# Rosalyn Chan – Admin - Shannon Salter

# General Administrative Law Principles – PAGE 1

Administrative law is essentially the body of rules which governs the executive branch’s relationship with persons (human or corporate), as well as the judiciary’s oversight of this relationship. It is important to remember that the Court is a separate, distinct, yet equal branch of government (***Vilardell***). There are various general principles which inform administrative law that should be kept in mind when analyzing issues within the administrative law sphere: constitutional supremacy, parliamentary sovereignty and legislative intent, and the rule of law, which dictates, among other things, that the Courts have a duty to prevent government from arbitrary exercise of power (***Roncarelli***) and everyone is entitled to equal access to the law (***Vilardell***). There are also two common law principles of natural justice to remember: *Audi alterem partem*, which requires the SDM to hear both sides of a dispute and *nemo judex in sua causa*, which dictates the right to have an impartial, unbias, and independent adjudicator.

# Privative Clauses – PAGE 1

Because section 96 of the *Constitution Act*, *1867,* sets out that only the federal government may create what are basically courts, provinces cannot create administrative bodies which look and act too court-like. This is especially important to keep in mind and applicable where an administrative tribunal’s enabling statute sets out a clause that essentially says the decision of the tribunal/administrative body is final and conclusive and isn’t open to question or review by a court (ie. The court can’t issue a remedy for an administrative decision). These clauses are meant to insulate the administrative body from judicial review, are actually constitutionally incapable of completely eliminating judicial review due to S96 of the *Constitution*. In ***Crevier***, the court struck down portions of the statute that purported to insulate the tribunal from JR as unconstitutional.

# Procedural Fairness – PAGE 3

The Court in ***Nicholson*** stated that while the degree of procedural fairness that was owed varied on the spectrum of decision making between judicial and political, there was a general duty of fairness owed – he had the right to be treated fairly, not arbitrarily. Courts must exercise their constitutional mandate to supervise SDMs and there is an inference that the enabling statute requires SDMs to act fairly and legally, otherwise, they are exceeding their jurisdiction by acting outside the scope of their authority as well as the privative clause. Subject to express language or necessary implication, courts assume that legislative intention was to include the two common law basic rules of fair decision making: the right to be heard and the right to an independent and impartial hearing. The duty of procedural fairness lies whenever an SDM makes a decision, which is not legislative (***Re Canada Assistance Plan, Inuit Tapirisat***), that affects the rights, privileges or interests of an individual (***Cardinal***). The concept of the duty of fairness is variable and its content must be decided in a contextual approach (***Baker***). Essentially, the threshold question to ask is whether this kind of decision is one that should attract some kind of procedural right.

* 1. **Nature of the decision and process followed in making it** (more judicial-looking = more PF)
     + Judicial decisions – affect an individual’s rights
     + Quasi-judicial – limited to issues specific to the particular administrative body
  2. **Nature of the statutory scheme and the terms of the statute under which the body operates** (final decisions/determinative of issues)
  3. **The importance of the decision to the individuals affected** (profession, employment, family, citizenship, etc)
  4. **The legitimate expectations of the person challenging the decision** (pamphlets, websites, comments by staff, only relates to expectations of procedural rights, not substantive rights)
  5. **The choice of procedure made by the agency itself** (SDMs are the master of their own procedure)

**IF A PUBLIC EMPLOYEE EMPLOYMENT ISSUE:** Whenever a public employee has been dismissed and there is a procedural fairness question at issue, the first thing to ascertain is whether public law or private law governs the issue. Does this employee have a contract? Does the statute set out the fairness owed? ***Dunsmuir*** speaks to ***Knight*** and states that whether the public office holder is appointed or under contract, there is always recourse available where the employee is a public office holder AND the applicable law leaves him without any protection when dismissed. If the employee has an employment contract, that is the applicable law, otherwise, employment matters may engage PF where an employee is in a public position and the employer is operating under a statute (***Knight***). Further, “at pleasure” appointees have some PF rights, although the degree will be much less than an employee with fixed terms, as by the nature of their appointment, they can be summarily dismissed (***Dunsmuir, Keen***).

