**ADMIN LAW CAN SUMMARY:**

**A: Preliminary Process**:

**READ THE STATUTE**

* + Is there a Privative clause?
		- Serious errors by SDM, the privative clause will NOT apply
	+ Does it derive its authority from the ATA? – more of a SOR issue [if it’s ATA you go to the ATA, if it’s not go to the CL]

**Is the Tribunal Legitimate?**

* + Three Steps to Permissibility of Province Creating an Administrative Tribunal: ***Re Residential Tenancies Act***
1. THRESHOLD TEST: Does the power/jurisdiction conform to one exercised by the courts at the time of Confederation?
* No? Tribunal OK
* Yes? continue
1. Consider the function (not just the procedure) within an institutional setting. What is the nature of the Q the AT must decide?
* The more they are adjudicating disputes between individuals, the more court-like it looks. If it’s policy based, fine.
1. If it is judicial power being exercised, review the ATs function **as a whole.**
* Are the impugned judicial powers subsidiary to the general administrative functions of the AT?
* Are they incidental to some broader legislative goal?
* ONLY valid where the adjudicative function is the sole or central function of the tribunal, ie acting like a section 96 court.
* SCC concluded that s.96 made it invalid for the province to completely immunize or insulate an AT from ANY form of judicial oversight. Supreme final authority only goes to courts: ***Crevier***.

**Is it a Public or Private Matter?** [to determine whether it falls under Administrative Law]

* + Factors to Consider re Applicability of JR v Private Law remedies (***Air Canada v Toronto Port***)
		- Character of matter for which review is sought
		- Nature of SDM and its responsibilities
		- Extent to which decision is based in law vs private discretion
		- Body’s relationship w/ other schemes / parts of governments
		- Is SDM an agent of government or otherwise directed by a public entity?
		- Suitability of public law remedies
		- Existence of compulsory power
		- Conduct has attained serious public dimension
		- **BUT** Court found that sponsors of immigrants who signed Ks were entitled to some PF despite the K based nature of the dispute (***Mavi***)
		- Just because it’s deemed a contractual issue it is not always considered just to be private law. Entitled to some PF before govt enforced debt (but not a high degree of PF) - ***Mavi***

**B: Determine whether there is a duty of PF**

Use ***Cardinal/Knight*** to determine whether there are **rights, entitlements, obligations** that affect an individual and are of a specific administrative nature rather than general or political.

* Factors to determine EXISTENCE of duty of PF (***Knight*** – where neither Act nor K specifically accorded right to PF):
	+ Nature of decision
		1. The more its about the rights of an individual vs broad policy, it will attract PF
		2. Is it a final decision?
	+ Relationship existing between that body and the individual
	+ The effect of the decision on the individual’s rights
		1. Employment, immigration, professional discipline = automatic PF
		- Inference that enabling statute requires SDMs to act fairly and legally
		- If they are not – exceeding their jurisdiction and are acting outside scope of their legislative authority
		- General duty of PF owed: ***Nicholson*** (first time SCC spoke of this). Degree of PF required varies on spectrum of decision making between judicial and political but there is a general duty owed
		- Content is based on CL but can be displaced expressly by statute
		- Duty of PF lies on every public authority making decisions that affect an individual’s RIGHTS, PRIVILEGES and INTERESTS (***Cardinal***)
		- No breach of PF too trivial to trigger analysis of PF duty (***Cardinal***)
* **If statute is SILENT**: then CL applies. On the other hand, try to argue that silence meant to imply the legislature meant no PF duty to arise.

Is it a **PUBLIC EMPLOYEE EMPLOYMENT** issue?

* + - Ascertain whether public law or private (K) law applies
		- Does this employee have a K?
		- Does the statute set out the fairness owed?
		- Three scenarios where private law on employment may not apply:
1. Where public employee not protected by K (judges, ministers, other officials)
2. Where public officer serves at pleasure and can be summarily dismissed (***Dunsmuir***).
* There is PF but only a small amount (***Keen***)
1. Where duty of PF flows by necessary implication from a statutory power governing the employment relationship.

Does it **fall under the EXCEPTIONS TO BEING SUBJECT TO PF**?

* + Legislating: (***Re Canada Assistance Plan (BC)***; ***Iniut Tapisirat***)
		- Look to the provision and the scheme as a whole to discern the degree to which the legislature intended PF principles to apply (***Iniut Tapisirat***)
		- Even when there are legitimate expectations, they don’t need to be met and can’t find a PF dispute over the introduction of new legislation (***Re Canada Assistance Plan (BC)***)
			* Would fetter freedom of govt and its successors
		- Municipal by-laws could be considered quasi-judicial requiring PF, but are not automatically so: ***Wiswell; Vancouver Island***
	+ Government budget making
	+ High level allocation of resources
	+ Emergency (***Cardinal***)

