jurisdiction (Douglas College)

- **Cooper**
  - Authority to interpret law has to be conferred by enabling legislation since admin agencies have no inherent authority to decide Qs of law (can only be granted) and must evince “a general power to consider Qs of law”
McLachlin (dissent): insists that "all law and law-makers that touch the people must conform to the Charter"

_N.S. V. MARTIN; N.S. V. LASEUR (2003, SCC)_

- **Vindication of the dissent in Cooper?**
  - **Gonthier J:**
    - Held that admin tribunals which have jurisdiction – whether explicit or implied – to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide constitutional validity of that provision – overruled Cooper to the extent that it went the other way.
    - Q is whether Tribunal has power “to decide questions of law arising under the challenged provision” – these powers typically reside in tribunals with adjudicative functions (though this is not determinative).
    - If leg does not expressly grant jurisdiction to consider QoL, jurisdiction may still be present implicitly and inferred from series of factors:
      - Statutory mandate of tribunal and whether deciding QoL is necessary to fulfilling mandate effectively.
      - Interaction of tribunal w/other elements of admin system.
      - Whether tribunal is adjudicative in nature.
      - Practical considerations, including capacity to consider QoL.
    - **Guiding principle that guides application of these factors is whether legislature intended the Tribunal to have jurisdiction to decide QoL.**
    - Presence of such intent does not end inquiry, merely establishes rebuttable presumption that agency has jurisdiction to apply the Charter.

_ADMINISTRATIVE TRIBUNALS ACT SS. 43-46_

- **Recall that provisions must be incorporated into the enabling statute of the tribunal.**
- **S.43 – Discretion to Refer Questions of law to court**
  1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.
  2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.
  3) If a constitutional question is raised by a party in an application, on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.
- **S. 44 – Tribunal w/o jurisdiction over constitutional questions**
  1) The tribunal does not have jurisdiction over constitutional questions.
- **s. 45 – Tribunal w/o jurisdiction over Charter Issues**
  1) The tribunal does not have jurisdiction over constitutional questions relating to the Canadian Charter of Rights and Freedoms.
- **S. 46 – Notice to AG if constitutional question raised in application**
  1) If raised, party who raises must give notice in accordance with s. 8 of the Constitutional Question Act
- **Critique**
  - Both proponents and critics of agency jurisdiction over Charter claim that overall, their policy minimizes expense and time required to settle admin dispute involving Charter challenge → argument on both sides.
Mere fact that tribunals rely on leg for jurisdiction to decide QoL does not imply that leg has authority to deprive them of jurisdiction to apply the Charter to enabling legislation. Plausible interpretation of principle of constitutional supremacy is that the legislature cannot confer on agencies the authority to decide QoL w/o necessarily conferring on them authority to apply the Charter.

**PAUL V. BC (FOREST APPEALS COMMISSION) (2003, SCC)**

√ **Presumption, because the tribunal has the ability to consider question of law, that it may also consider constitutional questions, and there was nothing in the evidence to rebut that presumption in the context of s. 35 regarding Aboriginal rights.**

√ **Facts:**
  - BC Ministry of Forestry seized logs in possession of P, registered Indian, who planned to use wood to build deck; P said he had aboriginal right to cut timber for house modification and so s.96 prohibition in Forest Practices Code vs. cutting Crown timber did not apply to him; Admin Review Panel said P contravened Code; P appealed to Forest Appeals Commission which decided it was able to hear and determine the aboriginal rights issues in the appeal; BC Supreme Court held that leg had validly conferred on Commission power to decide Qs relating to aboriginal title and right in course of adjudicative function in relation to contraventions of Code; CA set aside decision and said s. 91(24) of Constitution which gives Parliament exclusive power to legislate in relation to Indians precluded Leg from conferring jurisdiction on Commission

√ **Issue:**
  - Does the province have legislative competence to endow administrative tribunal with capacity to consider Q of aboriginal rights in course of carrying out it valid provincial mandate?

√ **Held:**
  - Yes, appeal allowed.

√ **Analysis:**
  - Code is valid provincial legislation; does not touch on the “core of Indian-ness” and not unjustifiably inconsistent with s.35 of constitution → Doctrine of incidental effects: Constitutionally permissible for validly enacted provincial statute of general application to affect matters coming within exclusive jurisdiction of Parliament
  - To determine if tribunal has power to apply Constitution the essential Q is whether the empowering leg implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any QoL
  - If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide the question at issue in light of s. 35 or any other relevant constitutional provision.
  - There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, and practical considerations will not suffice generally to rebut the presumption that arises from authority to decide questions of law.
  - Here, the Commission has the power to decide questions relating to aboriginal rights arising incidentally to forestry matters and to hear P’s defence of his aboriginal right to harvest logs for renovation of his home. Section 131(8) of the Code permits a party to “make submissions as to facts, law and jurisdiction”. The Commission thus has the power to determine questions of law and nothing in the Code provides a clear implication to rebut the presumption that the Commission may decide questions of aboriginal law.
  - The nature of the appeal does not prohibit the Commission from hearing a s. 35 argument. Even if the Administrative Review Panel has no jurisdiction to determine a s. 35 question, the Commission is not restricted to the issues considered by that board.
Lastly, any restriction on the Commission’s remedial powers is not determinative of its jurisdiction to decide s. 35 issues, nor is the complexity of the questions.

**R. V. Conway**

- **New approach for determining when administrative tribunal can grant remedy under s. 24(1)**
- **Facts:**
  - C spent most of his life in MH institutions; found not guilty by reason of insanity of sexual assault w/weapon; he complained of various abuses and Charter violations; sought absolute discharge under s. 24(1) before Ontario Review Board; Board denied request finding C would pose risk to public safety if released
- **Issue:**
  - Does the Ontario Review Board have jurisdiction to grant remedies under s.24(1) of the Charter?
- **Analysis:**
  - We do not have one Charter for the courts and another for administrative tribunals → with rare exceptions, administrative tribunals with the authority to apply the law, have the jurisdiction to apply the Charter to the issues that arise in the proper exercise of their statutory functions.
  - Any scheme favouring bifurcation of proceedings is inconsistent with principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal’s specialized statutory jurisdiction.
    - determine whether the board is a “court of competent jurisdiction” within meaning of s. 24(1) Q: does this particular tribunal have the jurisdiction to grant Charter remedies generally?
  - **Test:** same as in Martin – whether tribunal has jurisdiction to decide QoL. If it does, and unless leg has clearly demonstrated intent to withdraw charter from tribunal’s authority, will be a court of competent jurisdiction
    - if board is a “court of competent jurisdiction” need to ask if the board has jurisdiction to grant the specific remedy sought → look to legislative intent, as discerned by Board’s statutory mandate, structure and function
  - Here Board was quasi-judicial body authorized to decide QoL in relation to persons detained for wrongful acts for which they were not criminally responsible; established by and operated under Crim Code; Crim Code provides for appeals from Board decisions on QoL → court of competent jurisdiction for purposes of s.24(1)
  - If NCR patient poses significant risk to public, board is barred by statute from granting the individual an absolute discharge → b/c board Conway was risk to public safety could not grant absolute discharge under s.24(1)
  - SO: by grounding jurisdiction over s.24(1) on statutory scheme alone it seems that applicants entitled to petition boards for only those remedies and order that are already available under statute

**PROCEDURAL REVIEW IN ADMINISTRATIVE LAW**

**INTRODUCTION/OVERVIEW TO THE DOCTRINE OF PROCEDURAL FAIRNESS**

- **The Content of the Duty of Fairness**
  - The extension of the duty of fairness to a wide range of administrative decisions in Nicholson was facilitated by the decision to make the content of duty flexible and context-specific.
• Thus, fairness, requires compliance with some, but not necessarily all, of the requirements of natural justice [Matsqui]
• Fairness is a minimum duty that must be met

➢ In determining whether the duty of fairness has been met, courts ask whether the procedural protection provided in particular circumstances was adequate, not ideal. [Waycobah]
➢ Consider the three scenarios: [high to low PF]
  • Criminal law prosecution: stakes for the person are high → nothing less than full procedural protection
  • Human rights adjudication: remedial rather than punitive, so in principle the stakes are lower than that in criminal charge
    • Consequences may nevertheless be significant → less formal in nature but essence of matter will be the same [call evidence, cross examine, make and reply to arguments, etc]
  • Licensing regulation: importance of the matter is a consideration, but the needs of the state must also be considered

➢ Some tribunals operate pursuant to detailed legislation that establishes procedural requirements; others are empowered to establish their own procedures in secondary legislation
➢ For a large range of ADMs, CL considerations govern the scope and content of the duty of fairness → leading case on this is Baker

❖ Sources of Administrative Law

➢ Governing Statutes and Regulations
  • Critical to start with the tribunal’s governing statute or statutes.
  • To determine the unique procedural requirements but also to characterize the tribunal
    • Primarily adjudicative? Regulatory? This helps to determine the procedural protections that may be available at CL
  • Importance of the purpose of the statute

➢ Tribunal Rules, Policies, and Guidelines
  • statutes, regulations, and statutory procedural codes are the obvious sources of a tribunal’s authority
  • there may also be rules promulgated by tribunals themselves!
  • Initially not without controversy, but now considered that rule making by tribunals is a good thing

➢ Statutory Procedural Codes
  • some provinces have statutory procedural codes that establish procedural requirements for administrative proceedings
  • The approach of the BC ATA is to empower tribunals to make their own rules. There are few procedural requirements prescribed by the ATA

    • Reference must be had to the tribunal’s enabling statute or statutes to ascertain which, if any, of the procedural provisions of the ATA apply
  • A tribunal may be established under one statute, but its proceedings may be governed by another, and that there may be applicable procedures in both
  • Because the procedural codes represent “minimum rules”, the CL may operate to require greater procedural protections than those set out in the procedural codes

➢ Common-Law Principles of Procedural Fairness
  • Types of procedural protection to which one is entitled vary widely depending on context
  • Baker established the modern CL approach to the duty of fairness
    • ADM is now seen as falling somewhere on a spectrum between quasi-judicial and legislative decision making, with procedural entitlements varying according to placemen on the spectrum.
• Once an individual’s “rights, privileges or interests” are at stake, the duty of fairness applies and the question then becomes one of degree
• The 5 Baker factors attempt to balance the need to give effect to legislative intention in crafting administrative processes [accessibility, efficiency, informality and cost] with the need to ensure that those processes protect individual interests
• Clear legislative restrictions will oust the procedural protections that would typically be afforded at common law
• In such circumstances, only the Charter or constitutional rights can override legislative restrictions
• = if a tribunal’s enabling statute expressly disavows any right to a hearing, the CL does not override express statutory language and no hearing will be required. Courts tend to narrowly interpret rights-limiting statutory provisions

**Charter of Rights and Freedoms and Constitutional Law**

- Important to consider whether there are any Charter or constitutional rights in issue and, if so, whether the tribunal has jurisdiction to entertain a Charter or constitutional argument or whether it must be brought before a court
- In BC, the A7A expressly distinguishes those tribunals with jurisdiction to determine constitutional questions from those that do not
- If both the tribunal and the court have jurisdiction ... the tribunal is obliged to exercise its jurisdiction. However, ensure that the remedy sought is within the tribunal’s jurisdiction, because courts retain jurisdiction on some remedies

**PROCEDURAL FAIRNESS – WHEN DOES IT APPLY (THE “THRESHOLD”) AND WHAT DOES IT GRANT? (THE “CONTENT”)**

**HISTORICAL BACKGROUND AND EMERGENCE OF THE GENERAL DOCTRINE OF “FAIRNESS”**

- **Introduction**
  - Development of a “duty of fairness” is one of the great achievements of modern administrative law
  - Promotes better informed decision making process, leading to better public policy outcomes, and helps to ensure that individuals are treated with respect in the administrative process
  - The duty is **context specific**
  - The most common means to attack an adverse AD is to impugn the procedure

- **From Natural Justice to Fairness**
  - Judicial and quasi-judicial were required to be made in accordance with the rules of natural justice.
  - So called administrative decisions could be made without any procedural impediments [formalistic dichotomy]
  - SCC abandoned the all-or-nothing approach to the provision of procedural protection in **Nicholson v Haldimand-Norfolk (Regional) Police**
    - 5:4 majority held that a general duty of “procedural fairness” applies to administrative decisions
    - no longer any reason to differentiate between the two concepts [NJ, PF] or the sphere in which they operate → the duty of fairness applies across the spectrum of decisions that public authorities may make
  - Duty of fairness promotes:
    - sound public administration
accountability of public decision makers by ensuring that decisions are made with input from those affected by them
- well informed decisions are likely to be better decisions
- decisions made pursuant to transparent, participatory processes promote important rule of law values

- fairness is a means to an end
- ensures that people are allowed to participate meaningfully in decision-making processes that affect them

Fairness is a CL concept and, subject only to compliance with the Charter, may be limited or even ousted by ordinary legislation
- However, courts require specific legislative direction before concluding that this has occurred
- *Kane:* to abrogate the rules of natural justice, express language or necessary implication must be found in the stator instrument
- Courts presume that legislature intended procedural protection to apply, even if nothing is said

- CL duty of fairness supplements existing statutory duties and fills the gap where none exist
- S. 7 provides a constitutional backdrop for procedural protection, but this right applies in a narrower range of circs than the duty of fairness

- The content of the duty is informed by the context in which a particular decision is made and varies in accordance with a number of factors
- Two questions with respect to PF judicial review
  1) has the threshold for the application of the duty been met?
  2) what does the duty require in the relevant circumstances
- Not concerned with the substantive decision, just ensuring they act fairly when *making* the decision

- The Threshold Test: When is Fairness Required

  - Rights, Privileges, and Interests
    - Well established that the duty of fairness applies to the decisions of public authorities [subject to some exceptions] that affect an individual's rights, privileges, or interests
    - Purpose of these terms is to expand the range of decisions subject to the fairness duty
    - Sufficiently broad in scope to cover most decisions made by public authorities that affect or have the potential to affect individuals in important ways

  - Constitutional Protection
    - When, and to what extent, does the Charter require the provision of procedural protection?  
      section 7 [life, liberty, and security of the person and not to be deprived thereof except in accordance with PFJ]
    - SCC: the principals of fundamental justice subsume PF protection, but the right does not constitutionalize the duty of fairness per se.
      - Section 7 applies only in the context of deprivation of life, liberty, and security of the person, and this establishes a higher threshold than simply demonstrating that a right, privilege or interest is affected
      - Ex: ordinary legislation could limit or even oust the application of fairness duty to the licensing scheme without infringing the Charter

- Even if found not to be in accordance with s.7, highly unlikely that it will be considered justified under s.1 of the Charter.
  - May be considered justified only in "extraordinary circumstances where concerns are grave and the challenges complex" [*Charkaoui*]
**NICHOLSON V. HALDIMAND**

- **Facts:**
  - Summary dismissal of a police officer, he was not given reasons for the dismissal, not given notice, not allowed to make representations.
  - The Regulations made under provincial legislation governing the police said that police officers could not be penalized without a hearing and an appeal
    - But the Board of Commissioners of Police could dispense with services of any constable w/in eighteen months of being hired.
  - In this case, the police officer was only 15 months into his term of service.

- **Issue:**
  - Did the decision attract any procedural fairness obligations, even though the legislation did not provide for any procedures?

- **Decision:**
  - Consequences to the appellant are serious
  - Should have been told why and given opportunity [either orally or in writing] to respond
  - “Although the appellant cannot claim the procedural protections afforded to a constable with more than 18 months, he cannot be denied any protection. He should be treated fairly, not arbitrarily”
  - “realization that the classification of statutory functions as judicial, quasi-judicial, or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.”
  - **Martland dissent: [Martland, Pigeon, Beetz and Pratte]**
    - Very purpose of probationary period → decision purely administrative → under no duty to explain.

- **Legal Principle:**
  - a general duty of "procedural fairness" applies to administrative decisions
  - NOTE: The SCC did not do away with the distinction btw admin and judicial decisions – instead, accepted as a general principle of CL that in the sphere of the judicial, the rules of natural justice run and in the administrative sphere there is a general duty of fairness*
  - *Nicholson kept a dichotomy between judicial/quasi-judicial decisions (natural justice) and administrative decisions (duty of fairness). The modern approach has since done away with this dichotomy.

**THE BAKER SYNTHESIS FOR DETERMINING THE CONTENT OF PROCEDURAL FAIRNESS**

- **Baker v Canada (Minister of Citizenship and Immigration)**
  - Discretionary power involved in assessing compassionate and humanitarian considerations was exercised in the name of the minister by an immigration officer. That officer denied Baker’s requires for an exemption on the advice of another officer, Officer Lorenzo, whose written memorandum was provided to Baker
  - Baker sought judicial review of the minister’s decision, arguing, among other things, that the minister failed to observe the requirements of the duty of fairness:
    - She should have been granted an oral interview before the decision maker; that her children and their fathers should have been given notice of the interview, should have been allowed to make
submissions at the interview, and that the fathers of her children should have been given permission to attend the interview with counsel

- Entitled to reasons
- RAOB

SCC held that Baker was entitled to procedural fairness protection, but the content of the duty was minimal in the circumstances. An oral hearing was not required

- Note purpose of duty of procedural fairness re: participatory rights/fair/open procedure and the importance of respecting the needs of the ADMs
- Certain balance between the need for fairness, efficiency, and predictability of outcome

The Baker Synthesis

- five criteria are non exhaustive [Mavi]
- none of the Baker criteria is, in theory, more important than any other
- overall appraisal of the circumstances

The Nature of the Decision Being Made and the Process Followed in Making It

- Decisions that are considered judicial/quasi judicial in nature are more likely to demand more extensive procedural protection
- Ex: greater procedural protection is likely to be required in an adjudicative context than a regulatory one

The Nature of the Statutory Scheme and the Terms of the Statute Pursuant to Which the Body Operates

- Important to pay close attention to the legislation that authorizes a particular decision to be made.
- The requirements of fairness may be minimal in the context of steps that are preliminary to a formal decision making process
  - Ex: investigatory procedures are not normally subject to the duty of fairness
  - Greater fairness protection will usually be required if a final decision must be made, but a decision need not be final to attract a high degree of PF
  - Existence of an appeal is an important consideration in deciding whether and to what extent reasons for a first-level decision are required

The Importance of the Decision to the Individual or Individuals Affected

- Content of PF increases in proportion to the importance of the particular decision to the person it affects
  - Kane: high standard of justice is required when the right to continue in one's profession or employment is at stake

The Legitimate Expectations of the Person Challenging the Relevant Decision

- PF may extend on the basis of the conduct of public authorities in particular circumstances
- Ex: if legitimate expectation that oral hearing → the public authority will be required to hold an oral hearing [even though that level of PF would not otherwise be required]
- Conduct such as representations, promises, or undertakings or past practice or current policy of a decision maker. [Mavi: makes representations within in the scope of his authority...]
- LE may arise if a person is led to expect a particular outcome
  - This raises different concerns than above ... doesn’t require that the expectations of a particular substantive outcome be fulfilled, BUT, the person may be entitled to enhanced procedural fairness protection
- SCC: LED affords only procedural protection

The Choices of Procedure made by the Agency Itself
The choices made by the decision-maker must be taken into account [and respected] in determining the requirements of the duty of fairness [Baker]

- Particularly when the statute leaves to the ADM the ability to chose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.
- Not clear how significant the procedural choices of ADMs will turn out to be
- LHD: “important weight” must be given, but this provides little meaningful guidance, especially if the other criteria support claims to greater procedural protection [page 171, text]

**BAKER (PF PORTION OF CASE)**

- Para 20: “The fact that a decision is administrative and affects the “rights, privileges or interests of an individual” is sufficient to trigger the application of the duty of fairness: *Cardinal v Kent* ... and it has long been recognized that the duty of fairness applies to H&C decisions”
- [1] **Factors Affecting the Duty of Fairness:**
  - Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances.
    - [para 22]
  - “underlying all these factors is the notion that 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 by the decision-maker.” [para 22]
  - **1) Nature of decision being made**
    - the more it resembles “judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of PF” [para 23]
  - **2) Nature of the statutory scheme**
    - And the “terms of the statute pursuant to which the body operates”
    - Greater procedural fairness when no appeal procedure is provided, or when decision is determinative of the issue and further requests cannot be submitted [para 24]
  - **3) Importance of decision to the individual**
    - The more important to decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the PF that will be mandated
    - Ex: *Kane*: “A high standard of justice is required when right to continue in one’s profession or employment is at stake...”
    - Para 25: constitutes a significant factor affecting the content of PF
  - **4) Legitimate expectations of the person** [para 26]
    - Does NOT create substantive rights
    - “If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness”
    - “If the claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights
    - Based on the principle that the circumstances affecting PF take into account the promises or regular practices of ADMs, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights
  - **5) Choices of procedure of the Agency Itself** [para 27]
should also “take into account and respect the choices of procedure made by the agency itself”

“particularly when the statute leaves to the ADM the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

This is not determinative, “important weight must be given to the choice of procedures made by the agency itself and its institutional constraints”

- Para 28: this list of factors is not exhaustive. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights

- [2] Legitimate Expectations: [para 29]
  - “the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker”
  - “This Convention is not equivalent of a government representation about how H&C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded.”
  - T4 does not affect the analysis

- NOTE: court says “it is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation”

- [3] Participatory Rights: [30-34]
  - Was the failure to accord an oral hearing and give notice to Ms. Baker was inconsistent with the participatory rights required by the duty of fairness in these circs. Were those whose interests were affected had a meaningful opportunity to present their case fully and fairly?