1. ***Nicholson*** – general duty of fairness
2. ***Cardinal*** – duty of PF lies whenever an SDM makes a decision, which is not legislative (***Re Canada Assistance Plan, Inuit Tapirisat***), that affects the rights, privileges, or interests of an individual
3. ***Baker*** – five factors for calibrating the content of PF
4. Look to but other specific cases to figure out particular arguments for each PF issue – **PAGE 7**
   1. Notice?
   2. Duty to provide reasons? “Some form of reasons”, SDMs must provide written reasons where important issues are at stake or where further appeal is permitted under statute – ***Baker***, if satisfy ***Dunsmuir*** criteria (justification, transparency, and intelligibility), then presumption of adequacy: ***Newfoundland Nurses’***
   3. Oral hearing? Look to statute, or else ***Baker***. If the issue is one of credibility, always an oral hearing: ***Singh v Minister of Employment & Immigration***
   4. Right to cross examine? Where the rights of citizens are involved and the statute affords the right to a full hearing, there needs to be clear language to curtail the right to cross examine: ***Innisfil***
   5. Document disclosure rights? ***ATA* S34, 40(3)***,* SDMS must disclose whatever evidence they rely on: ***Kane v UBC***
   6. Was there delay? ***Blencoe***

# Procedural Fairness – Is there an Independence And Bias Issue? – PAGE 4

The duty of procedural fairness also requires that decisions be made free from the reasonable apprehensions of bias. As ***Rex v Sussex*** articulates, “justice not only needs to be done, it must also be perceived to be done.” A general test for whether the decision was fair is set out in ***Baker*** and is stated as whether an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude that it is more likely than not that the SDM would not decide fair. This is an objective balance of probabilities test. This test is further calibrated in ***R v S(RD)*** and ***Committee for Justice and Liberty*** as asking whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the adjudicator’s conduct gives rise to a reasonable apprehension of bias. The dissent in ***Committee for Justice*** elaborates further and states that most people come to an issue with some sort of opinion already, but absent any pecuniary or other demonstrable interests, this shouldn’t rebut the assumption that the SDM will conduct himself fairly. This view was adopted in ***Newfoundland Telephone v Newfoundland***.

* IF INSTITUTIONAL BIAS – PAGE 5: While the DM, themselves, might be free from bias, the context in which they are to render a decision might raise a reasonable concern as to whether the DM will/can have an open mind. Institutional bias seems to rear its head in the context of independence of the DM, in which ***Valente*** lays out the three indicia of independence: security of tenure, financial security, and institutional independence over the administration of the tribunal. These factors should be used in assessing institutional independence from government to complement the analysis of the nature of the SDM, the issue its deciding and the statutory context it operates within. The existence of independence is important to ascertain because a judge should be free from outsider interference to conduct their case and make their decision as they wish, on the basis of the case and evidence before them (***Beauregard***). The test for institutional bias is laid out in ***Matsqui Indian Band*** and asks whether there will be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases. This must be considered on a case-by-case basis and was also applied in ***Regie***. It is important to remember that the test for impartiality and bias is context driven, using the ***Baker*** factors, as tribunals have unique needs and demands, so misconduct is not found in the legitimate interests of the tribunal in the overall quality of its decisions (***KOZAK, IWA v Consolidated-Bathurst***). Further, there is no constitutional guarantee of independence of tribunals since SDMs are not a court and absent any constitutional constraints, the degree of independence required is determined by the enabling statute, which must be construed as a whole to determine the legislative intention (***Ocean Port Hotel***).
  + IS THE TRIBUNAL SUPER QUASI-JUDICIAL? Although ***Ocean Port Hotel*** remains good law, there is a possibility that even though no common law procedural fairness is required because it is explicitly stated as such in the enabling statute, tribunals still may not be able to have totally subservient and biased people in these positions – cowed sycophants – as these same people, in a judicial role, would have to be independent. It would be an affront to the rule of law to do so (***McKenzie v Minister of Public Safety***). Further, ***Bell Canada v Canada v Canadian Telephone Employees Association*** suggested a spectrum of types of SDMs in which highly adjudicative tribunals endowed with court-like powers could require a higher degree of PF, including the need for more independence.