- Factors considered:
  - H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires consideration of multiple factors
  - Its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law
  - these factors militate in favour of more relaxed requirements under duty of fairness
  - On the other hand: there is no appeal procedure, although judicial review may be applied for with leave of the FC – Trial division
  - Considering the 3rd factor, this is a decision that has exceptional importance to the lives of those with an interest in its result → more extensive duty of fairness
  - Applying the fifth factor, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, of a matter of practice, do not conduct interviews in all cases
  - Institutional practices and choices made by the minister are significant, though not determinative factors

- Some suggest stricter, others suggest more relaxed

- Para 32: on balance → “the circumstances require a full and fair consideration of the issues, and the claimant … must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered”

- Para 33: “the flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations”

- Para 34: “oral hearing is not a general requirement for H&C decisions”
  - Appellant had opportunity to put forward (in writing) information about her situation, which were put before the decision-makers, and they contained the information relevant to making this decision
  - Taking all the factors into account … lack of an oral hearing or notice of such a hearing did not constitute a violation of PF requirements that Ms. Baker was entitled to. [particularly because several factors pointed toward a more relaxed standard]
“The opportunity, which was accorded,... to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.” [para 34]

**CANADA V. MAVI**

- **Facts:**
  - Family reunification is an important objective of IRPA.
  - If a member of the family class (sponsored by a relative) comes to Canada as a PM and later obtains social assistance (contrary to sponsor’s undertaking of support), the sponsor is deemed to have defaulted and either the provincial or federal government may recover from the sponsor the cost of providing social assistance.
  - These proceedings were initiated by eight sponsors who denied liability under their undertakings.
  - The debts created are not only contractual but statutory, so their enforcement is not exclusively governed by the private law of contracts.

- **Issue:**
  - To what extent, if at all, is the government constrained by considerations of procedural fairness in making enforcement decisions in relation to these statutory debts.

- **Decision:**
  - **Para 4:** on a proper interpretation of the governing legislation ... crown does have a limited discretion in these collections.
  - **Para 5:** “in the exercise of this discretion ... the Crown is bound by a duty of procedural fairness. The content of this duty is fairly minimal”
  - **Para 7:** “the sponsors are entitled to a basic level of procedural fairness, my view is that the Ontario guidelines are quite adequate in that regard and are consistent with the statutory scheme.” ➔ duty of fairness is met!
    - Respondent’s contention that they are entitled to a more elaborate “process” of the decision making must be rejected.
    - “We are, after all, dealing with statutory debt collection”
  - **Reasons [not in paras 1-9, but in the text beforehand]**
    - Nature of decision is final and specific in nature
    - IRPA does not provide a mechanism for sponsors to appeal [+PF]
    - Effect of the decision is significant as sponsorship debts can be very large
    - It is purely administrative process and is a matter of debt collection
    - Given the legislative and regulatory framework, the non-judicial nature of the process and the absence of any statutory right of appeal, the government’s duty of fairness in this situation does not extend to providing reasons in each case.
    - Here the undertakings reaffirm that the government can defer, but not forgive, sponsorship debt.
    - It is clear that no representation is made that the debt will be cancelled, even when the Minister exercises their discretion to defer enforcement.

**LIMITATIONS ON AND EXCEPTIONS TO THE APPLICATION OF PROCEDURAL FAIRNESS**

- There are limitations on the reach of the duty of fairness, both inherent in the concept and imposed on the concept by the courts.
The duty Applies to Decisions

- The duty of fairness applies in contexts where decisions are being made
  - In other words, it does not apply to investigatory or advisory processes that may occur prior to the commencement of a formal decision making process.
  - However, it PF may be required at the investigatory stage when:
    - Reputation is at stake (Blencoe)
    - The preliminary stage has de facto finality
  - For ex: invariable acceptance by the ultimate decision maker of the results of an investigation or advice from a preliminary decision-maker suggests that the real decision is being made at the preliminary stage, and in order for the duty of fairness to do its work, it should apply here.

Another threshold issue:

- a duty of PF may not apply to a decision if it is of a “legislative and general” nature (Inuit)
- the rules governing procedural fairness do not apply to a body exercising a purely legislative functions (Re CAP)
  - however, they do apply to administrative decisions that are specific in nature (Inuit).
- For example, primary legislation is not subject to a duty of fairness. Lawmakers are subject to the constitution, but being subject to the court would override the separation of powers (Inuit)
- Decisions of a legislative and general nature are distinguishable from acts of a more administrative and specific nature (Knight)

The duty does not apply to legislative Decisions

- Re Canada Assistance Plan (BC): “the rules governing procedural fairness do not apply to a body exercising purely legislative functions”
- Primary legislation is clearly exempt from duty of fairness because of separation of powers
  - “no one has the right to prevail in the political process, no matter how sympathetic his or her cause may seem, as Authorson v Canada demonstrates” → “the only procedure due any citizen of Canada is that proposed legislation receive 3 readings in the Senate and House of Commons and that it receives Royal Assent” [para 37]
  - The legislation retrospectively limited the amount of money owed to disabled war veterans ...
- Invites the argument over the term “legislative” and makes for all-or-nothing outcomes
- Categorical exemption of legislative function becomes especially problematic as it extends beyond primary leg to include secondary leg and policy decisions
  - Are Cabinet and Ministerial Decisions Covered by the Legislative Exemption?
    - CAN be covered by the “L&G” exemption, but may not always be (Inuit)
    - Not technically subject to the legislative exemption, but easy to characterize their decisions as legislative in nature and thus exempt from the duty of fairness, esp. if broad/policy (Inuit)
      - Cabinet decisions that affect specific individuals are more likely to give rise to a duty of fairness, but court may still be reluctant for a multitude of reasons
      - Potential for conflict between the courts and the executive is great... courts wary of scrutinizing the decisions of the executive branch of government, even for limited procedural purposes
• Unique role and responsibilities of the executive branch as a reason for not extending the duty of fairness to ministerial decisions → per ldziak: the Minister’s review should be characterized as being at the extreme legislative end of the continuum of ADM.

• **Is Subordinate Legislation Covered by the Legislative Exemption?**
  • PF is unlikely to attach to subordinate legislation (*Homex*)
  • There is less concern about judicial interference, and democratic accountability is often minimal, but in general courts have not imposed procedural requirements on the subordinate law-making function
  • Some exceptions, such as unique circumstances in (*Homex*)
    ♦ Passage of municipal bylaw subject to PF because the motivation for passing it was an ongoing dispute
  • **Substance is more important than form** when legislative exemptions are concerned

• **Are Policy Decisions Covered by the Legislative Exemption?**
  • The legislative exemption includes decisions that may be described as “policy” as well as decisions that are general in nature
  • Are general in nature, thus they are exempt from the duty of fairness
  • These decisions are inherently political and are subject to political accountability (i.e. governments are elected to make policy decisions and must be allowed to do so, as long as they comply with the constitution)
  • *Imperial Oil v Quebec*: minister performing a political role in choosing from among the policy options allowed under environment legislation and was not subject to fairness obligations beyond those in the Act.
  • Governments are elected to make policy decisions and must be allowed to do so
  • **It is easy for a court to characterize a decision as policy if it simply does not want to interfere...** [page 161 text]

• **The Duty Does Not Apply to Public Office Holders Employed Under Contracts**
  • Law will no longer draw a distinction between public office holders and other EEs in dismissal cases [ordinary private law K remedies apply in event of dismissal, regardless of public nature of the employment.
  • It is assumed that an employment K addresses PF issues. If not, normal common law rules apply. Either way, private law contract principles are primary protection from wrongful dismissal with 2 exceptions:
    ♦ Duty of fairness applies to employees not protected by employment contracts
    ♦ Duty of fairness may apply by necessary implication in some statutory contexts

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**CANADA (ATTORNEY GENERAL) V. INUIT TAPIRISAT**

♦ **Delegated legislation, “legislative action in its purest form”**
♦ **Legislative and general in nature → PF does not apply**
♦ **Facts:**
  - Secondary delegation of rate fixing function by parliament to GIC
  - Increase of phone rates in Northern areas
  - CRTC must determine if rates are just & reasonable, or discriminatory
    • Inuit intervenes, but CRTC accepts rate increase
  - Appealed decision of CRTC, enabling act allows a petition to GIC who “in his discretion” may vary/rescind any decision
  - Federal cabinet rejects petition without allowing Inuit to be heard
Issue:
- Does a duty of fairness apply to decisions of the Cabinet?

Held:
- No.

Analysis:
- No – PF common law hearing obligations do not attach to the Cabinet petition
  - It is a legislative decision “in its purest form”
  - No limitations/rules/guidelines placed on the GIC; large amounts of discretion
  - General decision
  - no need for reasons for rejection or to hold a hearing
  - why is it a legislative decision and not administrative?
    - Subject matter is not unique to an individual, this is a policy choice not resolution of a dispute, it is a creation of a general rule
  - Nature of subject matter played a big role in this finding
- Inuit does not immunize all Cabinet decision-making from PF obligations
  - decisions by cabinet may be administrative in nature, especially if they apply to one specific person/group
  - the fact that it is Cabinet is not determinative
- there is still room to infuse PF obligations via the rule of law if: 1) the decision applies to an individual rather than generally; 2) if there are objective standards for cabinet to follow
  - “mere fact that a statutory power is vested in the GIC does not mean that it is beyond review”
  - “not helpful to attempt to classify the action ... into one of the traditional categories [like “judicial”] ... the essence of the principle of law here operating is simply that in the exercise of a statutory power, the GIC, like any other person, must keep within the law as laid down by Parliament or legislature”
- Executive branch cannot be deprived of the right to resort to its staff...

Legal Principle:
- The nature of the decision must be considered. If it is a legislative decision, then PF will not apply. However, not all decisions by Cabinet will be legislative. If the decision applies to an individual rather than generally, PF may still apply. Just because its cabinet doesn’t mean that it isn’t bound by PF – if it’s making an administrative decision and not a legislative one, they will be bound.

**HOMEX REALTY V. WYOMING (VILLAGE)**

- An exception for subordinate legislation -> PF for municipal bylaw
- Legislative decisions are not immune from PF if they are individualised in substance

Facts:
- city had a personal dispute with Homex over installation of services
- Municipality says cost should not be imposed on general taxpayers, Homex as the developer should pay
- Without prior notice, city passes bylaw that renders Homex’s land unregistered unless services are installed, which makes them unable to sell their land
- Municipality is acting in public interest

Issue:
- Can a duty of fairness apply to passage of subordinate legislation including municipal bylaw?
  - (Does the bylaw attract PF?)

Held:
- Yes, Homex had been denied the PF it was owed.

Analysis:
Even though the form is legislative (it's a bylaw), the substance is administrative
- Etsey I says property rights being target directly, adversely, and specifically
- You have to look beyond the form of a particular act to the substance of the nature of that action (ie its impact, its purpose)
- Even though the form was subordinate legislation, the substance was a specific administrative decision targeted at an individual and his property in the way that must have PF obligations attached
  - Ie the municipal bylaw is not, in substance legislation (even though it is in form)
- Since it is an administrative action, the municipality should not have acted without giving prior notice – this is a breach of PF
- Three main points made this case pass the threshold:
  - The hearings right are regarding property rights → consider Cooper, people have a right to be heard when property rights are at stake
  - The mere presence of a public interest for the by-law is not enough to eliminate PF
  - There is no longer a need for strict classifications of public bodies – as long as they make decisions affecting rights, interest property, liberty...PF may apply
- Content issue:
  - Flexibility is required in the analysis
    - Purely ministerial decision on broad grounds typically will afford little or no procedural protection
    - A function on the judicial end of the spectrum will entail substantial procedural safeguards
- Remedy
  - Homex denied on the basis of misconduct because of his lack of frankness (remedies are discretionary, Homex was a dink)
- Even though legal rights were established, remedy was denied

Legal Principle:
- In determining whether PF applies, it is necessary to look at the substance of the decision that is being made. Something can be legislative in form, but not in substance, and in that case PF will apply. If a decision targets an individual directly, then it is not legislative and general in substance, it is an administrative decision.

CONGREGATION V. LAFONTAINE

Duty of fairness breached, give reasons

Facts:
- Jehovah’s witnesses were trying to find land where they could build a church
- Tried to get a few pieces of land rezoned, were denied
  - First denial, the village took the application very seriously
- On the third attempt, the village gave no reasons “not required to provide you with justification and no intention of giving reasons

Issue:
- Does PF attach to municipal bylaw decisions?
  - Specifically, whether the municipality of the village of Lafontaine lawfully denied an application for rezoning to permit the Congregation to build a place of worship. Does the duty of fairness require the Municipality to give the Congregation reasons for refusing the rezoning application?

Held:
Yes, municipal decisions can be specific and administrative when directed to individuals and in this case, it was.

**Decision:**

- The first denial of permission to rezone complied with the law, the second and third did not because the Municipality gave no reasons for its denial, instead taking the position that it enjoyed absolute discretion to refuse the zoning variance with no explanation to the Congregation.
- Based on application of Baker factors, the decision was quashed and sent back to the municipality with PF conditions.
- “Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials.” [Para 13]
- “A public body like a municipality is bound by a duty of PF when it makes an admin decision affecting individual rights, privileges or interests” [para 3, referencing Inuit and Nicholson, among others]
  - this was NOT a policy decision on general rezoning matters!

**Baker 5 used to determine content of duty. (para 5):**

- **First Factor:** nature of decision and the process by which it is reached
  - Elected councilors cannot deny a rezoning application in an arbitrary manner.
  - Where the municipal council acts in an arbitrary fashion in the discharge of its public function, “good and sufficient reason” exists to warrant intervention from the reviewing court in order to remedy the proven misconduct.
  - Need for judicial oversight of arbitrary municipal decision making is only heightened by the aggravated potential for abuse of discretionary statutory authority.

- **Second Factor:** statutory scheme and its provisions
  - Act respecting land use planning and development grants the Municipality authority to consider a rezoning application.
  - Absence of an appeal provision demands greater municipal solicitude for fairness.
  - Enhanced procedural protections “will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted”: *Baker, supra*, at para. 24, *per L’Heureux-Dubé*.

- **Third Factor:** importance of the decision to the Congregation
  - Important that the municipal decision affects the Congregation’s practice of its religion.
  - Right to freely adhere to a faith and to congregate with others in doing so is of primary importance, as attested to by its protection in the Charter.

- **Fourth factor:** the legitimate expectations of the Congregation
  - Where prior conduct creates for the claimant a legitimate expectation that certain procedures will be followed as a matter of course, fairness may require consistency (Baker).
  - The Municipality followed an involved process in responding to the Congregation’s first application. By doing this they gave rise to the expectation that future applications would be carefully considered.

- **Fifth factor:** nature of the deference due to the decision maker
  - Municipal decisions on rezoning fall within the sphere in which municipalities have expertise beyond the capacity of the judiciary, thus warranting deference from reviewing courts.
  - However, this factor may not carry much weight where, as here on the second and third applications for rezoning, there is no record to indicate that the Municipality has actually engaged its expertise in evaluating the applications.
Five Baker factors suggest that the Municipality's duty of procedural fairness to the Congregation required the Municipality to carefully evaluate the applications for a zoning variance and give reasons for refusing them.

**Applying the Duty of Fairness to the Facts**
- Municipality’s duty of procedural fairness to the Congregation is not contingent upon the interactions of the Congregation with third parties.
- The Municipality’s duty exists independent of the Congregation's own conduct.

**Legal Principle:**
- Municipalities and other public bodies will be bound by a duty of PF when the decision they are making is essentially administrative in nature and affects individual rights, privileges or interests. This decision illustrates that municipalities are going to make different kinds of decisions, some of which will be individualized and attract procedural fairness. When an administrative decision is being made, there is a duty of PF. Then, you must look at the Baker factors to see how great a degree of PF.

**Policy:**
- Giving reasons serves the values of fair and transparent decision-making, reduces chance of arbitrary and capricious decisions, and cultivates the confidence of citizens in public officials.

**CPR V. VANCOUVER (CITY)**

- **Should the bylaw be set aside for procedural irregularities?**

**Analysis:**
- **Para 38:** Baker affirmed a duty of PF in making administrative decisions [para 38]
  - such decisions must be made “using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context” [Baker, para 22 LHD]
- **Para 39:** Baker 5 factors
  - last factor: “requirement to respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances” [Baker 22-27]
- **Para 40:** Vancouver Charter imposes no stat requirement to hold a public hearing before adopting an ODP... however, given the potential impact on an ODP-bylaw on CPR in this case, there can be little doubt that city owed it a duty of fairness. → city sought to fill this duty through the public hearing process.
  - SO, ISSUE: whether the City's conduct in relation to CPR meets the standard of fairness with reference to the factors set out in Baker.

**CPR’s 3 complaints:**
1) Failure of the hearing notices to state that the proposed by-law “designates private land public”
2) Change made to the by-law after the hearing, in contravention of alleged representations to CPR and the general public that no decisions would be made on specific transit uses or routing, [LED issue!]
3) Non-disclosure of relevant documents
  - Written submissions made to City Council, and
  - City documents, including a letter written by a councilor to two Van residents, and reports concerning the city’s railway and an investigation by the BC building Corp into a possible purchase of CPR’s Land

**Legal Principle:**
- Application of Baker test to bylaw with procedural irregularities.
EMERGENCY DOCTRINE

- The duty may be suspended or abridged in the event of an emergency
  - Sometimes it isn’t possible to fulfill the duty of fairness in an emergency without risking harm. In those cases, it’s ok to suspend it (Cardinal)
  - In reality, very few cases where minimal fairness procedures are not able to be provided before a decision is made.