IMPORTANT TO CONSIDER WAIVER IN BIAS ISSUES – sophistication of the party as well

## Bias – PAGE 4

* TEST FOR PERSONAL BIAS: Whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the adjudicator’s conduct gives rise to a reasonable apprehension of bias: ***R v S (RD), Committee for Justice***
  + Would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude that it is more likely than not that the SDM would not decide fairly?: ***Baker*** – objective balance of probabilities test
* DID SOMEONE MAKE STRONG COMMENTS REGARDING THE MATTER PRE-HEARING?: Reasonably informed bystander – did the board member pre-judge that matter to such an extent that any representations made to the contrary would be futile?: ***Newfoundland Telephone***
* TEST FOR INSTITUTIONAL BIAS: Will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases?: ***Matsqui Indian Band***
  + Primarily adjudicative bodies: zero bias – a high standard like the courts
  + Polycentric/elected members: more lenient – they’re allowed a public policy function

## Tribunal Independence – PAGE 5

1. Look to the enabling statute as to whether there is a degree of independence required is determined by the enabling statute, which must be construed as a whole to determine the legislative intention: ***Ocean Port Hotel***
2. ***Valente*** sets out three indicia of independence re: judges
   * Security of tenure
   * Financial security
   * Institutional independence over administration of the tribunal

# Tribunal Standing on JR – PAGE 10

The issue of tribunal standing on JR is rather unclear and the Court in ***Henthorne*** called upon the SCC to clarify how courts should weigh discretion versus impartiality. ***Northwestern Utilities*** is the benchmark case which speaks to the appropriateness in limiting the tribunal’s role, even where the statute permits, to an explanatory role within its home statute. Otherwise, allowing them to justify themselves would create a “spectacle” that the courts want to avoid and lend its hand to impartiality. While S15 of the *JRPA* allows tribunals to be a party, it only indicates an intention for the SDM to be permitted to appear at the hearing. The extent of their role if an appearance is made is left undefined and up to the discretion of the court (***Quintette Coal Ltd***).

**EXCEPTIONS ARE CARVED OUT OF THIS… look at the CAN –** *Paccar, Leon’s Furniture, Brewer, Children’s Lawyer*

# Standard of Review – PAGE 12

Because of S96 and the inability of provinces to set up administrative bodies that are absolutely insulated from judicial review, the standard of review debate represents the tension between parliamentary supremacy and the rule of law. The decision by Parliament or the legislatures to use SDMs rather than courts for certain matters is clear intention of the democratically elected body to specifically prefer tribunals to courts. This choice is made abundantly clear with the inclusion of privative clauses in enabling statute to allow for quick and inexpensive decision making. This legislative intent should be respected and points to a need for deference to tribunal decisions because tribunals are the way in which legislators decided certain types of rights and obligations would be best resolved. The tension, however, arises because courts are an equal branch of government (***Vilardell***) and their explicit function means they cannot be excluded from playing some sort of residual supervisory role where the rights and obligation of society are at issue, at least not in a way that is constitutionally acceptable. Until the late 1970s, the courts got around parliamentary supremacy during JR by pulling questions of law outside the privative clause and labelling them as collateral or preliminary questions that had to be answered prior to the tribunal exercising their jurisdiction in deciding the matter. This sort of excessive intrusion, while the courts viewed it as respecting legislative will, essentially undermined the very benefits of the administrative system. The court in ***CUPE v New Brunswick Liquor Corp*** began to move away from this appellate approach and towards a more deferential approach stating “there is no one perfect interpretation of statutes and the Board was well-place to balance the interests in the statute – creating collateral/preliminary questions is too easy a manipulation – the Board was able to engage in the statutory interpretation exercise at issue and their decision fell within the privative clause in the statute”. The Court in ***CUPE*** also developed the original PAFA to SOR, which is later streamlined in ***Southam*** and ***Pushpanathan***. ***Southam*** then created reasonableness as a middle ground between patently unreasonable and correctness and defined the difference between patently unreasonable and reasonable as lying in the immediacy or obviousness of the defect – if very obvious, apparent on the face, patently unreasonable, but if it takes significant searching or testing to find the defect, then only unreasonable. An unreasonable one is one that cannot stand up to a somewhat probing examination. This definition is expanded and made more clear in ***United Steelworkers***.

**NOW….GO THROUGH THE FRAMEWORK**

## SOR for Discretionary Decision WHERE ATA DOESN’T APPLY - PAGE 14

A discretionary decision is one where the law does not dictate a specific outcome OR where the tribunal is given a choice of options within a statutorily imposed set of boundaries. The steps for SOR for substantive discretionary decision is to go through the PAFA analysis, but in the fourth factor, the nature of the problem in question, if the issue is highly discretionary and fact-based, this affords more deference to the tribunal (***Baker***). Although, as always, the decision must be made within the bounds of the jurisdiction set out in the enabling statute, there should be a high degree of deference to the SDM in reviewing their exercise of discretion and actually determining the scope of the SDM’s jurisdiction when determining if the decision fell within it (***Baker***).

* **TEST** for appellate courts reviewing lower court JR decisions: ***Dr. Q v College of Physicians***
  + The role of the CoA was to determine whether the reviewing judge had chosen and applied the correct SOR, and in the event she had not, to assess the administrative body’s decision in light of the correct SOR, reasonableness
  + **Did the lower court apply the proper SOR?**
    - If yes, confirm the decision
    - If no, then the appellate court should apply correct SOR and assess administrative decision in that light
  + Where there is a credibility issue, the fourth criteria – the nature of the question – merits deference – which makes sense as the SDM is there to witness first hand who should be believed
  + SOR was not an opportunity to meddle (unless it is on the correctness SOR) and does not permit re-weighing

# Current Framework for SOR Analysis – PAGE 14/15

1. Is this an *ATA* issue or a *Dunsmuir* issue?
   1. **The *ATA* doesn’t apply if:**
      1. Outside BC
      2. Enabling statute excludes the *ATA* or is silent
      3. It’s a federal tribunal
2. **If it is a *Dunsmuir* issue** – You don’t always need an exhaustive review to determine the SOR – if it has already been determined, don’t repeat: ***Mowat***, but if not, apply the SOR analysis:
   1. The existence of a privative clause
   2. Is it a specialized administrative regime (purpose, nature of scheme) with expertise?
   3. What is the nature of the question?
3. This will most likely lead to a presumption of reasonableness where interpretation their home statute or any laws closely tied to this: ***Mowat***, but the following exceptions will generally require correctness:
   * General questions of law of central importance to the legal profession **AND** it is outside the expertise of the SDM: ***Mowat, Toronto v CUPE***
   * A constitutional question
   * Determining the boundaries of jurisdiction between competing tribunals
   * True questions of jurisdiction or vires – in the narrow sense of having the authority to hear the matter, rather than ancillary issues
   * Concurrent jurisdiction with the courts over the same subject matters/actions
   * Questions of law that are not within the home statutes or an associated statute with which the tribunal has specialized expertise/familiarity
4. If it is **reasonableness** – determine whether the decision is reasonable remembering that “in JR, 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”: ***Dunsmuir***

* Exceptions to the reasonableness SOR should be construed very narrowly - Unless the situation is exceptional, the interpretation by the tribunal of its own statute or those closely related to its function, should be presumed to be a question of statutory interpretation subject to deference on JR: ***Alberta v Alberta Teachers’ Assc***
* CONCURRENT JURISDICTION? Rebut the presumption of reasonableness for interpretation of the enabling statute: ***Rogers Comm Inc v SOCAN***