THE LEGITIMATE EXPECTATIONS DOCTRINE

- A duty of procedural fairness may be present if there are legitimate expectations that a certain procedure will be followed. The LED acts to expand the amount of procedural fairness owed in the circumstances beyond what it would otherwise have been.

- Legitimate Expectation Doctrine (LED) works to expand Procedural Fairness
  - Where it can be successfully invoked, the LED doctrine might provide some procedures where the common law would not otherwise accord any procedures, or the LED doctrine might provide better [more extensive] procedures than the common law would normally accord.
    - The concept of LE is akin to promissory estoppel, an equitable doctrine that offers relief from reliance on promises that do not give rise to enforceable contracts BUT there are differences

- Important points about the LED:
  - The LED doctrine in Canadian law is part of the common law of procedural fairness. It CANNOT be used to achieve a specific substantive outcome, ONLY PROCEDURES.
    - This was confirmed in Re CAP, Baker, & minority opinion in Mount Sinai
    - Why?
      - If it was extended, it might encourage claims
      - If it was extended, it might hinder the State’s ability to be open, transparent, help...
      - Generally the Legislature wants Ministers to have discretion (not be bound to random statements)
      - Separation of power: the Court does not want to impose on the broad discretion the State has given to decision-makers
      - Policies may change with time and the executive needs to be able to make these changes for policy or political reasons, without being bound to old statements

- The term “legitimate expectation” has two connotations in Canadian law. These are described clearly in Baker at para 26:
  - (1) If the claimant has a legitimate expectation that a particular procedure will be followed in his/her case, because of the representations, regular practices, or promises of the decision-maker, then this procedure must be followed
  - (2) If the claimant has a legitimate expectation that a particular substantive result will be reached in his/her case (because of the past conduct, practices, or representations of the state) then more extensive procedural protections than would otherwise be required by the common law may be necessary before he/she can be deprived of that outcome
    - This does NOT guarantee an outcome (i.e. you do not necessarily get the grant under these circumstances, but you should be allocated more procedures before it is denied)

- The doctrine is related to promoting regularity, consistency and certainty in administrative decision-making.
  - In Baker, Justice L’Heureux-Dube stated that the legitimate expectations doctrine “is based on the principle that the “circumstances” affecting procedural fairness take into account the promises or
regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights"

- The conduct relied on (established practices, representations, promises) to establish a legitimate expectation must be clear, unambiguous and unequivocal so as to give rise to a reasonable expectation that a particular procedure will be followed or that a particular result will be obtained (CUPE v. Ontario Minister of Labour AKA the “Retired Judges” case)
- There is no need for the person seeking to rely on the LED to prove that he/she had express knowledge of the practice or other conduct that is alleged to create the legitimate expectation or that there was an individualized promise or representation made to him/her, or that he/she relied on the existing practice or representation to his/her detriment (Mt Sinai)
- A legitimate expectation must never conflict with a statutory duty.
  - That is, the state cannot lawfully promise to do something that is contrary to statute and the court should not enforce a promise or representation that is contrary to statute.
- The LED cannot be used to fetter, directly or indirectly the power of a provincial legislature or Parliament to enact statutes (Re CAP)
  - Also, because of certain passages in the judgment of Sopinka J. in Re CAP there is some question about whether the LED can apply to “legislative and general” decision-making understood more broadly. [P.S. Crane thinks it should!]
  - In the context of the CAP decision, Sopinka might have meant “legislative decisions” as decisions to enact legislation BUT it could apply more broadly to include all sorts of legislation – Crane thinks that his ruling should be confined to statutes

What is a legitimate expectation?
1) describes a situation in which an administrative body will be required to afford a particular procedural right (where such a right would be otherwise be imposed by the common law) because of the past conduct or promises of the administrative decision-maker regarding the procedure
2) describes a particular kind of interest that an individual may have and denotes that that interest is worth of protection through the duty of PF
- “If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness…. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded” (Baker, para 26)
- “If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous” (Agraira, para 90)

What is the effect of a “legitimate expectation” when it applies?
- “a factor in determining what is required by the common law duty of fairness” (Agraira, para 90)
- can extend PF obligations beyond what the common law would otherwise provide
- LED is considered to be “an extension of the rules of natural justice and procedural fairness”
  - Can provide better procedures than would otherwise apply
  - Can provide some procedures where otherwise there would be none
- “The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The
court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation” (OSBRA, cited in Re CAP para 57)

- **basically**, legitimate expectations occur when a party has been led to believe that a certain process will be followed

**Requirements to establish a legitimate expectation**
- in relation to a legitimate expectation about “procedures”
  - public official makes promises or representations regarding procedures
  - representations must be “clear, unambiguous and unqualified” (Agraira, para 90)
    - “generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement” (Mavi, para 69)
  - important that the representations made are within the scope of his/her authority
- representations must not conflict with a statutory duty (and must also be within the authority of the official to make)
- no need for proof or reliance or proof of prior knowledge
  - why not?
    - focus is on promoting regularity, predictability, and certainty in the way the government deals with the public
    - it’s not very difficult to establish the idea of legitimate expectations as long as you have sufficient clarity in the practice and you can prove it after the fact

**Key limitations of the legitimate expectations doctrine**
- cannot give rise to substantive rights, only to procedures (procedural remedies) (Agraira, para 93)
- does not apply to legislative decisions (Re CAP)

**REFERENCE RE CANADA ASSISTANCE PLAN (B.C.)**

**No Legitimate Expectation**

**Facts:**
- Changes to legislation governing federal-provincial transfer agreements
- In 1990, there was a huge deficit problem; the federal gov’t introduced a deficit reduction plan and they introduced legislation that would amend the CAP without the provinces consent and without giving 1 years notice. Under the new plan, the “financially stronger provinces” would get less than the 50% (BC, Ontario, Alberta).

**Issue:**
- Did the federal government violate PF by amending the plan without the consent of provinces, because it violated their legitimate expectations?
  - [the provisions of the agreement, as well as the previous conduct of the gov’t of Canada, gave rise to a legitimate expectation that the gov’t of Canada would not introduce a bill into parliament to change the terms of the CAP without BC’s consent or without the 1 year notice]

**Held:**
- Provinces lost, LED doesn’t apply and PF not extended

**Decision:**
- No, Parliament cannot bind the hands of subsequent legislatures
- BC was trying to use the legitimate expectation doctrine substantively rather than procedurally; they are either after a veto or a delay for 1 year – the court says a delay is substantive, not procedural
• There is no support in Canadian or English cases for the proposition that the doctrine of legitimate expectations can create substantive rights
  ➢ this is a legislative function, so the common law duties of PF do not apply
  ➢ LED does not apply to creation of statutes by parliament because it would interfere with legislative sovereignty
    • “Restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself”
    • “where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bin itself in the future.”
  ➢ LED cannot attach to ministers of Cabinet via the introduction of bills into parliament because it would interfere with Parliament indirectly
  ➢ LED does not give rise to substantive rights, only affects procedural entitlements
  ➢ In trying to stop Cabinet from introducing a bill, they said they were fettering the work of the legislature
    • "A cabinet is a combining committee...that fastens the legislative part of the state to the executive part of the state”
    • Therefore, the main reason for rejecting the applicability of the legitimate expectation argument in this was is that it had no relevance to legislative functions
  ➢ Also note the principle of successor governments
    • To allow this case to have succeeded would have impinged this principle
    • Each Parliament should be able to change the law continuously; they can’t be bound to what the last Parliament did; the law can change
    • Note: it seems as though, in this decision, Sopinka was only saying you can’t attach legitimate expectation to the ‘making statute’ part of the legislative function
    • However, some argue that this attaches to all sorts of policy decisions that classify as legislative functions

Legal Principle:
  ➢ The legitimate expectations doctrine does not apply to the creation of statutes by Parliament or to the introduction of bills into Parliament.
  ➢ It also does not give rise to substantive rights if it applies – it will only affect procedural entitlements.

CUPE V. MOL

No LE, because not “clear, unqualified or unambiguous”

Analysis:
  ➢ Para 133: “conditions precedent to LED not established in this case”:
    • Evidence of past practice is equivocal
    • So too, is the evidence of a promise to “return to” past practice [evidence showed that the system varied]
    • Minister made continued resort to the s.49(10) roster [labor board selections], but also equally shows variation in resorting to s.49(1)
    • In interview, said "academics and judges “might” be used to staff the commission...
  ➢ Para 146: Basically, “the evidence in support of the various agreements and “understandings” he alleges is not clear and it is certainly not unqualified or unambiguous”
    • Evidence does not establish a firm "practice”
    • A general promise to “continue under the existing system” where the reference to the system itself is ambiguous” CANNOT bind the Minister’s exercise
Legal Principle:
- "Doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness" (Reference re CAP)" [para 131]
  - It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including establish practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken."
  - To be “legitimate” such expectations must not conflict with a statutory duty

CANADA V. MAVI

Yes, LE, but for deferring, not forgiveness of debt - but PF is minimal

Facts:
- sponsored immigrants receiving social assistance
- sponsors in default of their undertakings
- government can claw back any money paid to sponsoree as if it were a debt

Issue:
- Do participatory rights attach to debt collection by the Crown in relation to immigration sponsorship?

Decision:
- LED successfully invoked because of wording in undertakings signed by sponsors
- PF attaches to debt collection, but the PF owed is minimal
  - Right to notice and an opportunity to be heard, but no reasons need to be given
  - Thus, legitimate expectations don't help much
- Para 72: Given the legitimate expectations created by the wording of these undertakings I do not think it open to the bureaucracy to proceed without notice and without permitting sponsors to make a case for deferral or other modification of enforcement procedures.

Legal Principle:
- Para 68 is important: Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.
- Proof of reliance is not a requisite.
- Para 69: Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.
- [43] nature of the administrative decision is a straightforward debt collection. Parliament has made clear in the statutory scheme its intention to avoid a complicated administrative review process.

AGRAIRA V. CANADA

LED fulfilled

Analysis:
- Was the decision unfair? And did it fail to meet the appellant’s LE?
  - Para 93: Notes Dunsmuir in saying that “procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to
decisions that affect the rights, privileges or interest of an individual” ... “procedural fairness has many faces”

- 97: cannot give rise to substantive rights

**IN THE CASE AT BAR:**

- “the Guidelines created a clear, unambiguous and unqualified procedural framework for the handling of relief applications, and thus a LE that that framework would be followed”
- Guidelines published
- Clear who they are used by
- Publicly available
- Constitute relatively comprehensive procedural code

- *appellant could reasonably expect* his application be dealt with in accordance with process set out in them → LED fulfilled!

- **BUT,** appellant has NOT shown that his application was not dealt with in accordance with the process outlined in the Guidelines

- Appellant raises further argument he had LE that Minister would consider certain factors in his relief application:
  - Guidelines created expectation that the pertinent factors would be considered
  - Alleges he had a LE that H&C factors would be considered because of a letter he had received
  - This argument fails b/c, even if this was clear and unambiguous, the Minister, in a manner consistent with the interpretation of “national interest”, “reviewed and considered the material and evidence submitted in its entirety” [para 101]
  - So if the appellant had LED that Minister would consider certain factors, including H&C, this expectation was fulfilled.

- NO FAILURE to meet the appellant’s LED or to discharge duty of PF owed to him. Minister’s decision cannot be set aside.

**LED:**

- “If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.”

- **Para 95:** “practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified” [Judicial Review of Administrative Action in Canada]

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### CONSTITUTIONAL AND QUASI-CONSTITUTIONAL GUARANTEES OF PROCEDURAL FAIRNESS

- **When and to what extent does the Charter require the provision of procedural protection?**
  - **Procedural Fairness and PF**
  - S. 7 is the only right-conferring provision in the Charter that refers to the PFJ and, within Charter’s substantive rights conferring provisions, only these principles have been found to include PF
  - S. 7 is therefore the primary source of procedural safeguards within the Charter
  - To access these safeguards, complainants must first cross threshold of establishing that their “life, liberty, or security” interests are impaired
    - Right to life: one’s right to live and be free of state conduct that increases the risk of dying
    - Right to liberty: freedom from physical restraint AND freedom to make fundamental life choices
Right to Security: right to be free from both physical and psychological harm

- If complainant CANNOT establish that decision touches s.7 interest, may still be owed PF, but as a matter of CL or CBR
- **CL**: does NOT empower judges to procedure in the face of clear statutory language that dictates less stringent (or even no) procedural safeguards
- **Charter**: If s.7 interest IS engaged, PF comes into play by means of PF] → these are constitutional requirements therefore legislation must conform to them in order to be lawful
- **CBR**: also provides safeguards that cannot be overridden “unless it is expressly declared by an Act...that it shall operate notwithstanding the CBR”

**CANADIAN CHARTER OF RIGHTS AND FREEDOMS, SS. 7, 1 AND 52**

- **S. 1**: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- **s. 7**: 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.
- **s. 52**: (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

**CANADIAN BILL OF RIGHTS, SS. 1(A) AND 2(E)**

- **S. 1**: It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- **S. 2**: Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the CBR, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

**AUTHORSON V. CANADA (AG)**

- **Due process protections do not apply to the legislative process.**
- **Facts:**
  - class action by disabled war vets who received pensions and benefits from federal crown; Crown administered funds w/out investing or paying interest; questions arose in 1990, the practice was changed and Parliament passed legislation declaring that the Crown was not liable for lost interest and enacted the following statutory bar:
  - **s.5.1(4) No claim shall be made after this subsection comes into force for or on account of interest on moneys held or administered by the Minister during any period prior to Jan 1 1990 pursuant to subsection 41(1) of the Pension Act, subsection 15(2) of the War Vets Allowance Act or any regulations under s.5 of this Act.**
  - Veterans claims that the provision violates s.1(a), 2(e) of the CBR
  - **3 arguments re s.1 CBR violation:**
• no procedural rights accorded to A prior to passage of statutory bar, thus stat. bar took away individual property rights w/out due process (trying to attach procedural process rights to passage of legislation)
• no procedural rights accorded to A before the stat bar was applied to A’s specific case and therefore property rights were denied w/out due process
• “due process” can be applied substantively and it protects A from legislation that expropriates his property w/out fair compensation i.e., leg can be declared invalid due to conflict w CBR s.1(a)

➢ Argument re CBR s. 2(e): statutory bar was a “determination” of A’s “rights” and therefore he should have had a fair hearing

➢ Issue:
➢ What was guaranteed by the CBR when the vet’s property rights were extinguished?

➢ Held:
➢ SCC rejected all arguments and upheld the statutory bar – CBR did not prevent Parliament from legislating as it had in this case.

➢ Analysis:
➢ 3 main points:
1) there is no "right to be heard" before the passage of legislation that is protected by either CBR s.1(a) or 2(e) - neither provision applies to parliament in legislating
2) the statutory bar operates automatically - there was no administrative decision vsi a vis the application of the bar to A's specific case to which due process could attach (i.e., no decision or judgment was being made under statutory authority about whether to take away his property rights - the statute simply extinguished the existence of property rights)
• A is trying to individualize the decision and make it administrative
3) re the "substantive" due process argument:
➢ CBR s1(a) only "declares and recognizes" rights of a kind that existed in 1960 - at the time the CBR was enacted
➢ in 1960, the legal system recognized the right of the legislature to expropriate w/out compensation provided that it did so clearly enough
➢ therefore, CBR s.1(a) does not protect the citizen against expropriation of property by the enactment of clear legislation such as the statute at issue in this case

➢ Key Point:
➢ There is no right to fair treatment in this case; the safety net is the ballot box. Due process protections cannot interfere with the right of the legislative branch to determine its own procedure. For the Bill of Rights to confer such a power would effectively amend the constitution.

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**ORAL HEARINGS AND SCOPE OF S. 7**

**SINGH V. CANADA (MINISTRY OF EMPLOYMENT AND IMMIGRATION)**

➢ PFJ includes PF but does not constitutionalise it per se; where serious issues of credibility involved PFJ require credibility be determined on basis of oral hearing

➢ Facts:
➢ Appellants were Convention Refugee claimants; Minister, on the advice of RSAC determined they were not refugees; they applied to IAB for redetermination hearing. IAB however held there were no reasonable grounds to believe their claims could be established at a redetermination hearing and they were thus found not to be refugees w/out an oral hearing having been held by either the RSAC
or IAB. Appellants bring JR application to FCA challenging validity of process arguing it violates s.7 rights. FCA dismissed applications and they appeal to SCC.

- **3 stages of refugee status determination process:**
  - **10 Stage:** a claim is made by an alien in Canada; 10 examines claim on oath; counsel rights and a reasonable opportunity to engage counsel are afforded; transcript of examination results; transcript goes to claimant and RSAC
  - **RSAC stage:** [RSAC acts on powers that have been lawfully delegated from the Minister] RSAC reviews claim and transcript; no further info received from or given to claimant; RSAC can rely on its general policies/knowledge of world events w/out advising claimant about these matters and w/out hearing from claimant about them; RSAC decides if claimant is refugee or not
  - **IAB stage:** unsuccessful claimant can apply to IAB for a redetermination of ref. status; claimant submits transcripts of exam and declaration of oath setting out basis of application for determination of and the facts/evidence/information and submissions that would be relied on at a redetermination hearing (if one is held); on basis of these materials, IAB considers whether there are reasonable grounds to believe the claim could be established at a redetermination hearing - if so, full oral hearing will be held - if not, claimant found not to be ref. w/out further process

- **Key point:** a claim for refugee status could be determined against applicant w/out opportunity for an oral hearing by d/maker at any stage of the process and w/out applicant having opportunity to both “know the case against him” and to respond to that case.

- **Issue:**
  - Did the claim’s determination process violate s. 7 of the Charter?
    - Note: after oral argument SCC also asked for written submissions re: whether the process was consistent with s. 2(e) of CBR.

- **Held:**
  - Charter infringed; CBR s. 2(e) infringed.

- **Analysis:**
  - **1. Reasoning: Wilson J (3)**
    - Because the statutory scheme excluded the possibility of oral hearing in these cases, CL of PF could not “supply the omission of the legislature; there was no omission bur rather clear exclusion
    - Thus in order for complainants to succeed, court had to find that s. 7 overrides the statut
  - **Held: Charter infringed**
    - **Framework for analysis of s.7 challenge:**
      1) **Is s. 7 engaged?** Does admin decision deprive (or threaten to deprive) an individual of his/her interests in life, liberty or security of the person? (as those concepts have been understood in SCC jurisprudence)
        - **YES:** everyone in Canada is entitled to Charter protection → Wilson J decides that “Everyone” means everyone physically in Canada and “security of the person” includes “freedom from state imposed threats of physical punishment” or suffering as well as the imposition of such punishment or suffering - this threat existed here
        - Although Singh had no constitutional right to remain in Canada, he had the right to have his claim determined in accordance with the principles of fundamental justice
      2) **If yes, is the deprivation in accordance with POFJs? no: should’ve been an oral hearing**
        - (a) procedurally: ie, are procedures by which deprivation can occur in accordance with procedures required by POFJ?
          - Wilson said POFJ = procedural fairness
In this case, convention refugees didn’t have fair opportunity to refute case against them b/c didn’t know what happened at RSAC stage - greatest concern about this procedural scheme

Determination depended significantly on credibility which cannot be easily assessed through written submissions → requires oral hearing: “I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.”

• (b) substantively: i.e., is the deprivation itself (the possibility that it could occur) consistent with POJJs?

3) If L/L/SOP at stake in decision and not in accordance with POJ, is denial justified by s.1?

• No, not a “reasonable limit, prescribed by law, that is demonstrably justified in a free and democratic society”

• Wilson disregards minister’s utilitarian arguments re fact that procedures were accepted by UN and that IAB was subject to a strain in volume of cases if oral hearings granted → balance of administrative convenience does not override the need to adhere to principles of fundamental justice.

• Note: this case does not mean you get an oral hearing under s.7 ; consider the context of the case - b/c credibility was at stake oral hearing was required

• Wilson J says resort to the Charter should be reserved for cases in which ordinary statutory interpretation cannot provide a remedy. Here, the principles of fundamental justice in the context of determining refugee status require an oral hearing, and the statute itself expressly barred some refugee claimants from receiving such a hearing.

➢ 2. Reasoning: Beetz J (3)

• Held: CBR s.2(e) infringed

  • Basically makes decision for same reasons as under Charter but applies different rights document

  • Right to fair hearing under s 2(e) CBR - you may get an oral hearing depending on context

  • Must consider the nature of the rights at issue (important rights = life, liberty, security of person) and severity of consequences for individuals concerned

• Remedy: case remitted to IAB for full hearing of claim on the merits

➢ Breakthrough case for 2 reasons:

  ➢ 3 judges decided to breathe rights into the CBR (perhaps b/c this was right after the Charter came into effect and they didn’t want to get into s.7 yet)

  ➢ The judgment by Wilson (+2) decided there had to be hearings for refugee detention process → led to government overhaul of statutory scheme and establishment of Immigration and Refugee Board.

INCORPORATION OF COMMON LAW FRAMEWORK UNDER S. 7

➢ RECALL: Baker Framework for determining content of PF:

  ➢ Nature of decision
  ➢ Role and place of decision w/i statutory scheme
  ➢ Importance of decision to individual affected
  ➢ Legitimate expectations
  ➢ Minister or agency’s choice of procedures
DUTY TO DISCLOSE AND RIGHT TO REPLY/DUTY TO GIVE REASONS

SURESH V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

- **Facts:**
  - S was Sri Lankan born Tamil; came to Canada 1990 and made refugee claim based on fear of persecution by Sri Lankan gvt; also member of Tamil Tigers (listed terrorist org); Generally, CR status means the refugee cannot be returned to country where his/her life or freedom would be threatened b/c of his/her race, religion, nationality, membership in a particular social group/political opinion. But there is an exemption in s.53(1)(b) of IA that allows Minister to exercise discretion where person constitutes a danger to the security of Canada.
  - **Process followed:**
    1. Ministers issue certificate under s.40.1 alleging S is member of inadmissible class on security grounds.
    2. FCTD judge holds a “reasonableness hearing” re certificate - holds certificate was reasonable
    3. Deportation hearing held - adjudicator holds S is a member of an inadmissible class and should be deported.
    4. Ministerial “danger assessment” decision
      - M gave S notice that she was considering issuing an opinion under s.53(1)(b) declaring S to be a danger to the security of Canada [and thus liable to be deported even though he is refuge and his life/freedom would be threatened by return to Sri Lanka]
      - S given opportunity to respond in writing and does so - includes materials re threats he would face in SL [raises possibility of torture if returned]
      - IO Gautier reviews material and prepares memo for minister recommending the opinion should issue declaring S to be danger to security of CA
      - S does not get copy of Gautier’s opinion nor any opportunity to respond
      - M issues opinion that S is danger to security and should be deported
  - S seeks JR on substantive, constitutional and PF grounds:
    - On the procedural side he argued that in order to make meaningful submissions, he needed disclosure, especially the material/recommendation/opinion written by Gautier indicating that he is a danger to Canada.

- **Issue:**
  - Are Suresh’s s. 7 rights engaged so as to cross the procedural fairness threshold?
  - If so, what is the nature of the procedural fairness owed?

- **Held:**
  - Yes, rights engaged. Suresh entitled to new deportation hearing under IA.
    - Decision quashed because of breach of PF.

- **Analysis:**
  - Content of PFJ
    - As per *Singh*, at minimum the PFJ require compliance with the common law requirement.
    - “Section 7 protects substantive as well as procedural rights. Insofar as procedural rights are concerned, the common law doctrine in *Baker* properly recognizes the ingredients of fundamental justice. As such, it is appropriate to look to the factors discussed in Baker in determining not only whether the common law duty of fairness has been met, but also in deciding whether the safeguards provided satisfy the demands of s. 7. We look to the common factors not as an end in themselves, but to inform the s. 7 procedural analysis. At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to a case.”
• In determining the content of the duty owed, you must look to the context of the statute involved and the rights affected (here, as in Baker, the statute was silent regarding the process owed).

Is s.7 triggered?
• YES, deportation to face torture = deprivation of life, liberty or security of the person, thus such a deprivation must be in accordance with POFJ both in substantive and in a procedural sense
  1) **substantively:** SCC held that barring extraordinary circumstances, deportation where there is a substantial risk of torture is contrary to s. 7 PFJ in a substantive sense
     • Minister must therefore exercise her discretion accordingly and should generally decline to deport where there is a substantial risk of torture
     • [SCC did not totally exclude possibility that in exceptional circumstances such a deportation could be justified either s.7 or s.1 balancing tests]
  2) **procedurally:**
     • **Baker factors used to assess content of PFJ**
       1. *Nature of Decision - neutral:* somewhat judicial decision b/c weighing of risks and somewhat individualized; serious nature (>PF) BUT also discretionary and policy element (<PF)
       2. *Nature of statutory scheme - more PF:* Act contained extensive procedures to ensure certs issued fairly but NONE at all under s.53(1)(b); also no right to appeal
       3. *Importance of rights at stake – more PF:* possibility of deportation leading to torture is pretty serious personal, financial and emotional consequences
       4. *Legitimate expectations – More PF:* Canada has signed Convention Against Torture that prohibits deportation of persons to states where there are substantial grounds for believing they will face torture - gives rise to expectation; this convention necessarily informs s.7 “it is only reasonable that the same executive that bound itself to the [Convention Against Torture] intends to act in accordance with [its] plain meaning.”
       5. *Deference – less PF:* some need to defer to Minister's choice of procedures
          • The statute gave the Minister broad discretion to choose whatever procedures she wished for the s. 53(1)(b) stage, as well as in the evaluation of future risk and security concerns.
          • This need for deference must be reconciled with the elevated level of procedural protections mandated by the serious situation of refugees like Suresh, who may face torture or other violations of their human rights if deported. Canada cannot be complicit in this constitutionally, nor under its international treaty obligations.
          • Weighing all the factors, the court concluded that s. 7 does not require that a full oral hearing or complete judicial process be conducted in this case, but Suresh should get more than the minimal protections he received. Specifically, it concludes that Suresh is entitled to:
             ◆ Notice
             ◆ Disclosure of any materials that the Minister based her decision on (subject to privilege and/or national security concerns)
             ◆ An opportunity to respond/make submissions
                ➢ While the Minister accepted written submissions from Suresh, without access to the material the Minister received from her staff and on which she based her decision, Suresh had no way of knowing which factors he needed to address.
                ➢ Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him/her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.
             ◆ Written reasons for the decision
• The court said these must articulate why there are no substantial grounds to believe that the individual will be subjected to torture, execution, or other cruel/unusual punishment, why the Minister believes the subject to be a danger to the security of Canada (subject to privilege), and must be from the person making the decision, i.e. the Minister, rather than in the form of advice/suggestion of an immigration officer.

• NOTE: *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador* raises serious doubt that inadequate reasons will give rise to violation of PF → rejects proposition that adequacy of reasons is stand-alone basis for quashing decision (non-constitutional context) → net result is that if reasons are provided at all it seems the duty has been complied with, and that the adequacy of those reasons will be assessed together with the outcome in substantive review, perhaps on R rather than C standard

**Key Points:**
- In order to pass the threshold a refugee must show *prima facie* that there is a real risk of torture before being entitled to the above requirements under s. 7.
- Canada’s interest in combating terrorism must be balanced against the refugee’s interest in not being deported to torture.
- The minimum content of the duty of fairness to meet the requirements of fundamental justice are:
  - access to all relevant information the administrative decision maker intends to rely on;
  - at minimum a written submission with regard to his danger to Canada and the risk of torture; and reasons.
  - Section 7 does not mandate a full oral hearing.

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**RIGHT TO STATE-FUNDED LEGAL COUNSEL**

- Neither PF nor ROL in admin setting requires the state to fund legal representation
- BUT in certain circumstances, where decision impairs s.7 interest, state must provide the individual w/legal counsel in order to satisfy requirements of PFJ

**NEW BRUNSWICK (MINISTER OF HEALTH AND COMMUNITY SERVICES) V. J.G.**

**Facts:**
- NB Minister of Health and Community services was granted custody of the app’s 3 children for 6 months - wanted to extend it another 6 months. The appellant was very poor and receiving social assistance - applied for legal aid to get lawyer in opposing Minister’s application for an extension - was denied b/c custody applications were not covered under legal aid guidelines. App sought a declaration that the rules and policies governing the distribution of legal aid violate s.7 of the Charter - she argues that s.7 mandates state-funded counsel.

**Issue:**
- If the proceedings had taken place without the parent being represented by counsel, would this have violated s. 7?
- Does s. 7 require state funded counsel in such circumstances?

**Held:**
- Yes, state has a **constitutional obligation** to provide appellant with state funded counsel in the particular circumstances of this case.

**Analysis:**
1) *Is s.7 engaged?*
   - Security of person engaged by removal of children;
• To trigger section 7 on this basis, state action must have a serious and profound effect on psychological integrity
  • The effect of state action must be assessed objectively from the perspective of a person of reasonable sensitivity
  • Need not arise to the level of nervous shock or psychiatric illness but must be greater than ordinary stress or anxiety
• Removal of child from parental custody constitutes a serious interference with psychological integrity of parent
• Note: court was cautious to expand meaning of “liberty” by applying it in this case

2) Deprivation in accordance with POF?  
• Although the state may relieve a parent of custody in order to protect a child’s health and safety, it must be done through a fair procedure (a hearing) that determines whether the removal is in the child’s best interest (paramount consideration)
• Whether a “fair hearing” includes a right to state-funded counsel depends on:
  I. Seriousness of the interests at stake (being a parent, child’s best interests)
  II. The complexity of the proceedings (this is a long, confusing case)
  III. The capacities of the individual to represent him/herself (consider level of education, familiarity with legal system, level of literacy, emotional aspects of the case...)
• Caveat: the court did not say that in every child custody case there would be a right to counsel - must consider above factors
• In this case, the seriousness of the interests, the complexity of the proceedings, and the capacities of the appellant point to the need for state-funded counsel in order to ensure a fair hearing

3) Violation not saved by s.1  
• Violation of s.7 will be difficult to justify under s.1 - “exceptional circumstances” may be required such as “cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like”
• The additional costs are far outweighed by the gross harm that would come if she was not represented.
• NOTE: Although court in Suresh insisted that “the CL [of PF] is not constitutionalized”, the consistent refusal of SCC to find s.7 infringement justified under s.1 signals extent to which right to fair hearing has been constitutionalized

➤ Why counsel required?  
• PFJ gives parent right to fair hearing when seeks custody of children; this means parents must have opportunity to present their case effectively; effective participation necessary b/c decision must be based on full information about where the best interests of the child lie - parent is important source of relevant information

➤ Remedy: provided w state funded counsel; this is an expensive remedy so case is limited to state-funded counsel in child apprehension cases

UNDUE DELAY

• Undue delay in resolution of HR complaint COULD infringe security interest protected under s.7 → could result in stigmatization and impairment of psychological integrity of alleged wrongdoer
• BUT threshold to cross is VERY HIGH – unlikely delay could actually constitute infringement of s.7
EX PARTE, IN CAMERA HEARINGS

CHARKAOUI V. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (2007, SCC)

❖ Facts:
  ➢ Canadian security agencies alleged that Chark. (a permanent resident) was involved with a terrorist organization. Minister issued security certificate against him pursuant to s.77 of the IRPA - this led to his detention pending deportation.
      ▪ Two ministers can jointly issue security certificates against either permanent residents or foreign nationals on various grounds, including connection w terrorist activities - issuance of certificate enables immediate detention and triggers a process that can lead to deportation.
      ▪ Certificates are reviewed by federal court judge to determine if the certificates are reasonable (i.e., conducts a “reasonableness review”):
         ♦ Key features of “reasonableness review” process:
            ◆ Conducted in camera and ex parte vis a vis any sensitive information that the state ought to rely on and that could jeopardize national security or the safety of others
            ◆ Named person and counsel not allowed to have access to such info, but the judge can rely on it in assessing reasonableness of the certificates
            ◆ J provides named person w summary of “case against” evidence but must not disclose sensitive information
            ◆ If certificate is found to be reasonable, the decision is not reviewable and the certificate becomes a removal order
  ➢ Issue:
     ➢ Does the procedure under the IRPA for determining the reasonableness of the certificate infringe s. 7 of the Charter, and if so, is the infringement justified under s. 1 of the Charter?
❖ Held:
  ➢ Breach of s.7 not saved by s.1. Therefore process unconstitutional and struck down - order suspended for 1 year to give government time to change the law.
❖ Analysis:
  ➢ 1. Is s.7 engaged?
      ▪ yes, liberty is engaged: person named in certificate can face detention pending outcome of proceedings
      ▪ security of person may be engaged; detainee may be removed from Canada to place where they face risk or torture and/or where life/freedom is threatened
  ➢ 2. If yes, deprivation in accordance with POFJ?
      ➢ Need to ask if the process is fundamentally unfair to the affected person → the greater the effect on liberty = greater need for procedural protections to meet duty of fairness and requirements of PFJ
      ➢ deprivation of liberty in this case contrary to POFJ b/c of non-disclosure issues (no ability to know case against and respond to it)
      ▪ Procedures required to conform to the POFJs must reflect the exigencies of the security context; but they cannot be permitted to erode the essence of s.7
      ▪ While national security concerns should be taken into account, the overriding issue in case is nature & seriousness of interest at stake (i.e., the lengthy detention)
      ▪ POFJs require that before state detains people, it must accord them fair judicial process meaning:
         ◆ the right to a hearing before an independent and impartial magistrate, on the facts and the law
• the right to know the case against them, and right to answer to that case
• The secrecy required by the statutory scheme means that named person may never know the case he or she has to meet, because may be based, in whole or in part, on undisclosed material
• In this case there was a hearing before independent/impartial judge but hearing was not on the facts/law
• If named person doesn’t know case against and is not present at hearing cannot put relevant evidence before judge (judge is restricted to evidence put before them to make decision)
• “The fairness of the IRPA procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and law, and reflects the named person’s knowledge of the case to meet. The judge, working under the constraints imposed by the IRPA, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her.” [para 63]

❖ 3. Violation of s.7 saved by s.1?
  ➢ no, scheme does not choose the least intrusive measures; as there are alternatives for keeping the info secret
  ➢ eg. special advocate system is not perfect but better protects s.7 interests without compromising security
  ➢ NOTE: Canada has since amended IRPA to provide for special advocate

SPECIFIC PROCEDURAL ISSUES

SPECIFIC CONTENT ISSUES - PRE-HEARING ISSUES: NOTICE, DISCOVERY AND DISCLOSURE

❖ Notice
  ➢ Starting point for participation in any d/m process
  ➢ Qs of who, what, when, where, why and how a decision is to be made
  ➢ Is it sufficient?
    • Must comply with Tribunal’s enabling statute or procedural code
    • Must comply with CL requirement to provide sufficient detail to enable party to know what is at stake in hearing
  ➢ General Rule: Notice must be adequate in order to afford those concerned a reasonable opportunity to present proofs and arguments, and to respond to those presented in opposition
  ➢ Notice is an ONGOING duty → arises prior to the making of a decision and continues throughout the course of decision-making process → party whose rights/interests are at stake must be kept apprised of any relevant issues

❖ Disclosure
  ➢ Stinchombe principles of disclosure (Crown must disclose “all relevant material” does NOT apply in admin law context (May v Ferndale Institution)
  ➢ BUT duty of PF generally requires d/m to disclose info he/she relied upon – individual must know the case to meet
  ➢ Tribunals required to hold oral hearings usually have disclosure obligations spelled out in procedural rules
  ➢ Extent of disclosure obligation also governed by CL
Degree of disclosure required varies depending on the nature of the tribunal and the nature of the interest affected (May v Ferndale Institution)

- Duty of PF is satisfied if party has sufficient info to make informed submissions in regard to a particular matter

### Specific Content Issues at the Hearing Stage

#### Oral or Written Hearings?

- Factors to be considered in determining what form of hearing is required MAY or MAY NOT be listed, or may be expressed in general terms only
- Whether oral hearings is required at CL depends on (Khan):
  - Seriousness of the interest at stake
  - Whether there is a significant credibility issue
- Oral hearings not typically required to reach informed decision on admin law matter
- Oral hearing will be required where decision depends on findings of W credibility (Singh)
- Need to balance fairness and efficiency concerns

### Khan v. University of Ottawa

- **Facts:**
  - K failed her evidence exam in 2L. Instructor graded exam on contents of 3 exam booklets - but Khan said she handed in a 4th booklet. 4th booklet could not be found. She appealed her failing grade to Faculty Exam Committee and then Senate Committee. No oral hearing was given and each Committee dismissed application on basis that she had failed to demonstrate any error or injustice in grading her exam. Her failing grade in Evidence lowered her GPA below level required to pass - she failed 2L. Had to complete additional semester of courses before she could graduate. K applied for JR, contending each committee denied her PF.

- **Issue:**
  - Did duty of fairness in this case require an oral hearing?

- **Held:**
  - Yes, oral hearing required.

- **Analysis:**
  - **Laskin**
    - University committees/appeal tribunals must act fairly when they review student grades - duty of fairness (has passed threshold)
    - Court relied on Singh > if there is a serious issue of credibility there should be an oral hearing
    - **Rule:** when a really important decision turns on credibility, a d/maker should not make an adverse finding of credibility w/out affording the affected person an oral hearing
      - In this case, decision is *extremely important*: effect of failed year may be very serious for university student - it can delay/end career of student, may render valueless previous academic successes and it may foreclose further education > professional interests at stake
      - In this case, decision turned on credibility - the question was whether she had written a fourth booklet, and the answer depended on whether the committee believed her or not aka whether she was lying.
  - **Note:** there would have been "reasonable prejudice" to Khan if PF was denied
  - **Dissent:** Finalyson J
Khan given opportunity to provide a full and detailed written report about reasons why she deserved relief and took advantage of that opportunity.

- Distinguishes *Singh*; *Singh* was about Charter interests, and there are no Charter interests here.
- The issue was not that serious - the consequence was not expulsion, she would not have been kicked out of the legal profession – merely delayed by one semester in order to demonstrate necessary standard – not solely due to failing grade in class but also low grade point average overall.
- This was not a matter that turned on credibility - no allegations made against app., no accusations of dishonesty, proceedings were not adversarial in nature. App had not been charged w cheating on exam or with any other disreputable conduct.