1. **If it is an *ATA* issue** – look to whether the tribunal has a privative clause to determine whether S58 or 59 applies
2. If there is a privative clause, use S58, then look to whether the issue is one of law, fact or discretion WITHIN EXCLUSIVE JURISDICTION
   1. 1) **Expertise of the tribunal is assumed from the existence of a privative clause** – the tribunal MUST be considered an expert, it’s not rebuttable
   2. 2) a) **Question of Fact**: patently unreasonable – look to ***Southam***: immediacy and obviousness of the error, plus ***United Steelworker***’s ***Speckling*** principles!
   3. 2) a) **Question of Law**: patently unreasonable – look to ***Southam*** immediacy and obviousness of the error, plus ***United Steelworker***’s ***Speckling*** principles!
   4. 2) a) **Discretionary Decision**: patently unreasonable, as defined by **S58(3)** – Was the discretion exercised in bad faith? Exercised for an improper purpose? Based entirely or predominantly on irrelevant factors? **OR** failed to take statutory requirements into account? If yes, patently unreasonable!
   5. 2) b) **Question of PF**: whether the tribunal acted fairly – look to the ***Baker*** factors
   6. 2) c) **All other matters**: correctness – mere error: ***Bibeault***
3. **IF THERE IS NO PRIVATIVE CLAUSE, use S59:** 
   1. 2) **Questions of Fact**: reasonableness or set aside if there is no evidence
   2. 3) **Discretionary Decision**: patently unreasonable, as defined by **S59(4)** – Was the discretion exercised in bad faith? Exercised for an improper purpose? Based entirely or predominantly on irrelevant factors? **OR** failed to take statutory requirements into account? If yes, patently unreasonable!
   3. 5) **Question of PF**: whether the tribunal acted fairly – look to the ***Baker*** factors
   4. 1) **All other matters**: correctness – mere error: ***Bibeault***
   5. 1) **Questions of Law**: correctness – mere error: ***Bibeault***

* Despite *Dunsmuir*, patent unreasonableness will live on in BC, but the content and the precise degree of deference will necessarily continue to be calibrated according to general principles of administrative law – S58 *ATA* is clear legislative direction to give SDMs a high degree of deference on issues of fact and effect must be given to this clear intention: ***Khosa***
  + ***Coast Mountain Bus Company Ltd*** – this is to be interpreted in the common law context (aka use ***Southam*** to inform the *ATA*)
* Patent unreasonableness standard in S58 *ATA* stands at the far end of the spectrum of reasonableness, requiring the greatest deference to the decision under review – this standard requires the tribunal to have rational support and, since *Dunsmuir*, it must fall within a range of outcomes defensible in respect of the facts and the law: ***Viking Logistics* para 59-60**
  + BUT can’t just replace patent unreasonableness with reasonableness because this would disregard legislative intention, so it stands at the upper end of the reasonableness spectrum: **para 63**
* The Court in ***United Steelworkers*** adopted the principles of patent unreasonableness for S58 of the *ATA* set out in ***Speckling v BC (WCB)***
  + Patently unreasonable means openly, clearly, evidently unreasonable: ***Southam***
  + The review test must be applied to the result, not to the reasons leading to the result: ***Kavach v BC (WCB)***
  + A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: ***Douglas Aircraft etc v McConnell*** and ***Board of Education for the City of Toronto***

# Statutory Delegation of Power – PAGE 18

**IF SUBORDINATE LEGISLATION, REGULATIONS OR SOFT LAW IS AN ISSUE or IF SOMEONE OTHER THAN THE MINISTER’S POWER IS IN QUESTION**

Originally, the courts were opposed to the subdelegation and the common law principle of *delgatus non potest deleregare*, the delegate must not themselves delegate their statutory authority to another, was affected in order to restrict the devolution of decision making and regulation making powers. While this may have been ideal in theory, this became seriously problematic in an administrative state that is growing in both size and complexity. It would be fairly absurd to think the Minister could or should be the only one to do everything regarding that specific delegation of power. A partial fix to the common law principle was affected through the Carltona doctrine, in which the subdelegation of power was assumed to be proper as long as that power was exercised in that minister’s name by departmental officials in accordance with the department’s normal administrative practice. There was no need in that scenario to have specific legislative direction conferring authority for that subdelegation. This is now codified in both provincial and federal *Interpretation Act*s and ensures efficiency is still optimal in that regard.