**Key Points:**
- An oral hearing should be granted where:
  - Credibility is a serious issue; and
  - Where the consequences to the interest at stake are grave.
- An oral hearing should include an opportunity to appear, to make oral representations, and correct or contradict circumstantial evidence on which the decision might be based.

**RIGHT TO COUNSEL?**

- There is no general constitutional right to counsel (*BC v Christie*).
- Where NO oral hearing → party MAY be represented by counsel.
- Where there IS oral hearing → right to be represented by counsel/agent is assumed and sometimes the statute itself will require it expressly.
- s.32 ATA (if applicable) provides that a party may be represented by counsel or an agent.
- Issue from PF perspective is when counsel is necessary to give indiv. adequate opportunity to be heard/make his/her case.
- Where deprivation of L/L/SOP is at stake, PFJ MAY require provision of counsel.
- 3 Factors to consider in regard to state funded counsel as a matter of “fundamental justice” (NB Minister of Health):
  1) the seriousness of the issues and the impact of the decision: what’s at stake?
  2) the complexity in terms of the process and the law: will questions of law arise in the proceedings?
  3) the capacity of the person affected by the proceedings to understand the process and to participate w/out the assistance of counsel.
- [possible off-setting factors to argue against counsel in certain cases = need for speed, informality, economy in d/making and whether involvement of lawyers would impair those goals]

**DISCLOSURE OF "THE CASE AGAINST" (RIGHT TO A DECISION “ON THE RECORD”)**

**KANE V. BOARD OF GOVERNORS OF UBC**

- Kane holds tenured position as prof at UBC. Faculty recommended that he be terminated for cause in 1977 because alleged that she made improper use of the university computer facilities for personal purposes and improper use of his research grant for private work. Following meeting with university president, at which K and his counsel were present, dean recommended that K be suspended w/out
salary for 3 months and be required to make financial restitution to Uni. President acted on Dean's recommendation.

- **K appealed** to board of governors - oral hearing where Kane answered questions. President attended as member of the Board and answered questions directed to him by Board. At end of meeting, Chairman requested Kane and his counsel leave so Board could deliberate - president was present throughout deliberations. Didn’t participate in discussions or vote on resolution but answered questions directed to him by board members. Board approved 3-month suspension w/out pay.

**Issue:**

- Was PF violated because there was no disclosure of the president’s answers when Kane was absent?

**Held:**

- Violation of PF because **disclosure required.**

**Analysis:**

- Duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a Board of Governors of a University, sitting in appeal, pursuant to legislative mandate.
- The tribunal must observe natural justice → to abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.
- A high standard of justice is required when the right to continue in one's profession or employment is at 'stake. A disciplinary suspension can have grave and permanent consequences upon a professional career.
- The tribunal must listen fairly to both sides giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views.
- In this case, representations were made in the absence of Kane - he was not present to hear additional facts presented by president
- The Board should have postponed further deliberation until K might be present and hear additional facts adduced OR, at the very least, should have disclosed those additional facts to Kane and afforded him a real and effective opportunity to correct/meet any adverse statements made - a party must know the case which is made against him
- Unless expressly or by necessary implication empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny.
- The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so.
- **Note:** Kane also argued that there was bias but the court did not rule on this issue

**Ritchie J (dissent):** K knew from the outset exactly what it was that he was charged with, and he had an opportunity to present his case and to examine the Ws against him; could not be suggested that the President decided to wait until K was absent before providing the members of the Board with additional facts (no bad faith); too slender a thread upon which to support an accusation of such gravity against men of presumed integrity acting under a statutory authority.

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**EVIDENCE AND CROSS-EXAMINATION**

- Denial/limitation of a party’s ability to present evidence or to cross-examine witnesses could amount to a breach of PF if it prevents the party from being heard (from contesting the case against and from affirmatively putting the party’s case)
- **Guiding principle:** party should have an ability to present and test evidence that is **adequate and reasonable** in the circumstances
What is required varies in relation to level of PF required and nature of proceedings at issue

Right to call and cross-examine Ws usually part of right to oral hearing

- BUT not absolute → adm controls their own procedures and may limit exercise of that right

Right is NOT to be withheld on basis of a judgment by Tribunal that it is of limited utility (Innisfil v Vespra)

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**POST HEARING ISSUES: WHEN IS THERE A DUTY TO GIVE REASONS?**

Two Main Questions:
- Is there a duty to give reasons in the circumstances?
- Were the reasons adequate to satisfy the duty?

**BAKER (REASONS ISSUE)**

- Duty to give reasons required in two circumstances... and in “other circumstances”
- L’H-D:
  - “In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of PF will require the provision of a written explanation for a decision”. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.”

**Key Points:**
- If decision has important significance for the individual
- If statutory appeal process exists to facilitate the workings of that process (i.e., can’t determine whether appeal is required if no explanation for first decision provided)
- In other circumstances... Baker left open residual discretion for courts to provide reasons in “other circumstances” AND contemplates flexibility in complying w duty to provide reasons (requirement is to provide “some form” of reasons)
- Here - Court accepted that informal notes of prepared by IO for the advice of another satisfied the duty

**NEWFOUNDLAND AND LABRADOR NURSES’ UNION (2011, SCC)**

- Only question of PF is whether reasons have been given, adequacy or quality of reasons is a question of substantive review.

**Facts:**
- union disputed an arbitrator’s award which involved the calculation of vacation benefits; issue was whether time as a casual employee could be credited towards annual leave entitlement if EE became permanent; arbitrator concluded that it was not to be included in calculating the length of vacation entitlements; on JR the arbitrator’s reasons were found to be insufficient and therefore unreasonable and the decision was set aside; majority of the CA agreed with the arbitrator.

**Issue:**
- Were the reasons of the arbitrator insufficient so as to violate PF?

**Held:**
- NO – sufficiency of reasons goes to substantive review (SOR of reasonableness) not PF (SOR of correctness) and here reasons show that arbitrator came within range of reasonable outcomes

**Analysis:**
ABELLA J:

Dunsmuir confirmed that reasonableness is a deferential standard: “Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.”

Court endorses statement by Professor Dyzenhaus that deference requires “respectful attention to the reasons offered or which could be offered in support of a decision”

This represents a respectful appreciation that a wide range of specialized ADMs render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decision that are often counter-intuitive to a generalist.

Dunsmuir does NOT stand for the proposition that the “adequacy” of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result. It is a more organic exercise — the reasons must be read together with the outcome, and serve the purpose of showing whether the result falls within a range of possible outcomes.

Reasons need not include all the arguments or details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.

Reviewing judges should pay “respectful attention” to the decision-maker’s reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

“perfection is not the standard” → reviewing courts should ask whether “when read in light of the evidence before it and the nature of its statutory task, the Tribunal’s reasons adequately explain the bases of its decision” (Canada Post Corp v Public Service Alliance of Canada)

Baker DOES NOT say that reasons are always required, or that quality of reasons is Q of PF: “It strikes me as an unhelpful elaboration on Baker to suggest that alleged deficiencies of flaws in the reasons fall under the category of a breach of the duty of fairness and that they are subject to a correctness review...[I]f there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis”

Here, court found that the reasons showed that the arbitrator was alive to the question at issue and came to a result well within the range of reasonable outcomes.

Court also considered that goal of arbitration is to resolve disputes as quickly as possible knowing that there is relieving prospect of negotiating new CA w/ different terms; process would be paralyzed if arbitrators were expected to every argument or possible line of analysis

ALBERTA (INFO AND PRIVACY COMMISSIONER) V. ALBERTA TEACHER’S ASSOCIATION
(2011, SCC)

❖ Where no explicit reasons given on issue raised at JR – reviewing court should give respectful attention to the reasons “which could be offered in support of a decision”

❖ Facts:

➢ The Information and Privacy Commissioner received complaints that the Alberta Teachers’ Association (“ATA”) disclosed private information in contravention of the Alberta Personal Information Protection Act (“PIPA”); an adjudicator delegated by the Commissioner issued an order,
finding that the ATA had contravened the Act. The ATA applied for JR of the adjudicator’s order; ATA made new argument in at JR and chambers judge quashed adjudicators decision on that basis; CA upheld chamber judge's decision

- **Issue:**
  - How might a court give adequate deference to a tribunal when a party raises an issue before the court on JR, which was never raised before the tribunal and where, the tribunal provided no express reasons with respect to the disposition of that issue?

- **Held:**
  - reviewing court should give respectful attention to the reasons “which could be offered in support of a decision”; if reasonable basis for decision court should not interfere

- **Analysis:**
  - Where the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear because the issue was not raised before the tribunal.
  - where the tribunal’s decision is implicit, the reviewing court cannot refer to the tribunal’s process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal’s decision-making process → cannot give respectful attention to the reasons offered because there are no reasons.
  - However, in these circumstances a reviewing court should give respectful attention to the reasons “which could be offered in support of a decision” (NFL Nurses Union) → may well be that the adm did not provide reasons because the issue was not raised and it was not viewed as contentious → If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.
  - HOWEVER this direction is not a “carte blanche to reformulate a tribunal’s decision in a way that casts aside an unreasonable chain of analysis in favour of the court’s own rationale for the result” (Petro-Canada v. Workers’ Compensation Board (B.C))
  - this direction should also not “be taken as diluting the importance of giving proper reasons for an administrative decision” (Canada (Citizenship and Immigration) v. Khosa)
  - Deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided.
  - BUT When there is no duty to give reasons or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.
  - In some cases, it may be that a reviewing court cannot adequately show deference to adm w/o first providing the adm the opportunity to give its own reasons for the decision → may remit the issue to the tribunal to allow the tribunal to provide reasons.
  - HOWEVER, remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making
  - SO when a reasonable basis for the decision is apparent to the reviewing court, it will generally be unnecessary to remit the decision to the tribunal. Instead, the decision should simply be upheld as reasonable.
  - On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one.
In this case, a review of the reasons of the Commissioner and the adjudicators in other cases allows this Court to determine without difficulty that a reasonable basis exists for the adjudicator’s implied decision in this case.

PROCEDURES AND THE ADMINISTRATIVE TRIBUNALS ACT

- The ATA provides a number of provisions that set out powers relevant to administrative tribunals. These provisions are generally enabling – creating authority for the tribunal to do certain things, as opposed to requiring them to do things in a particular way.
- It is important to know that specific provisions of the ATA apply to a particular tribunal only if the enabling statute that establishes the tribunal so provides – and only to the extent that the enabling legislation so provides. That is, the ATA can apply “piecemeal” or not at all.
- Accordingly, to determine whether a particular provision of the ATA applies to a particular tribunal, you need to consult that tribunal’s enabling legislation.
- This “opting in” aspect of the ATA is underscored by the definition of “tribunal” in section 1 of the ATA: “tribunal means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal’s enabling Act.”
- There are approximately 31 administrative tribunals in B.C. and some or all of the provisions of the ATA have been made applicable to 26 of them at this point.
- **There are essentially 2 main “parts” of aspects to the ATA:**
  1. Provisions related to the appointment of tribunal Chairs and Members (ss. 2 – 10)
  2. Provisions related to tribunal powers – “a menu of powers” (ss. 11-61)

SUMMARY OF KEY ASPECTS OF THE ADMINISTRATIVE TRIBUNALS ACT

- **The most noteworthy provisions in regard to appointments are:**
  - ss. 2 and 3 provide for a merit-based process for appointments of Chairs and tribunal members and deals with some of the Chair’s powers
  - s.8 provides: “The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.”
  - s. 10 provides that tribunal members must have set remuneration set in accordance with general directives of Treasury Board and must be reimbursed for reasonable travelling and out of pocket expenses incurred in carrying out their duties.
- **NOTE:** ss. 8 and 10 are relevant to establishing the independence of the tribunal.

ADMINISTRATIVE TRIBUNALS ACT

- **s. 11** gives tribunals to which it applies the power to make rules re practice and procedures regarding a wide variety of matters such as
  - giving notice to parties
  - pre-hearing conferences
  - dispute resolution
  - disclosure and discovery
  - hearing procedures
  - effect of non-compliance with rules
- **ss. 12 and 13** give power to make non-binding practice directives, including directives that establish time periods for procedural steps and that set out the usual time taken to render a decision
ss. 14-18 provides various powers to make orders to enforce the tribunal’s rules and to control its proceedings; to make interim orders, to authorize consent orders, and to give effect to a settlement through making an order; it is also provided that the tribunal has the power to refuse to issue a consent order in some circumstances

ss. 19-21 contain provisions regarding the service or notice or documents, including a power for the tribunal to serve documents by “personal service, mail, electronically, or any other method” and includes specific authorization to effect service by public advertising or other means to give “mass” notice when parties are numerous or it is otherwise impracticable to serve by other means

ss. 22-25 are provisions regarding Notices of Appeal – they concern how to file a notice of appeal to an appellate tribunal and what the content of the notice must be; s. 24 establishes a 30 day time limit for an appeal of this kind, which tribunal is empowered to extend if special circumstances exist

ss. 26-27 provides that the Chair has the power to set hearing panels and to designate a chair for a panel; these provisions also specify that a panel has the same powers as the tribunal does

s. 28-29 authorizes the Chair to appoint a staff member, tribunal member or other person to conduct a dispute resolution process and provides that such persons cannot then hear the merits of the case if it proceeds without the consent of the parties; these provisions also provide for non-disclosure of what goes on in a DR process

s. 31 sets out the circumstances in which a tribunal can summarily dismiss a matter (these include: where the matter is: beyond the jurisdiction of the tribunal; out of time; frivolous, vexatious and trivial; made in bad faith or for an improper purpose or motive; has appropriately been dealt with elsewhere; has no reasonable prospect of success; or has not been diligently pursued by a party)

s. 32 provides that a party to an application may be represented by a counsel or agent and may make submissions as to the facts, law and jurisdiction

s. 33 allows a tribunal to permit interveners if satisfied that (a) they can make a valuable contribution or bring a valuable perspective and (b) that the potential benefits of the intervention outweigh any possible prejudice to the parties; the tribunal can also specify (limit) the role of interveners

s. 34 provides for the summoning of witnesses and the production of documents or things

s. 35 allows the tribunal to transcribe or tape-record its proceedings

s. 36 authorizes tribunal to hold written, electronic or oral hearings or any combination thereof

s. 37 allows for joinder of applications that raise the same or similar issues

s. 38 allows a party in an oral or electronic hearing to present evidence, make submissions and call, examine, and cross-examine witnesses as reasonably required

s. 39 deals with adjournments

s. 40 deals with the admissibility of information (evidence) and provides that a tribunal can admit information (evidence) even if it would not be admissible in a court of law but with the exception that nothing that would be privileged (and inadmissible on that basis) under the rules of evidence, is admissible before a tribunal

ss.41 and 42 provide that an oral hearing must be open to the public but preserves the ability of a tribunal to hear information in camera if this is desirable

ss. 43-46 deal with the authority of a tribunal to hear and consider constitutional matters; there are 3 alternatives that could potentially be adopted in this regard

- S. 43 - tribunal has jurisdiction to hear all questions of fact, law or discretion that arise in any matter before it, including constitutional questions (i.e. both division of powers and Charter issues); at this point, only the Labour Relations Board and the Securities Commission have this power

- S. 44 tribunal has NO jurisdiction to hear constitutional issues; this is the most common situation at present
- **S. 45** tribunal has jurisdiction only over constitutional division of powers matters but not over Charter issues; at this point, the Employment Standards Tribunal, the Human Rights Tribunal, and the Farm Industry Review Board have this jurisdiction

- **NOTE:** in cases where the tribunal does have full or partial constitutional jurisdiction, the tribunal may state a case to the court on the constitutional question and MUST do so on the request of the AG (notice of any constitutional question raised must be given to the AG)

- **s. 47** provides powers to make orders for costs and expenses – tribunal can order
  - party to pay costs of another party or an intervener
  - intervener to pay costs of a party or other intervener
  - party to pay costs and expenses of the tribunal if the conduct of the party has been improper, vexatious, frivolous or abusive

- **ss. 48 and 49** deal with powers to maintain order at hearings and in particular allow a tribunal to apply to a court if a person summoned as a witness has breached an order to attend a hearing, take an oath, answer questions or produce records and the court could then make a contempt order

- **s. 51 -52** provides that the tribunal’s final decisions must be in writing and must include reasons; a copy of the decision and reasons must be given to all parties and interveners unless it is impracticable to do so because of numbers and in that case the tribunal may give reasonable notice of its decision by other means such as public advertisement

- **s. 53** allows for corrections of clerical, mathematical or other accidental or inadvertent errors in a final decision to be made within 30 days of the decision being made

- **s. 54** provides that an order of the tribunal can be filed in court and it then is treated as an order of the court for enforcement purposes

- **s. 55 and 56** provides that tribunal members cannot be compelled to testify regarding information obtained in the discharge of their duties except in a criminal proceeding; tribunal decision-makers also have immunity from legal proceedings for acts or omissions done in good faith in the performance of their duties

- **s. 57** provides that there is a 60 day time limit to commence an application for judicial review of a tribunal’s decision although the court has power to extend this time limit in certain circumstances

- **s. 58 – 59** deal with the standard of review that a court is to apply to the decisions of a tribunal in particular circumstances – we will deal with these provisions in detail later in the course

- **s. 60** provides that the Lieutenant Governor in Council can make regulations for various matters related to a tribunal this includes regulations that prescribe: rules of practice and procedure; tariffs of fees that can be charged; the circumstances in which costs orders can be made; and tariffs of costs payable when costs orders are made

- **s. 61** excludes the application of certain provisions of freedom of information legislation to tribunal members in relation to various kinds of records made in the decision-making process

### BIAS & IMPARTIALITY AS GROUNDS FOR CHALLENGE UNDER PROCEDURAL FAIRNESS

### BIAS ISSUES: GENERAL PRINCIPLES AND THE BASIC TEST FOR RAOB

- **Reasonable Apprehension of Bias**
  - Situations relate to perceived partiality either on the part of an individual decision-maker or on an institutional level
  - Traditional concerns about bias – for example, a direct pecuniary interest, stem from easy to understand occurrences that would be fatal to any decision making system
➢ Others stem from the nature of the administrative state, which comprises of a wide range of administrative actors, with very different natures and purposes

➢ List of situations: appearance of perceived attitudinal bias in the decision making process, concern about the practices used by administrative bodies to promote consistency and efficiency in their work
  - For example, full-board meetings and the use of “lead cases”

➢ The Rule Against Bias
  - *Nemo judex* rule aims to maintain public confidence in the administration of justice → rule against bias contributes to this function by ensuring decision makers are not reasonably perceived to be deciding matters that will benefit them or those with whom they have significant relationships
    - Prevent decision-making partiality that will result in negative treatment of a party b/c of interests and relationships, as well as preventing decisions based on factors that are irrelevant
      - Concern regards the decision-maker’s: current or prior knowledge, relationships, actions, or practices
  - Allegations of RAOB exist in two major forms
    - Perceptions of individual bias
    - Perceptions of institutional bias: reasonable perceptions of partiality regarding the decision-making body as a whole
  - One of the oldest CL doctrines
  - All ADMs required to meet the requirements of PF are subject to rule against bias
  - Allegation of perceived bias must be brought to the decision maker by the party alleging it on the first available occasion
    - If successful → quash decision made and have proceedings reheard by a new panel

➢ The Reasonable Apprehension of Bias Test
  - Test for bias relies on perception
    - Whether bias actually exists is **not** the question → to have a decision quashed, it is sufficient that a reasonable person with an informed understanding of how the tribunal functions **perceives** that the decision making is biased
  - Classic test was formulated in *Committee for Justice and Liberty v National Energy Board*
    - The chair of the panel of the NEB was responsible for receiving applications and issuing certificates for a pipeline
    - The chair had previously been involved in a study group that had put in an application for consideration
    - SCC held that there was a reasonable apprehension of bias wrt his participation as chair
    - Test was formulated in the dissenting opinion of DeGrandpre:
      - “The apprehension of bias must be a reasonable one and held by reasonable and right-minded persons, applying themselves to the question and obtaining theron the required information. In the words of the Court of Appeal, that these is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?” [at 394]
  - **components of the test**
    - reasonable person
    - right-minded person (not overly suspicious)
    - must have all the info
must think the info through

- **The grounds for RAOB must be substantial**
  - A real likelihood or probability of bias should be demonstrated
  - Mere suspicion of bias is insufficient for the test to be met
  - Courts often talk of demonstrating the likelihood of bias on a balance of probabilities
  - The reasonable well informed person is not one that is oversensitive! (Committee for Justice and Liberty)

- The standard for bias varies, depending on context

- Ex: while both cases dealt with a decision-maker’s prior involvement with a particular matter, the involvement of the NEB’s chair caused a RAOB in Committee for Justice and Liberty, but did not when the Quebec minister of the environment ordered a company to prepare a site characterization study and decontam measures in *Imperial Oil*
  - Why this difference?
  - The nature and context of the decision making process drive the content of PF, including what constitutes impartiality [page 257 text]
  - Quasi-judicial nature of the NEB vs work done by minister in *imperial Oil* did not require him to act in a truly adjudicative capacity [political and in public interest]

- Determining which procedural safeguards, including the degree of impartiality, are needed is a matter of balancing several factors. The SCC presents a list of non-exhaustive list in *Baker* (the Baker 5)

- **Quotes from cases:**
  - “procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision maker (*Baker*)
  - “the duty to act fairly includes the duty to provide procedural fairness to the parties. That cannot exist if an adjudicator is biased” (*Newfoundland Telephone*)
  - “the duty of impartiality, which originated with the judiciary, has now become party of the principles of administrative justice” (*Imperial Oil*)

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**REVIEW OF BAKER (RE: BIAS)**

- **Facts:**
  - B. entered Canada from Jamaica as visitor in 1981 and stayed illegally; worked as a domestic worker for 11 years; had 4 children in Canada [1985, 1989 (twins) 1992]
  - became ill: post partum depression/paranoid schizophrenia diagnosed after last child born (1992) and B. went on welfare; father took custody of 2 children; other 2 were placed in foster care for a time, then returned to B when her condition improved
  - Dec. 1992 B was ordered deported when it was found that she had worked illegally in Canada and overstayed her visitor’s visa [wd have been shortly after the birth of the last child]
  - 1993 B applied for exemption on humanitarian and compassionate grounds to allow her to remain in Canada to apply for PR status from within Canada [generally under the Act, applicants for permanent residence must apply from OUTSIDE Canada]
  - under *Immigration Act* s. 114(2) and Regs, the Minister has delegated authority to facilitate admission to Canada of a person *where the Minister is satisfied*, owing to the existence of humanitarian and compassionate grounds, that admission should be facilitated or that an exemption from the regulations made under the Act should be granted [the exercise of this ministerial discretion is referred to as the “H and C” decision]

- **Issue:**
Were the principles of PF violated?

Was there reasonable apprehension of bias (RAOB) in the making of the decision?

**Held:**

Yes, there was a RAOB in the circumstances (Lorenz's notes showed bias tainted the decision-making process)

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**R. V. S. (R.D.)**

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**Judge:** Police officers and “over-reacting” to non-whites -> no RAOB

**Facts:**

Judge made decision using her own perspective on things

**Issue:**

Is there bias?

**Decision:**

No, judge was relying appropriately on her own life experience and her own knowledge.

**Para 109:** “When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a RAOB” “actual bias need not be established”

**Legal Principle:**

RAOB test has a two-fold objective element [para 111]

1. person considering the alleged bias must be reasonable and
2. the apprehension of bias must also be reasonable in all the circumstances of the case

ALSO this reasonable person must:

1. be informed of all relevant circumstances; and
2. not have a “very sensitive or scrupulous conscience”

AND

the grounds for RAOB must be “substantial”

allegations of bias should not be made lightly [mere suspicion is not enough]

Bias does not demand the impossible

1. does not require judges to discount their own life experiences
2. at what point does an attitude/position/previous involvement become serious enough to amount to disqualifying bias?
   - When they cannot set their opinions aside in order to hear both sides of the case and come to an impartial decision

“true impartiality does not require that the judges have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind” [para 119]

The onus of demonstrating bias lies with the person who is alleging its existence

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**IMPERIAL OIL LTD. V. QUEBEC (MINISTER OF THE ENVIRONMENT)**

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Similar to NEB but no RAOB

**Facts:**

- Polluter pay scheme
- Minister orders Imperial to pay, but previously supervised decontamination site, failed, and damages claimed against Crown by current owners.

**Issue:**

Is there a RAOB?
Held:

No.

Analysis:

- There was no conflict of interest such as would warrant judicial intervention, let alone any abuse or misuse of power. The Minister acted within the framework provided by the applicable law and in accordance with that law. [39]

- Minister is acting under a complicated and intertwined statutory scheme – court says it’s a misunderstanding to be applying bias in that context, it doesn’t really apply to the minister and what the minister has to do.
  - “the role assigned to the Minister by the legislation sometimes inevitably places the Minister in a conflict with those subject to the law he administers, in the course of the implementation of environmental legislation.”

- It is a discretionary, ministerial decision implementing legislative environmental policy and protecting the public interest.

- What about the Minister’s personal interest? Again, stressing the context of the decision → “the Minister was merely defending, in the context of this case, the inseparable interests of the public and the state in the protection of the environment” [para 37]

- Para 32: stresses a careful examination of the applicable legislation in the analysis

- Para 39: “Having regard to the context, which includes the Minister’s functions viewed in their entirety, as well as to the framework within which his power to issue orders is exercised, the concept of impartiality governing the work of the courts did not apply to this decision”

Legal Principle:

- Some circumstances will not have bias attach to them.

### SPECIFIC EXAMPLES OF INDIVIDUAL BIAS ISSUES

**Pecuniary or Other Material Interests in the Outcome**

- **Perceptions of Individual Bias:**
  - Jurisprudence has established four situations in which a RAOB may arise vis-à-vis an individual decision maker:
    - a pecuniary or material interest in the outcome of the matter being decided
    - personal relationships with those involved in the dispute
    - prior knowledge or information about the matter in dispute
    - attitudinal predisposition toward an outcome
  - an allegation can be brought on more than one ground

**PECUNIARY OR OTHER MATERIAL INTERESTS IN THE OUTCOME**

- **Pecuniary Interest:**
  - Direct pecuniary interest in the outcome of a case is one of the clearest circumstances giving rise to disqualification for RAOB
  - Nemo Judex maxim is designed to prohibit an administrative actor from making decisions that advance his or her own cause
    - Standing to receive monetary gain fits the notion of advancing one’s cause
  - **Energy Probe**: stands for the proposition that only direct and certain financial interest can constitute pecuniary bias [part-time member was not currently a S.H, did not have a K with Ontario Hydro at time of hearing, no certainty would sell cables to Ontario Hydro in future]
Minority: more rational test would be to see if the benefits stemmed from the decision to be rendered and if the benefits would be so sufficiently likely to occur that they would “colour” the case in the eyes of the decision-maker.

- Pecuniary interest may be held not to give rise to RAOB if the decision-maker’s gain is no more than that of the average person in a widespread group of benefit recipients (R v Justices of Sunderland).
- As a general principle, the CL must cede to legislative will → statutory authorization that allows for indirect pecuniary benefit has prevailed over the CL rule against bias in contexts such as the regulation of egg marketing (Burnbrae Farms), and
- For some self-regulated discipline committees (Pearlman) [own self-interest is too speculative and remote to incite RAOB]

**Non Pecuniary Material Interest:**
- other forms of material interest have also led to disqualification
- ex: decision of a band council to evict a band member so that his house could be given to a larger family was set aside because an intended resident of the home was one of the councilors (Obichon)

### PEARLMAN V. MANITOBA LAW SOCIETY

- **Too remote, unreasonable → No RAOB**
- **Facts:**
  - alleged that panel members sitting on his case had a pecuniary interest in the outcome because of the costs provisions in the legislation
- **Issue:**
  - Is there a RAOB?
- **Held:**
  - No.
- **Decision:**
  - no – this is not a situation that amounts to a RAOB
    - the members of the board are not making any profit, they don't really have a pecuniary interest in the matter
    - it is too remote of an interest to give rise to a reasonable apprehension of bias (a reasonable person wouldn’t think that the decision-makers are going to lack impartiality because of this remote interest – whatever tiny benefit there may be will be spread across such a large group)
    - it is a peer reviewed context, entirely appropriate for the legal profession
    - the “costs” which stand to be recouped are in no sense “profits” or “gains” → more of a direct reimbursement
    - “no persona and distinct interest on the part of the Judicial Committee members”
  - = does not itself give rise to a RAOB in the context of self-governing professional organizations
- **Legal Principle:**
  - If a financial interest is indirect, the RAOB test applies.
  - Need to look at whether the decision-makers actually have any pecuniary interest in the decision, and if they do, how remote it is – would a reasonable person think their decisions would be influenced by it?

### PERSONAL OR BUSINESS RELATIONSHIPS WITH THOSE INVOLVED IN THE DISPUTE

- **Personal Relationships with those involved in the dispute**
RAOB may be found where the decision-maker has past or present relationship with those who are directly involved in the decision.

Factors to consider are whether the relationship presents a **significant enough interest** to affect the impartiality of the decision-maker and the amount of **time that has passed** [is the relationship current enough to reasonably pose a significant threat to impartiality?]

- Involvement may be past or present
- Relationship may be direct or indirect so long as the decision-maker has a relationship with those who have an interest in the outcome in the sense that they may either gain a benefit or suffer a detriment as a result of the particular decision

Family, business, professional, associational or friendly relationships (or a history of animosity) can provide grounds for RAOB if it can reasonable be perceived that, because of the relationship, the decision-maker may be (consciously or unconsciously) inclined to favour or disfavour a particular outcome.

**As always in admin law, appreciating the context is vital, and is equally so in determining bias**

- Nature of tribunal itself
- Diversity of decision-making bodies
- Connections between practicing lawyers, for example
- Representative experts populate decision making panels

Additional contextual factors that may diminish the AOB:

- Amount of time that has passed between the active association with the person
- *Marques v Dylex*: labour board member who had previously been a lawyer with the firm acting for an earlier iteration of the union appearing before his panel was not disqualified.
- **Over a year had passed since involvement with the firm**

Necessity can also be a relevant factor

Other conceptions of justice exist: Aboriginal Law

Some communities consider decisions to be fair when rendered by non-strangers whom they know and trust

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**BENNETT AND DOMAN**

- **CEO of company disqualified**

  **Facts:**
  
  - Doman is the head of a big forestry projects company
  - Devine is the head of another company, sits on the board
  - If Doman must step aside, then his competitor could potentially gain
    - Argues RAOB because member’s company stands to benefit if Doman is penalized, b/c he might lose the ability to run his company

  **Issue:**
  - Is there a RAOB?

  **Held:**
  - Yes.

  **Decision:**
  
  - while there was a weak evidentiary basis and the claim was speculative in nature, the facts of bias are relevant but not determinative
  - instead, it is the **perception** of bias that ultimately matters
    - “We are concerned only with the apprehension of partiality”[32]
  - “would a reasonable person think it just that a person sit on a panel evaluating the conduct of someone who is part of the same industry where that individual might be barred?” [37]
"Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs" [36]

reasonable person is “a mythical creature of the law” [39]

Legal Principle:

- If the facts are not determinative, can look at whether there is a reasonable perception of bias.
- If there is, then there will be a RAOB.

**Prior Knowledge or Information about the Matter in Dispute:**

- Ex: situations in which the decision-maker has had some kind of prior involvement with the specific case or issue now before him/her for decision
- in deciding whether RAOB exists → focus on the nature and extent of the decision-maker’s previous involvement
- **Wewaykum Indian Band:** the general principles from this case serve as a foundation for deciding RAOB claims for both judicial and administrative actors with prior knowledge of a matter
  - Property dispute between two first nations bands
  - Binnie’s previous employment as associate deputy minister of justice from ’82 – ’86 was challenged as giving rise to RAOB
    - He had been responsible for almost all litigation against the Canadian government and had supervisory authority over thousands of cases
    - In late ’85 he had participated in a meeting at which the current case was discussed and had received some information about one of the band’s claims
    - But, he was never counsel of record and played no active role in the dispute after the claim was filed → argument Binnie involved in the litigation in a material way was unsubstantiated
- Ex: **SEIU:** entire Ontario Labour Relations Board was found to be disqualified to hear a case before it because of information received earlier at a plenary meeting of vice chairs.
  - Prevented by oath from revealing what they knew, but indicated that the information that was received was contradictory by one or more the parties’ representations.
- More often, issues surrounding prior knowledge arise when a tribunal adjudicator is asked to hear an appeal or a subsequent proceeding of an original matter
  - **Mediation privilege,** which prevents a tribunal member from adjudicating a case that he or she has mediated is an attempt to avoid RAOB issue.

**Examples of prior involvement situations**

- re-hearings
  - decision-maker has already hear matter and now has to reheat it after a successful application of JR
    - generally, if a decision must go back to the same decision-maker, perhaps for reasons of necessity or efficiency, there is no RAOB; however, RAOB may be found in very specific contexts, such as involving clear finding of credibility (ex. BCNU)
  - prior involvement of the decision-maker with the specific case (or with the subject matter arising in the specific case) that stems from a time before the decision-maker joined the tribunal or agency
    - Committee for Justice and Liberty
    - Wewaykim Indian Band
    - Imperial Oil
Overlapping functions within the agency: prior involvement of the decision-maker with the subject matter of a case within the tribunal, before the matter gets to the decision-making stage

Committee for Justice and Liberty v. National Energy Board

- Chair involved in a study group -> RAOB
  - Similar situation to Imperial Oil but RAOB because of quasi-judicial nature of the NEB

Facts:
- McKenzie Valley pipeline
- Company applies to construct pipeline
- Crow has prior involvement with the general issue of whether there should be a pipeline, and has a relationship with the company coming before the board
  - Study → consideration of physical and economic feasibility of a northern natural gas pipeline
- Crow is president of the board

Issue:
- Should Crow be permitted to sit on the board, due to prior involvement with the company?

Decision:
- Majority
  - due to the closeness of the relationship, since Crow had helped to develop the application he was going to be sitting on, it leads to a RAOB
  - invoked policy rationale of public confidence
  - found that Crow didn’t need to sit on this panel
  - “participation of Mr. Crow … cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment on of the issues to be determined on a s.44 application” [para 29]
- Dissent [DeGrandpre]
  - Para 40: sets out RAOB test referred to above
  - important to have experts on these kinds of boards (not judicial or quasi-judicial), and there is inevitably going to be overlap with them and people in the industry
    - test must take into account "the broad functions entrusted by law to the Board" [para 44]
    - "members of administrative boards acquire the expertise by virtue of previous exposure to the industry" [46] → “the system would not work if it were not premised on an assertion of faith in those appointed to adjudicate”

How to distinguish NEB from Imperial Oil?
- Difference between NEB and Imperial?
  - content of procedural fairness [important principle of Admin law]
    - (1): NEB: quasi-judicial nature of NEB = enough to say might be biased [involvement in the decisions leading up to one party’s application to the board was enough to suggest that he might make a biased appraisal]
    - (2): Imperial Oil: word done did not require him to act in a truly adjudicative way [political and public interest]

- ATA: comments in a decision showing a predisposition toward an outcome in a specific case before the decision maker have been held to give rise to a RAOB, but R v RDS comments are ok [re broader social context]
WEWAYKUM INDIAN BAND V. CANADA

❖ **Binnie -> no RAOB**

❖ **Facts:**
  ➢ Property dispute between two first nations bands
  ➢ Binnie’s previous employment as associate deputy minister of justice from ’82 – ’86 was challenged as giving rise to RAOB
    ▪ He had been responsible for almost all litigation against the Canadian government and had supervisory authority over thousands of cases
    ▪ In late ’85 he had participated in a meeting at which the current case was discussed and had received some information about one of the band’s claims
  ➢ Band makes it clear not alleging any actual bias, just the reasonable apprehension of bias

❖ **Issue:**
  ➢ Is there a RAOB?

❖ **Decision:**
  ➢ NO RAOB
  ➢ Binnie recuses, rest of court is able to continue
  ➢ Distinguishable from Comittee
    ▪ Strong presumption of judicial impartiality
      • taking oath, guaranteed status, salary, and independence
      • binnie takes oath not to be biased
      • even if he was, it was an unanimous judgment
    ▪ Nature of involvement and recentness
      • Involvement limited, merely supervisory and administrative
      • While role was more than pro forma, didn’t really get involved
      • Was 15 years prior
  ➢ Even if there was a RAOB for Binnie, there is no way that the other 8 SCC judges could have been tainted

❖ **Legal Principle:**
  ❖ There is reduced chance of finding a RAOB when it involves a judicial decision-maker due to a strong presumption of judicial impartiality. The presumption of impartiality gets stronger the farther up the judge hierarchy you go.
  ❖ In addition, the nature of involvement and the recentness of involvement must be considered. If it was a long time ago, and limited involvement, this will mitigate towards no RAOB.
  ❖ **General Principle:** in deciding whether RAOB exists, will focus on the nature and extent of the decision-maker’s previous involvement

ATTITUDINAL PREDISPOSITION (PRE-JUDGMENT) & DIFFERENT CONTEXTUAL STANDARDS

❖ **Attitudinal Predisposition Toward an Outcome**
  ➢ Predispositions giving rise to a RAOB have come from decision-makers’ comments and attitudes in both the course of the hearing and outside the proceedings
    ▪ **During the hearing**, antagonism toward litigants, ex parte communications, and irrelevant or vexatious comments as well as the adjudicator or any other member of the tribunal taking an unauthorized role as an advocate to the proceeding, have all resulted in RAOB
• **Law Society of Upper Canada v Cengarle:** original hearing panel in this matter had been particularly interventionist
  - “the effect of interventions by a tribunal on the appearance of fairness in any given case must be assessed in relation to the unique facts and circumstances of the particular hearing”
  - Some of the interventions assumed the role of a prosecuting advocate, and intervened excessively → RAOB
  - Issue of how to draw the line between valid, non-adversarial or “inquisitorial” processes

• **Ex parte communications** have also given rise to RAOB [decision-maker speaks privately with one party]

• Sexist, condescending or other irrelevant comments also give rise to RAOB

• Comments in a decision showing a predisposition toward an outcome in a specific case before the decision-maker have been held to give rise to reasonable apprehension of bias
  - Decisions made the DM in previously unrelated cases will generally not give rise to a RAOB
  - but, per RDS, it is possible for comments made by a decision-maker to show understanding of, or to take judicial notice of, the broader social context without necessarily giving rise to a RAOB

• A decision-maker’s alleged attitude/predisposition to the outcome of a case has also arisen through comments expressed **outside the hearing** room about the on-going case
  - In these cases, it has been held that the standard for determining whether disqualifying bias exists should be whether the adjudicator has a **closed mind**
  - What is central is whether the decision-maker is amenable to persuasion or whether his or her comments indicate "a mind so closed that any submission [by the parties] would be futile"  
    - [*Newfoundland Telephone*]
  - The degree to which a prior, fixed view will be accepted by the court is determined by the nature and function of the decision making process
    - For example, in *Old St. Boniface Residents assn:* the SCC held that, because of the nature of municipal governance, it is to be expected that municipal councillors would have advocated a position during election time or before different committees prior to sitting on municipal council on decision of the same issue
    - SCC held the RAOB could not apply to a situation of municipal government like that in St. Boniface, so instead → more appropriate test in light of nature and function of the municipal council is that a councillor be disqualified for bias only if it can be established in fact that a councillor has such a closed mind on a matter that any representations made would be futile

• **Newfoundland Telephone:**
  - Multifunctional administrative body may have varying standards depending on the function being performed
    - Investigations, policy making, and adjudication, for example, may be afforded more freedom to hold a fixed view during an investigative or policy making stage than at an adjudicative stage
  - Despite this general principle, the jurisprudence is not always straightforward as to when the RAOB applies and when the closed-mind test applies
    - For example, in *Chretien* a RAOB was used to evaluate the comments made to the media by the commissioner of a public inquiry.
      - PM Chretien was successful in having the factual findings put aside b/c the commissioner’s media comments made during the inquiry showed prejudgment of the matter
      - SURPRISING! b/c public inquiries aim to determine the facts and do not have binding, enforceable impact
On the basis of SCC jurisprudence, you would have expected the closed mind test here!!! ***

So... are we left wondering about the conceptual framework to apply?