* ***The Queen v Harrison***: Where the exercise of a discretionary power is entrusted to a Minister of the Crown, it may be presumed that the acts will be preferred, not by the Minister in person, but by responsible officials in his department
  + The Minister is accountable to the Legislature for the acts of his appointees
* ***Edgar v Canada:*** s23 of the *Interpretation* *Act* states that a Minister of the Crown includes his deputy, but this is subject to whether a contrary intention appears and the addition of the words “in his sole discretion” is a contrary intention.
  + “in the opinion of the Minister” – ***Ramawad v Canada (Minister of Manpower of Immigration)***
  + “the Minister, himself” – ***Quebec (AG) v Carrieres Ste-Therese Ltee***
* ***Thorne’s Hardware Ltd v The Queen***: While it was possible to strike down an order in council on jurisdictional or other compelling grounds, it would take an egregious case to warrant such action, such as in *Roncarelli v Duplessis*
  + Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings
* ***Globalive Wireless Management Corp***: clarifies that Governor in Council decisions, when sitting as a decision-maker under a statutory delegation, are as amendable to JR, on the same grounds, as other SDMs or tribunals. Delegates must exercise their delegated duties within the grant of authority given to them and in accordance with the statutory objects in question – if they fail to do so, they may exceed the grant of delegated authority, such that they act without or in excess of their jurisdiction and the decision may be quashed on JR
* ***Enbridge Gas Distribution:***Question of proper interpretation of the Act is clearly one of law – something to which the Board can claim no greater expertise than the courts, especially since it’s not a provision that engages the core of the Board’s expertise. Government can be taken to court for failure to fulfill statutory procedural requirements.

RETROACTIVE RULES?

* ***Skyline Roofing Ltd v Alberta***: delegations of authority to create binding rules will be strongly presumed not to include the ability to make retroactive changes to those rules, except where benefit conferring
* ***Canadian Forest Products Ltd v BC:*** retroactive rules, or rules that have a retroactive effect, will be presumptively inconsistent with the statute unless clearly and explicitly authorized – the rule will be declared invalid

FETTERING?

* The delegated authority must not fetter statutory discretion because it would create a situation where the delegate was acting contrary to the enabling legislation by not exercising discretion: ***Thamotharem***

## Framework for Questions about Delegated Authorities

1. **Does the legislation expressly authorize the delegate of the grant of authority to subdelegate it?**
2. **If not, does the grant of authority impliedly authorize subdelegation?**
3. **If subdelegation is authorized either expressly or by implication, was the initial grant of authority in fact subdelegated?**
4. **If so, was the administrative action taken pursuant to the subdelegated power within the scope of the grant of authority?**

# Constitutional and Human Rights Issues – PAGE 22

Originally, courts were incredibly reluctant to allow any tribunal jurisdiction over constitutional and human rights issues, but there has since been recognition that the *Charter* and the *Constitution* reflected the fundamental law of the law. To deny access to these basic principles in the most accessibly manner, the tribunals where matters were already being brought, the courts were in effect denying access to justice. ***Cooper*** established when a tribunal had jurisdiction to consider constitutional and *Charter* issues. The test was whether the tribunal was entitled to consider question of law, even if only within its enabling statute. If so, the courts assumed the legislative intent was for the SDM to have the authority to decide constitutional and *Charter* issues because those issues are questions of law foundational to virtually every exercise of authority by any SDM. The test for jurisdiction of human rights legislation was established to be the same in ***Tranchemontagne***, but this was limited in BC’s *ATA*. In BC, unless the *ATA* is not applicable, whether the tribunal can consider these questions has been codified.