1) The SCC cases regarding municipal councillors such as *Old St. Boniface* suggest that legis functions will not attract a high degree of scrutiny from the perspective of procedural fairness

2) Similarly, cases such as *Newfoundland Telephone* seem to reassert a traditional common-law idea that investigative work does not attract the highest degree of PF b/c the impact on the individual is **not binding**.

1 makes sense because of separation of powers from constitutional doctrines, but 2 is more questionable → impact on individual should be measured in ways that extend past the existence or not of binding order

**Issue**: should public advocacy, like academic publications, that take a particular view, be held to give rise to RAOB?

- This question has remained outstanding in our jurisprudence

**Conclusion**:

- the RAOB test has been held to apply in individual bias cases
- the closed-mind test, which supports a different evidentiary burden, is generally used in conjunction with policy-making and investigatory functions
- What’s interesting here about these tests → variation in standards & the conceptual rationale underpinning them...

**NEWFOUNDLAND TELEPHONE CO. V. NEWFOUNDLAND (SCC, 1992)**

**Statements during and before -> RAOB and closed mind test depend on context**

**Facts**:

- Telephone company has monopoly on telephone services
- Policy-oriented board
- Newfoundland Telephone Co. wanted rates increased – their request was denied, they were told to just cut the wages of their executives.
- They appealed to the Board of Commissioners.
- Wells was on the Board, he made several strong statements against the company’s executive pay policies before a public hearing was held by the Board into the company’s costs – the statements were reported in the press.
- The company’s costs were disallowed – the company argued that there was a reasonable apprehension of bias due to Well’s participation on the panel.
- Wells = consumer advocate and municipal councillor is appointed to the board
  - Says he will play an adversarial role and champion of consumer rights against big salary and big expense plans, wants to protect consumer

**Issue**:

- Did Well’s public statements give rise to a reasonable apprehension of bias?

**Held**:

- Yes, ROAB

**Decision**:

- Yes, RAOB but only because of public statements made after the hearing had started
  - [para 35: The statements made by Mr. Wells before the hearing began on December 19 did not indicate that he had a closed mind]
- Wells made public statements both before and after the hearing date was set → the regular RAOB test applies to the comments made after the hearing started → those comments raised a reasonable apprehension of bias, as he made specific comments about the issue he was deciding
• Note: this is attitudinal bias - public statements made by a decision maker, advocating for one side of the issue
• The Board of Commissioners is a polycentric decision making body
  • Not adjudicative, deals with matters of policy, lots of interests at stake, public interest is key
    ➢ A bifurcated approach for policy-oriented decision-making boards
    ➢ In the pre-hearing approach, the closed mind test applies; must show that they are amenable to persuasion [relaxed standard]
    ➢ Once hearing begins, the regular RAOB test applies, a greater degree is required
      • This test is flexible
      • And → It need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity. [para 39]

Legal Principle:
➢ RAOB standard depends on context
  • Developed a bifurcated approach for policy decision-makers
    • Step 1 – pre-hearing
      ♦ Closed mind test
        ➢ Just have to be amenable to persuasion
    • Step 2 – hearing
      ♦ Regular RAOB test applies
  ➢ This test is flexible
    • “The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal’s nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.”

CHRETIEN V. CANADA

RAOB test – commissioner’s media comments
➢ Expected a closed mind, investigatory

Facts:
➢ application for judicial review in respect of the report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities [Gomery]
➢ Commissioner’s media comments re the Report
➢ Ex: "It’s such a disappointment that the Prime Minister would put his name on golf balls. That’s really small-town cheap, you know, free golf balls."
  • ... Not only was this remark a personal insult directed at the Applicant and his background, but it suggests that the Commissioner had come to the conclusion that the Applicant had acted improperly even before the Applicant appeared before the Commission to give his evidence.” [para 93]

Issue:
➢ Whether Commissioner Gomery breached the duty of procedural fairness by demonstrating a RAOB?

Held:
➢ Yes, a RAOB.

Decision:
... more than sufficient evidence to find that an informed person, viewing the matter realistically and practically and having thought the matter through would find a reasonable apprehension of bias on the part of the Commissioner. The comments made by the Commissioner, viewed cumulatively, not only indicate that he prejudged issues but also that the Commissioner was not impartial toward the Applicant.

Putting aside the fact that the Commissioner prejudged issues in the investigation, there is sufficient evidence in the surrounding circumstances to lead a reasonable person to conclude that the Commissioner was not impartial toward the Applicant.

This is consistent with the decision of the Supreme Court of Canada in Newfoundland Telephone, wherein Justice Cory, writing for the Court, held that where a reasonable apprehension of bias is found to exist on the part of a tribunal, its decision must be treated as void."

Legal Principle:

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

**Statutory Authorization Defence**

- statutory authorization is a defence to a RAOB
  - it ousts the common law
    - only thing to overrule it is the use of a rights document
  - must still go through process to see if there is a RAOB, before looking for the defence
    - the defence makes it so that there is no reasonable apprehension of bias

**CUPE v. ONT. (MINISTER OF LABOUR)**

Clear statutory provision ousts common law

Facts:

- In early 1998, the Minister appointed 4 retired judges to chair several HLDAA arbitration boards
- The judges were not appointed by mutual agreement and their names did not appear on the “agreed” list.
- The unions objected on the ground that this action breached their understanding about a return to the status quo and had been taken without prior consultation.
- They also made several other allegations, including an allegation that the Minister had a duty to act impartially in appointing the retired judges and had failed to do so.
- The following extract from the judgment of Justice Binnie, for the majority in the Supreme Court of Canada concerns only the latter allegation. As indicated below, this allegation squarely raised the defence of statutory authorization.]

Issue:

- Was there a RAOB, requiring that the Minister delegate his appointment duties to someone else?

Decision:

- Yes, but statutory authorization was a TOTAL DEFENCE
- Here, the legislature specifically conferred the power of appointment on the Minister. He can appoint whoever he wants and can choose whatever method to appoint – the statute is clear and unequivocal
117 The legal answer to this branch of the unions’ argument, however, is that the legislature specifically conferred the power of appointment on the Minister. Absent a constitutional challenge, a statutory regime expressed in clear and unequivocal language on this specific point prevails over common law principles of natural justice.

122 ... the legislature’s choice of the Minister as the proper authority to exercise the power of appointment is clear and unequivocal.

Legal Principle:
The defence of statutory authorization is a complete defence. The court will normally require clear and unequivocal language before ousting the common law requirement of impartiality.

NEW DIRECTIONS: ABORIGINAL ADMINISTRATIVE LAW

Self Government
Consider relationship between self-government and admin law – who has the authority to monitor accountability of FN ADMs and what are the standards against which accountability should be judged in those circumstances?

4 general forms of self-government
- sovereignty and self-government
  - eg. Nisga’a Administrative Decisions Review Board → enabling legislation denotes that this Tribunal operates just like any other tribunal created to review exec decision making
- self-management and self admin
  - eg. Decision-making by Indian Act band councils → typically reviewable by Canadian courts on admin law grounds
- co-management and joint management
  - eg. Haida Gwaii Management Council (HGMC) → required to adhere to natural justice, impartiality, and PF, but also function on consensus model
- participation in public government
  - eg. Nunavut Land Claims Agreement

Lafferty v Tilcho Government confirms autonomy of decisions made by Aboriginal governments, so long as adequate internal accountability exists

General Principles
Duty to consult derives from the honour of the Crown and applies both before and after proof or settlement of the Aboriginal treaty of rights at stake (Haida Nation)

Duty to consult is triggered when: the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it (Haida Nation, affirmed in Rio Tinto)

Past Crown conduct and past impacts/infringements of Ab rights will NOT, on their own, trigger duty to consult (Rio Tinto)

Duty to consult and accommodate is owed only to Aboriginal collectives rather than particular member of community, even where an individual’s interest is particularly affected (Little Salmon)

Duty to consult and accommodate is a constitutional “obligation” that rests with the Crown, as opposed to a constitutional “right” that belongs to Aboriginal communities → Consultation not an aboriginal right in and of itself but rather a constitutional duty that arises in relation to s. 35 rights, by means of the honour of the Crown (Haida Nation)

Duty to consult applies to strategic and planning decisions that would likely fall under legislative exemption in CL duty of fairness (Rio Tinto)

Correctness standard applies to the review of adequacy of consultation processes (Little Salmon)
Final result of consultation process – "substantive" outcomes – are reviewable on standard of reasonableness (Little Salmon)

“A reasonable process is one that recognizes and gives full consideration to the rights of Aboriginal peoples, and also recognizes and respects the rights and interests of the broader community” (West Moberley FN)

Q: whether the "process of consultation" is part of the adequacy of consultation (C standard) OR part of the decision (R standard) → Haida Nation suggests more opportunity for deference in review of consultations than LS suggests

Content of duty to consult is determined in relation to strength of claim and seriousness of adverse impact (Haida Nation)

Consultation and accommodations DOES NOT require agreement or consent (Haida Nation)

**HAIDA NATION V. BC (MINISTER OF FORESTS) (2004, SCC)**

- **Facts:**
  - 1961 the BC prov gov issued a "Tree Farm Licence" on the QC islands; Haida Nation had a pending land claim which had not yet been recognized at law; also claimed an aboriginal right to harvest red cedar in that area; 1999 Minister authorized a transfer of the licence to the Weyerhauser Company without consent from or consultation with the Haida Nation; Haida Nation brought a suit, requesting that the replacement and transfer be set aside; Crown was successful at trial, but this was overturned on appeal where the court found that both the Crown and Weyerhauser had a duty to consult with the Haida.

- **Issue:**
  - When is there a duty to consult, and what does this duty entail?

- **Held:**
  - **Crown had duty in this case – see below, but not WI**

- **Analysis:**
  - McLachlin:
    - source of a duty to consult with aboriginal peoples and accommodate their interest arises out of the honour of the Crown
    - duty arises when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it
    - duty consult includes requirement that the Crown consult with aboriginal communities both before AND after the proof or settlement of the Aboriginal or treaty rights at stake
    - content of the duty to consult is determined in relation to the preliminary assessment of the strength of the rights claim (where unproven) and the seriousness of the potential adverse impacts
    - If the claim to the right is weak, then the Crown only has to give notice and disclose information to the affected people(s).
    - If there is a strong *prima facie* case for the right the Crown must consult more extensively
      - requires allowing FN to make submissions for consideration, to formally participate in the decision-making, and ensuring that the Crown publishes reasons showing how the aboriginal concerns were factored into their decisions.
    - in all consultations, both sides must act in good faith
    - There is **no duty to come to an agreement** - there is only a duty to consult (Critique: this is indicative of assimilationist tendency of duty)
    - legal duty to consult and possibly accommodate **only applies to the Crown**, NOT 3Ps
In this case there was a strong *prima facie* case for the land claim, and thus the Crown had a legal duty to at least consult with the Haida before making decisions that could irreparably harm the land.

**RIO TINTO INC. V. CARRIER SEKANI TRIBAL COUNCIL (2010, SCC)**

- **Duty to consult arises when the Crown has knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.**
- **Facts:**
  - Dam and reservoir built in 1950s which altered the amount and timing of water in the Nechako River; Carrier Sekani claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project; excess power generated by the dam is sold by Alcan to BC Hydro; 2007 CS asserted that the new Energy Purchase Agreement should be subject to consultation under s. 35. Utilities Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise as the purchase agreement would not adversely affect any aboriginal interest. BCCA reversed the Commission's orders and remitted the case for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met.
- **Issue:**
  - When does a duty to consult arise?
- **Held:**
  - Duty to consult arises when the Crown has knowledge of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it
- **Analysis:**
  - **McLachlin:**
  - Reaffirmed the general approach set out in *Haida Nation* that the duty to consult is triggered when the Crown contemplates conduct that might adversely affect the exercise of an aboriginal right
  - **3 elements of the trigger:**
    - the Crown has knowledge, actual or constructive, of a potential aboriginal claim or right
      - While the existence of a potential claim is essential, proof that the claim will succeed is not.
    - the Crown must be contemplating conduct which engages a potential aboriginal right
      - required decision or conduct is not confined to government exercise of statutory powers or to decisions or conduct which have an immediate impact on lands and resources. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (eg. management plans); and
    - there must be the potential that the contemplated conduct may adversely affect an aboriginal claim or right
      - claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending claims or rights; Past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position will not suffice.
  - The duty to consult is grounded in the honour of the Crown and is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process.
  - The duty has both a legal and a constitutional character, and is prospective, fastening on rights yet to be proven.
  - The nature of the duty and the remedy for its breach vary with the situation.
Crown's failure to consult can lead to a variety of remedies including injunctive relief, an order to carry out additional consultation, and/or damages.

- Tribunals are confined to the powers conferred on them by their constituent legislation, and the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on them. The legislature may choose to delegate the duty to consult to a tribunal, and it may empower the tribunal to determine whether adequate consultation has taken place.
- If the tribunal structure set up by the legislature is incapable of dealing with a decision’s potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts.
- In this case: Commission had the power to consider the adequacy of Crown consultation in regard to matters that are properly before it, but the Utilities Commission Act did not empower it to engage in consultations in order to discharge the duty. The Court confirmed that BC Hydro, as a Crown corporation, held the Crown’s duty to consult. The Commission acted reasonably and correctly held that the purchase agreement would have neither physical impacts on the Nechako River or the fishery nor organizational, policy or managerial impacts that might adversely affect the claims or rights of the CS.
- The failure to consult on the initial project was an underlying infringement, and was not sufficient to trigger a duty to consult.

**BECKMAN V. LITTLE SALMON CARMACKS FIRST NATION (2010, SCC)**

- **Facts:**
  - LS has land claims agreement with the governments of Canada and Yukon; result of 20 years of negotiations; under the treaty, LS members have a right of access for hunting and fishing for subsistence in their traditional territory, which includes a parcel of land for which P submitted an application for an agricultural land grant; land applied for by P is within the trapline of S, who is a member of LS; Yukon gvt Land Application Review Committee considered P’s application at meeting to which it invited LS; LS submitted letter of opposition but did not attend; LARC recommended approval of grant and Director approved it; LS contends that in considering the grant to P the government proceeded without proper consultation and without proper regard to relevant FN concerns

- **Issue:**
  - What is the SOR for duty to consult and did the government violate duty?

- **Held:**
  - Government satisfied duty; SOR is correctness re: adequacy of consultation, SOR of reasonableness for outcomes

- **Analysis:**
  - *Binnie J*
  - when land claim treaty has been concluded, look to see if there is some form of consultation provided for in the treaty itself. While consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people — it is a doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself.
  - In this case, a continuing duty to consult existed.
  - While Treaty did not prevent gvt from making land grants out of the Crown’s holdings, obvious that such grants might adversely affect the traditional economic and cultural activities of LS and the Yukon was required to consult with LS to determine the nature and extent of such adverse effects.
Given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more elaborate consultation process in the Treaty itself, the scope of the duty of consultation in this situation was at the lower end of the spectrum.

- Director was required to be informed about and consider the nature and severity of any adverse impact of the proposed grant before he decided whether accommodation was necessary or appropriate.
- Purpose of consultation was NOT to re-open the Treaty or to re-negotiate the availability of the lands for an agricultural grant.

Here, the **duty of consultation was discharged**. LS received appropriate notice and info; objections were made in writing and they were dealt with at a meeting at which LS was entitled to be present; both Little LS objections and the response of those who attended the meeting were before the Director when he approved P's application.

- Neither the honour of the Crown nor the duty to consult required more.

Court rejects argument of LS that admin law principles “are not tools toward reconciliation” and finds that “**admin law is flexible enough to give full weight to the constitutional interests of the FN**”

In exercising his discretion in this case, the Director was required to respect legal and constitutional limits.

- SOR in that respect, including the adequacy of the consultation, is correctness. Within the limits established by the law and the Constitution, however, the Director’s decision should be reviewed on a standard of reasonableness.

Director did not err in law in concluding that the level of consultation that had taken place was adequate.

- No evidence that he failed to give full and fair consideration to the concerns of Little Salmon/Carmacks → disposition was reasonable in the circumstances.

Critique: is the reasonableness standard appropriate given constitutional nature of interests at stake?
APPENDIX I – THE ADMINISTRATIVE STATE AND RULE OF LAW HANDOUT

ADMINISTRATIVE LAW – GENERALLY
- a public law subject (as opposed to private law)
- the major and sometimes conflicting concerns of administrative law include:
  - to control exercises of governmental power by the executive and administrative branches of the state
    - confine govt power to its proper scope
    - curb potential for abuses of power
    - ensure proper procedures are followed in the exercise of powers that affect the rights/interests of citizens
    - ensure performance of mandatory statutory duties
  - to foster greater accountability in government and greater participation by interested parties in the decision-making processes of government
  - to ensure that the administrative branch of government effectively performs the tasks assigned to it by the legislature

ADMINISTRATIVE LAW VS. CONSTITUTIONAL LAW
- Administrative law and Constitutional Law are both areas of public law yet there are some differences:
  - unlike Constitutional Law, not generally concerned with legislative actions or with the validity or vries of statutes
  - primarily concerned with exercises of power by governmental officials and agencies made under statutory authority [i.e. exercises of statutory powers, delegated by the legislature to government officials and agencies] or, more rarely, exercise of powers exercised under Crown prerogative
    - reach
    - remedies
  - growing intersection between Constitutional and Administrative law because of the Charter
- Administrative Law is rooted in fundamental constitutional principles such as:
  - the rule of law
  - legislative supremacy/Parliamentary sovereignty (subject to the constitutional division of powers and the Charter)
  - the constitutionally protected and inherent jurisdiction of s. 96 superior courts and the principles of judicial independence

WHAT KINDS OF DECISION-MAKERS?
- Administrative Law is primarily concerned with individuals and bodies or agencies exercising powers under statutes (delegated decision-making authority):
  - administrative agencies - tribunals, boards, commissions (e.g. Workers Compensation Board, Labour Relations Board, Human Rights Commission)
  - public inquiries (e.g. Krever Commission)
  - professional associations exercising statutory powers of self-regulation (e.g. Law Society)
  - municipal gov't agencies and officials, school boards
  - Cabinet (Governor in Council, Lieutenant Governors in Council) and individual Ministers of the Crown
  - departmental officials (usually exercising delegated power in the name of the Minister)

SCOPE OF ADMINISTRATIVE LAW AND THE PUBLIC/PRIVATE DICHOTOMY
The "boundaries" of Administrative Law are not always easy to define:

- corporations that merely receive their existence by incorporation under general incorporation statutes do not exercise statutory powers in the sense that brings them within the ambit of administrative law
- some bodies such as universities have sometimes been treated as though they were private corporations rather than public bodies however now they are usually treated as decision-makers that are bound by admin law principles in much of what they do (e.g. decisions about Faculty members regarding tenure and promotion or decisions about student discipline)
- some of the principles of admin law are extended to so-called "domestic tribunals" – “private” bodies that do not exercise statutory powers but that do hold quasi-monopolistic powers in relation to certain spheres of activity e.g. sports associations, clubs, religious bodies; in this realm the courts will often apply the principles of administrative law related to procedural propriety – that is, such tribunals may have obligations to deal with their members in a manner that is procedurally fair
- Not all actions of government are dealt with by the application of administrative law principles – for example, where the government acts in ways that are similar to the private sector such as purchasing goods or dealing with ordinary employees, the principles of contract law or tort law are more relevant and administrative law principles may not be applicable

THE WIDE RANGE OF ADMINISTRATIVE AGENCIES
- 20th century saw the rise of “the regulatory state” and a consequent growth in administrative agencies of various kinds engaged in the delivery of a wide variety of public programs under statutory authority

RANGE OF ADMINISTRATIVE DECISIONS
- administrative agencies differ widely re the kinds of admin. decision-making they may be involved in
- some regulate relationships or resolve disputes between private persons on an individual case by case basis through adjudication much like courts (e.g. human rights agencies; labour relations arbitrators)
- some give approvals/permits/licenses to individuals, groups, corporations, to allow them to do certain things (e.g. CRTC radio and T.V. licensing, liquor licensing, environmental impact assessments, zoning approvals)
- some confer benefits on those who meet the statutory qualifications to receive them (e.g. social welfare benefits; workers comp; unemployment insurance)
- some impose restrictions/penalties on individuals or grant relief from them (e.g. prison and parole decisions; conditions on licensing; professional disciplinary boards)
- some are primarily involved in broad policy making as opposed to making decisions in individual cases [regulatory rule making]
- some do not make final decisions but only investigate and report the products of the investigation, with or without making recommendations

"INDEPENDENT" ADMINISTRATIVE AGENCIES
- 4 common features of "independent" administrative agencies (boards, commissions, tribunals):
  1) independence: they all enjoy some measure of "distance" and freedom from direct control by the Cabinet, the responsible Minister, and departmental officials in making decisions
  2) hearing processes: they typically engage in some sort of hearing process before making a particular decision or policy (although the nature of these processes may vary widely from agency to agency)
  3) individualized decision-making: they typically make decisions in individual cases (i.e. they apply the provisions of a statutory scheme to the situation of particular individuals or groups)
  4) specialization: they operate within a particular statutory scheme and usually deal with only one statute or with only a part of a statute (they deliver a particular public program or part of one)
- Why might the legislature assign decision-making or policy development to an independent administrative agency rather than to a government department?
  - legitimacy: there may be a need to "insulate" the decision-making or policy development process from partisan politics and pressures to attain more legitimacy for the decisions made
e.g. where the decision "pits the government against the citizen" (b/c it concerns eligibility for a benefit or imposition of a liability), the credibility, legitimacy, and "acceptability" of the decisions made or policies developed may be enhanced if the matter is distanced from the bureaucracy
  - better decisions: decisions reached may be better in quality because the administrative agency may be better able to
draw upon the expertise needed to make decisions
develop more open and participatory processes to hear those who are interested
- expediency: it is sometimes more convenient for government to shed direct political responsibility for decision-making in sensitive policy areas (e.g. to avoid unfavourable publicity associated with the decision-making in question)
- **Why might the legislature assign decision-making to an independent administrative agency rather than a court?**
  - policy laden subject-matter: the nature of decisions to be made may be deemed inappropriate for adjudication - multi-faceted policy laden matters are not well suited to resolution through an adversarial judicial system (e.g. environmental impact assessments, setting utility rates; setting marketing quotas; licensing vendors; etc)
  - quantity: the number of decisions to be made would clog the courts e.g. appeals from social welfare denials or workers compensation claims
  - procedural concerns: courts are formal, slow, expensive and require lawyers; a more informal, more accessible, quicker and less expensive decision-making process may be desired
  - expertise - the matter to be decided may be a matter that requires specialized expertise rather than the general legal expertise of a judge e.g. environmental assessments; financial regulation
  - ideology: sometimes the perceived ideology of the judiciary may be thought to be an impediment to the legitimacy and effectiveness of the statutory scheme (e.g. labour relations)
  - broader public participation is desired: the legislature may want the decision-maker to have input from a wide cross-section of the public before making a decision and courts are not well set up to deal with that kind of participation

- **NON-JUDICIAL MECHANISMS FOR CONTROL OF GOVERNMENT**
  - general legislative oversight and politics
    - scrutiny of legislation before enactment
    - review of regulations by standing committees
    - scrutiny of appointments to agencies
    - annual or special reports to Parl by agencies
    - questions to Minister in the legislature
  - ombudsman, access to information legislation
  - informal internal control mechanisms
    - day to day management and accounting policies and procedures (a government’s general “culture” and the role of government lawyers is an important factor in control)
    - internal reviews of operations and policies
    - internal reviews and reconsideration of individual decisions
  - formal non-judicial appeal mechanisms
    - formal internal appeal mechanisms i.e. statutory appeals to other administrative bodies or to the Minister, or to Cabinet
JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

appeals
- appeals to a court from an administrative decision may be provided for by statute [for there to be any such appeal rights there must be a statutory provision creating the appeal and setting out its parameters – courts have no inherent appellate powers]

"original jurisdiction" of the courts
- sometimes an administrative action may amount to a tort or a breach of contract or a trespass to property (etc.) or a Charter breach and that can be brought before the courts in an "ordinary" private law proceeding

judicial review jurisdiction of the courts
- superior courts exercise a power to engage in judicial review that is in its origin a common law power exercised as a matter of the courts' inherent jurisdiction [this jurisdiction to engage in judicial review is constitutionally protected in Canada as part of the inherent powers of superior courts under s.96 of the C.A. 1867. Government cannot insulate a decision-maker from review through a privative clause: Crevier (SCC, 1981). This applies both to provincial and federal legislation: MacMillan Bloedel Ltd. V. Simpson, [1995] 4 SCR 725.

s.96 prevents provinces from setting up administrative decision-makers (typically tribunals) that usurp the power of a s.96 court. This involves a 3-step inquiry:
- is the impugned power one that was exercised exclusively by a superior court at Confederation? (If not, then the power is valid.) If so, the second step presents itself:
- is the impugned power a “judicial” power versus “administrative” or “legislative”? A power is "judicial" if: a) it is a private dispute; 2) involves application of rules; c) is adjudicated formally. (If not, then the power is valid) If so, the third step presents itself:
- is the exercise of the “judicial” power “ancillary” or “central” within the larger institutional setting? (If so, then the power is valid). If not, the power is unconstitutional.

procedures for judicial review applications are now set out in statutes such as the Federal Court Act (for matters within federal jurisdiction) or the B.C. Judicial Review Procedure Act (for matters within B.C. provincial jurisdiction)

PRIMARY GROUNDS FOR JUDICIAL REVIEW

Procedural Impropriety - judicial review of the manner in which statutory powers of decision are exercised
- breach of procedural fairness obligations
- breach of rules against bias
- lack of the requisite degree of independence
- improperly constituted or authorized d/maker

"Substantive" Illegality and irrationality - review of the adequacy of the factual and legal basis of decisions made under statutory authority and review of the rationality of exercises of discretionary statutory powers. Possible grounds of such review, depending on the circumstances, include:
- jurisdictional errors in interpretations of the scope and meaning of the statutory power
- errors of law "on the face of the record"
- reviewable errors of fact (deciding without a sufficient evidentiary basis)
- abuse of discretionary powers (unreasonable or unauthorized exercises of discretion)

ADMINISTRATIVE LAW REMEDIES

exercise of the supervisory jurisdiction of the superior courts in England was largely based on a number of special remedies reserved for public law cases involving the exercise of public duties and powers

these remedies were known as prerogative writs and 3 of them were particularly important:
- (i) certiorari an order that quashes or sets aside a decision
- (ii) prohibition  an order that prohibits a tribunal from proceeding
- (iii) mandamus  an order requires the performance of a public duty

- each of these writs were discretionary and their purpose was to ensure that bodies with limited statutory powers did not exceed or abuse those powers
- in addition to the prerogative writs, the other main remedies that could be used in a public law context to control administrative agencies were the private law equitable remedies of:
  - declarations (to declare rights) and
  - injunctions (to restrain conduct)
- remedies similar to the traditional remedies used in public law (certiorari, mandamus, prohibition, declaration, and injunction) remain the key tools used by superior courts in exercising judicial review powers today
- HOWEVER, in many provinces, including B.C. procedural reforms mean that the 3 prerogative writs of certiorari, mandamus, and prohibition themselves can no longer be applied for or issued
- instead, in B.C. under the Judicial Review Procedure Act, one makes an application for judicial review by an originating application (a petition) and the statute provides that on such an application the court "may grant any relief that the applicant would be entitled to" in proceedings for relief in the nature of certiorari, prohibition or mandamus or for a declaration or injunction
- [Note: the writ of habeus corpus is another important kind of prerogative writ that enabled courts to review the lawfulness of a detention of “the (live) body” of a person – it is still available to do so and it has not been subsumed in the remedy of an application for judicial review – one may still apply for this writ]

**RULE OF LAW**
- a complex notion – varied shades of meaning
- a general principle of our constitutional law referred to in the preamble to the Charter and inherited from British constitutional law but cannot be used to challenge the validity of legislation
- underlies much of administrative law

**BASIC TRADITIONAL UNDERSTANDINGS (Diceyan)**
- “government must be subject to law”
  - principle of legality: there must be lawful authority for state actions that interfere with the rights and liberty of citizens
  - there should be clear legal rules – distrust of discretion because of fear of arbitrary use of power
- “no one is above the law” as administered by the ordinary courts
  - everyone, governments and citizens alike, are subject to the ordinary law as administered by the ordinary courts and the courts are the “final arbiters” of what the law is
- courts are the citizen’s bulwark against arbitrary government and will act to protect the rights of citizens against the state

**CRITIQUES – FUNCTIONALISM**
- functionalists believe that a central concern of administrative law should be to promote the effective functioning of the modern state
- the following state purposes should be fostered by law, not hindered:
  - regulation of private power in the public interest
  - promotion of greater social and economic equality through redistribution of income and benefits
- courts have sometimes used administrative law principles, based on ideas about the rule of law, to uphold the status quo and curb state intervention
  - have guarded common law values against encroachment (i.e. protects private property rights, freedom of contract) – laissez faire ideology
  - have imposed adversarial model on administrative decision-makers when it has not been appropriate to do so
have failed to appreciate the need to infuse policy into statutory interpretation and to recognize that they do not hold a monopoly on how to interpret statutes in a way that is consistent with legislative intent

APPENDIX II - FEDERAL COURTS ACT, SS. 18, 18.1-18.5, S. 28

❖ Extraordinary remedies, federal tribunals
❖ 18.
   1) Subject to section 28, the Federal Court has exclusive original jurisdiction
      a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
      b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
❖ Extraordinary remedies, members of Canadian Forces
   2) application for a writ of habeas corpus ad subjiciendum, writ of certiorari, writ of prohibition or writ of mandamus in relation to any member of the Canadian Forces serving outside Canada.
❖ Remedies to be obtained on application
   3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.
❖ Application for judicial review
❖ 18.1
   1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.
❖ Time limitation
   2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.
❖ Powers of Federal Court
   3) On an application for judicial review, the Federal Court may
      a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
      b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
❖ Grounds of review
   4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
      a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
      b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
      c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
e) acted, or failed to act, by reason of fraud or perjured evidence; or
f) acted in any other way that was contrary to law.

▶ Defect in form or technical irregularity
5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may
   a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and
   b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

▶ Judicial review
▶ 28.
   1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:
      a) the Board of Arbitration established by the Canada Agricultural Products Act;
      b) the Review Tribunal established by the Canada Agricultural Products Act;
         • b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the Parliament of Canada Act;
      c) the Canadian Radio-television and Telecommunications Commission established by the Canadian Radio-television and Telecommunications Commission Act;
      d) the Pension Appeals Board established by the Canada Pension Plan;
      e) the Canadian International Trade Tribunal established by the Canadian International Trade Tribunal Act;
      f) the National Energy Board established by the National Energy Board Act;
      g) the Governor in Council, when the Governor in Council makes an order under subsection 54(1) of the National Energy Board Act;
         • g) the Appeal Division of the Social Security Tribunal established under section 44 of the Department of Employment and Social Development Act, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the Canada Pension Plan, section 27.1 of the Old Age Security Act or section 112 of the Employment Insurance Act;
      h) the Canada Industrial Relations Board established by the Canada Labour Code;
      i) the Public Service Labour Relations Board established by the Public Service Labour Relations Act;
      j) the Copyright Board established by the Copyright Act;
      k) the Canadian Transportation Agency established by the Canada Transportation Act;
      l) [Repealed, 2002, c. 8, s. 35]
      m) umpires appointed under the Employment Insurance Act;
      n) the Competition Tribunal established by the Competition Tribunal Act;
      o) assessors appointed under the Canada Deposit Insurance Corporation Act;
      p) [Repealed, 2012, c. 19, s. 572]
      q) the Public Servants Disclosure Protection Tribunal established by the Public Servants Disclosure Protection Act; and
      r) the Specific Claims Tribunal established by the Specific Claims Tribunal Act.

▶ Sections apply
APPENDIX I

What do the standards of review mean? How are they different from each other?

Correctness:
- “court may undertake its own reasoning process to arrive at the result it judges correct.” (Ryan)
- single right answer and it is court’s role to seek this out (Ryan)

Reasonableness simpliciter
- “when deciding whether an administrative action is unreasonable, a court should not at any point ask itself what the correct decision would have been” (Ryan)
- “there will often be no single right answer to the questions that are under review against the standard of reasonableness” (Ryan)
- defect that “takes some significant searching or testing to find” (Southam).
- “Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that (ADM) to reach the decision it did.” (Ryan)
- defect that is “clearly wrong” (Southam) or not supported by a “tenable explanation” (Ryan)
- defect where “there is no line of analysis within the given reasons that could reasonably lead the (ADM) from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere” (Ryan)
- not every reason must be tenable or “independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision.” (Ryan)
- even if there is “one or more mistakes” in the decision, the decision will not be unreasonable if that mistake does “not affect the decision as a whole.” (Ryan)
- court should not reweigh the evidence, but rather determine if there is one tenable reason (Ryan)

Patent Unreasonableness
- Difference with RS is “in the immediacy or obviousness of the defect” (Southam)
- “defect is apparent on the face of the (ADM’s) reasons” (Southam)
- “defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. (Ryan)
- “Defect is openly, evidently, clearly unreasonable...This is not to say, of course that judges reviewing a decision on the standard of PU may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem.” (Southam)
- Defect that is “clearly unreasonable” (Southam) or “clearly irrational” (Ryan) or “evidently not in accordance with reason” (Ryan)
### APPENDIX IV – PF CLASS MAP DAY 1

<table>
<thead>
<tr>
<th>Standard of Review</th>
<th>Substantive Review</th>
<th>Procedural Fairness</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Varies</td>
<td>Correctness.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Leading case</th>
<th>Dunsmuir</th>
<th>Baker</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Object of Inquiry</th>
<th>Legislative intent regarding SOR – what did the legislature intend as to deference?</th>
<th>Duty of fairness – is it implicated and, if so, what is the content?</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Tests</th>
<th>Categorical analysis (presumption of R; defeated/rebutted through categories)</th>
<th>i. Nature of decision</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>May also consider SOR factors:</td>
<td>ii. Nature of the statutory scheme</td>
</tr>
<tr>
<td></td>
<td>i. Presence or absence of a privative clause</td>
<td>iii. Importance of the decision</td>
</tr>
<tr>
<td></td>
<td>ii. Purpose of the tribunal</td>
<td>iv. Legitimate expectations</td>
</tr>
<tr>
<td></td>
<td>iii. Nature of the question</td>
<td>v. Deference to procedural choices</td>
</tr>
<tr>
<td></td>
<td>iv. Expertise of the tribunal</td>
<td><strong>Balance five non-exhaustive factors</strong></td>
</tr>
<tr>
<td></td>
<td>Consider one or more factors depending on which may be determinant</td>
<td></td>
</tr>
<tr>
<td></td>
<td>*The above assumes the SOR analysis proceeds to this part of Dunsmuir methodology</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Similarities in test elements?</th>
<th>Yes, in the nature of the decision, the statutory scheme and the expertise of the decision-maker.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Differences in test elements?</td>
<td>Yes, the importance of the decision in PF, while presence of privative clause is only relevant to SR.</td>
</tr>
<tr>
<td>Is this common law doctrine?</td>
<td>Yes, but can be legislatively altered if constitutional.</td>
</tr>
<tr>
<td></td>
<td>Yes, but can be legislatively altered if constitutional.</td>
</tr>
</tbody>
</table>

**The Fairness Revolution**

- Chronology leading to Nicholson – why it is a “revolutionary” case?
- Impact of Nicholson: administrative versus judicial distinction repudiation; emergence of “procedural fairness” in Canada
- Questions arising in the wake of Nicholson:
  - What is the threshold for PF? Will all “administrative” decisions pass it?
  - What is the content of PF?
  - What is the effect of Nicholson on the distinction between judicial and administrative? NO longer marks the threshold, but does it mark a distinction between NJ and PF?
  - Should there be more deference to ADMs on procedures?
- Note the era – “revolutions” occurring in SR as well
- Affirmed and clarified in Cardinal and Indian Head School Division, as discussed in Mavi, para. 38. Purpose of PF is to have fairness, openness, while respecting ADM’s institutional needs (pp. 166-167, citing important passages from L’Heureux-Dubé J.)
- Baker Synthesis is a balancing act: see Day 4 handout and other handouts
- SCC affirms in Mavi, paras. 1-2, 38-44. Also identifying it as central to the “just exercise of power” (para. 42) citing Dunsmuir. Factors are non-exhaustive and test is flexible.
- Mavi: “general rule” that PF applies subject to statutory override (para. 39)