**CONSTITUTIONAL AND ATA DOESN’T APPLY?** The Court in ***Martin*** affirmed the main principles from ***Cuddy Chicks*** regarding a tribunal’s constitutional jurisdiction and articulated the question to be asked to determine whether that jurisdiction indeed exists. 1) No government actor can apply an unconstitutional law due to constitutional remedy (important to remember that tribunals cannot strike down legislation, but merely treat it as invalid for the purposes of the issue before them: ***Cuddy Chicks***) 2) agreeing with McLachlin’s dissent in ***Cooper***, Canadians should be able to assert the rights and freedoms of the *Constitution* in the most accessible forum available, without the need to fragment their proceedings amongst different legal avenues and 3) Tribunals can, in fact, be the most well-informed, expert view of the issues at stake. The question to ask is whether, under the tribunal’s enabling statute, the administrative tribunal have jurisdiction, explicit or implied, to decide question of law arising under a legislative provision. This can be rebutted if there is explicit wording in the legislation or if the party convinces the court that by looking at the statutory scheme, it shows that the legislator intended to exclude *Charter* jurisdiction

**ATA APPLIES?** – **PAGE 24**

* **S44(1)** – The tribunal doesn’t have jurisdiction over **constitutional questions**
* **S45(1)** – The tribunal doesn’t have jurisdiction over **constitutional questions relating to the *Charter***
  + **(2)** If **a constitutional question other than one relating to the *Charter*** is raised by a party in a tribunal proceeding
    - **(a)** on the request of a party or by its own initiative MAY refer that question to the court in the form of a stated case OR
    - **(b)** on request of the AG, the tribunal MUST refer that question to the court in the form of a stated case
* **S2** – definitions – constitutional question means any question that requires notice to be given under S8 of the *Constitutional Questions Act*
* ***Constitutional Questions Act* S8**: “constitutional remedy” means a remedy under S24(1) of the *Charter* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion
  + Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstances
  + **A cause, matter or other proceeding that challenges the constitutional validity or applicability of any law or regulation or where an application is made for a constitutional remedy is a constitutional question as it requires notice**

**SPECIFIC CHARTER SECTION CHALLENGES: look at the CAN**

**HUMAN RIGHTS ISSUES WHERE THE ATA APPLIES? – PAGE 25**

* ***ATA* S46.1(1)** – discretion to decline jurisdiction to apply the *HRC* – the tribunal may decline jurisdiction to apply the *HRC* in any matter before it
  + **(2)** – the tribunal may also consider whether, in the circumstances, there is a more appropriate forum in which the *HRC* may be applied
* ***ATA* S46.2(1)** – limited jurisdiction and discretion to decline jurisdiction to apply the *HRC* – the tribunal may decline jurisdiction to apply the *HRC* in any matter before it
  + **(2)** – the tribunal doesn’t have jurisdiction over a question of whether there is a conflict between the *HRC* and any other enactment
  + **(3)** - the tribunal may also consider whether, in the circumstances, there is a more appropriate forum in which the *HRC* may be applied
* ***ATA* S46.3(1)** – the tribunal doesn’t have jurisdiction to apply the *HRC*

**OVERLAPPING JURISDICTION? – PAGE 26** When an adjudicative body decides an issue within its jurisdiction, it and the parties in the process are entitled to assume that, subject to appeal or JR, its decision will not only be final, it will be treated as such by other adjudicative bodies (***Figliola***). Relititgation is expensive and it should be inquired as to whether it makes any sense to expend private and public resources to do so over the same dispute. The Court in ***Figliola*** stated that tribunals should ask several questions in the face of possible concurrent jurisdiction: 1) is there concurrent jurisdiction to consider HR issues? 2) Was the previously decided legal issue essentially the same as what is being complained of now? 3) Was there an opportunity for the complainants to know the case to be met and have a chance to meet it? This should be considered regardless of how closely the previous process procedurally mirrored the one they themselves prefer or use.

# PF Remedies – PAGE 27

**Section 8 of the *JRPA*** sets out four available court remedies in JR: certiorari (quashing), prohibition (stopping the action), mandamus (ordering performance), and a declaration of the interpretation of the issue. These remedies are equitable and discretionary, flowing from the inherent jurisdiction of the superior Courts and can be refused if an exception, outlined later, is found to exist in the circumstances.The role of the court is to supervise the decision-making process, and not the decision itself. Because of this, if a breach of procedural fairness is established, the default position to remedy this breach must always result in quashing the decision (***Cardinal***), but as with many rules, there exists exceptions.

1. **Triviality**: Even if procedural fairness is breached, if the breach is insignificant and has no impact on the final outcome, a remedy may be irrelevant and not granted (***Westfair Foods Ltd***). This is elaborated on in ***Compass Group Canada*** when evidence was ignored, but was of marginal relevance. The court knew with near certainty what the result would have been and so, the breach of procedural fairness was too insignificant to warrant a remedy.
2. **Mootness**: Because remedies on JR are always discretionary, if there is no hope of obtaining a different outcome due to the circumstances, regardless of a breach of procedural fairness, the point is moot and no remedy will be granted (***Moose Jaw Central Bingo***). The Courts are very sensitive to the need for the conservation of judicial resources and ensuring judicial economy and so will not grant a remedy where it is pointless (***Bago, Mobil Oil Canada***). The Court will ask whether there is any purpose, or any practical effect on an individual’s rights, in resolving the issue. If not, the issue is moot and no remedy will be granted (***Bago***). However, even if there is no purpose, sometimes the court may hear a matter if it is significant and will not otherwise get to court. In that situation, the three ***Borowski*** factors would be considered: Is there a judiciable interest? Does the person have a real and genuine interest in the matter? Is there another reasonable means other than bringing the matter to court?
3. **Curing**: A remedy may not be granted where the error was or could have been cured either in the original hearing process or by pursuing additional avenues of appeal under the statute. There are two ways in which curing can happen. The first is in a stacked decision making system where the appellate SDM has full substitutional authority over fairness issues and they take steps to cure the breaches and error in the original decision so that it can't be complained of on JR (***Taiga***). The second way in which curing can happen is where the breach is in some preliminary ruling, but the outcome of the final decision fixes or makes irrelevant any argument about the preliminary issue.
4. **Exhausting Internal Appeals**: Where there is an adequate alternative remedy in the form of an internal appeal mechanism, *certiorari* shouldn’t be granted except under special circumstances. It has to be assumed that the appellate SDM would have reached the right decision, or else a superior level or court could then quash the decision after that (***Harelkin v University of Regina***)
5. **Prematurity:** The Court will not permit JR of a tribunal’s preliminary determinations, unless there are special circumstances that would otherwise merit the court’s intervention, such as absence of original jurisdiction or some other overwhelming prejudice (***Zundel v Canada (HRC)***). A special circumstance in which the alternate remedy would not be an adequate one as it would waste time and resources to go through the original and appeal process is one that negates the prematurity exception of remedies.
6. **Waiver:** A party can be seen to explicitly or implicitly waive their right to complain of a fairness issue, and if this is established, the Court will not grant a remedy. Waiver is only implied where, in all the circumstances, the party can be reasonably seen as knowing the problem and intentionally not raising it (***Kvelashvili***). If you do not pursue your request or raise the allegation of bias at the earliest practicable opportunity, you may be deemed to waive your right (***Allard, Cougar Aviation Ltd***). However, if you do not know or understand that your rights are being breached and that you may object, waiver may not be effective (***Kvelashvili***).
7. **Unclean Hands**: Because JR remedies are equitable, the court must look very closely at the true purpose for the application for JR. If it is being requested for an improper purpose, the remedy should be refused (***Cosman Realty***). One can’t expect to do something contrary to the procedures of court or against seeking justice, such as perjury, and expect a remedy when you come to the Courts with unclean hands (***Jaouadi***).
8. **Balance of Convenience**: While balance of convenience is a principle of correcting substantive errors, it may also be available for procedural fairness issues. Balance of convenience considerations will include any disproportionate impacts on the interest of innocent third parties that are caught in the crosshairs (***MiningWatch***).