**C: Calibrating the Content (Level) of PF [Not determining whether it is unfair yet]**

* **5 Baker Factors for Calibrating Content of PF:**
1. Nature of decision and process followed in making it
* More judicial looking = more PF
* Is it legislative or political = less PF or no PF
* Is it adjudicative/affecting the rights of an individual = more PF
* Polycentric (managing competing interests/broad policy) = less PF
1. Nature of statutory scheme (and the terms of the statute under which the body operates)
* Final and determinative = more PF
* Statute can override CL right to PF: ***OceanPort***
1. The importance of the decision to the individuals affected
* Serious adverse consequences involving profession, employment, family, citizenship
* Affecting rights = entitlement to PF is high: ***Cardinal***
* Disciplined in profession = high PF: ***Kane***
* Core: people’s health/employment/citizenship/tenancy/anything involving liberty interest
1. The legitimate expectations of the person challenging the decision
* Legitimate expectations doctrine: consistency in procedure [doesn’t apply to Parliament]
* Doctrine can’t create substantive rights. Applies to things like rules/policies/how it arrives at decision but not the decision itself
* Find it in pamphlets, websites, comments by staff
1. The choice of procedure made by the agency itself
* SDMs are masters of their own procedure: ***Prasad*** [exceedingly clear language req’d in statute to displace presumption that AT and SDMs are “masters in their own house.”]
* Important to respect decisions made by SDMs
* Can’t create a binding test case used to screen out applicants and limit people’s rights: ***Geza***

**Practice Point: It is much easier to prove there has been PF breach that that the decision is wrong.**

**D: Is there a BIAS/INDEPENDENCE Issue?**

* Don’t have to prove actual bias, just RAB
* Misconduct is not found in the legitimate interests of the AT but in the overall quality of its decision
* **Is there evidence of PERSONAL BIAS?**
	+ **Committee v NEB & R v S (RD):** Test is 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.”
	+ Nepotism; evidence of personal interest; inappropriate personal stake in case (anti-immigration views held to interfere with his impartiality: ***Baker***); evidence of pre-judgment (okay to draw people from a relevant industry that they have a stake in, and we should presume that they will act appropriately: dissent in ***NEB***, picked up in ***Nfld Telephone***).
* **Has the SDM made comments or shown strong personal opinions?**
	+ Absent pecuniary or other demonstrable interests the fact that a SDM has opinions should not displace the assumption that the SDM will conduct himself fairly.
	+ Where someone makes strong statements regarding the matter pre-hearing:
		- Fine as long as the statements don’t indicate the mind is closed.
		- Personal statements: ***Baker***
		- Needs to be strong evidence of pre-judgment; lack of open mind with regard to proceedings. Standard for adjudicative policy boards is closer to courts but for elected official standard is more lenient: ***Nfld Telephone***.
		- At hearing stage, a greater degree of discretion is required: ***Nfld Telephone***.
* **Is there evidence of INSTITUTIONAL BIAS? [**Same as personal (fully informed person test), with addition of “in a substantial number of cases”: ***Regie***. Can’t be speculative: ***Matsqui***]
	+ Proving Institutional Bias:
		- Nature of tribunal
		- Interests at stake
		- Oath of office?
		- Independence – Valente Criteria
* **Is there sufficient independence of the AT?**

*Will of the Legislature should prevail in determining how much independence any tribunal should have*.

* + **INDEPENDENCE**: ***Valente*** factors (Regie also applied ***Valente*** criteria):
		1. Security of Tenure
			- Court reasoned that adjudicators shouldn’t face possibility of being dismissed simply at the pleasure of the Executive branch: ***Regie***
			- Decision to suspend license closely resembled judicial decision and so Liquor Appeal Board members required more security of tenure than an “at pleasure” appointment
		2. Financial Security
		3. Institutional Independence over administration of tribunal
		- Prosecuting counsel must never participate in the adjudication process
		- Should have separation between DMs at various stages of the process
		- Judicial type tribunal requires more independence (cite ***McKenzie***) – rule of law required this result.
		- Licensing you argue requires less independence (cite ***Oceanport***)
		- At pleasure appointment: low PF
* Court held that letter was sufficient to satisfy requirements of fairness for an “at pleasure appointee”: ***Keen***
* Provided that a lower level of PF is required on termination of an “at pleasure” appointee: ***Dunsmuir***
* Loss of livelihood fits with higher PF requirement: ***Baker***
	+ - Dunsmuir:
		- Absent any constitutional constraints, the degree of independence required is determined by the enabling statute (which must be construed as a whole to determine legislative intention: ***OceanPort***)
		- Independence, like all PF, can be ousted by express language
		- No constitutional guarantee of independence because SDMs are not courts
		- Institutional bias is rarely found because if it exists, it is usually authorized by statute and overrides PF: ***Oceanport***
	+ **Exam note:** Valente is the gold standard of independence. May not be followed depending on required standard from Baker 5 Factors analysis. BUT can argue independence if less than *Valente.*
* **Is there outside influence?**
	+ Okay for tribunal to be supervised by the Executive but they need independence in so far as the exercise of their judicial-type function
	+ Outside influence does not vitiate PF (***Khan***)

**E: Other Factors Affecting PF**

**Notice Requirement:**

* + Must be enough to provide a reasonable opportunity to present proof and arguments and to respond to those presented in opposition

**Adequacy of Reasons:**

* **Was the duty to give reasons met?**
	+ Look to the statute to see whether reasons are required.
	+ If they provide anything that has any form of content, there is no PF issue.
	+ 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’***
	+ Reasons need not be given on every minor point raised during proceeding: ***Gichuru***
	+ Where substantive evidence / arguments are missing it is not PF but possibly a substantive error
	+ A wholesale failure to provide reasons will constitute a breach of PF but otherwise duty has been met regardless of adequacy or sufficiency: ***Nfld Nurses***
* **Assessment of reasons**
	+ Given the ATA, assessment of reasons in BC is integrated into the substantive analysis under the appropriate SOR set out in the ATA: ***Phillips v WCAT***

**Oral Hearing:**

* Look to the statute – clear language indicating one way or another
* ***Strathcona***:
* **If there is no clear language, go to 5 *Baker* Factors:**
1. Nature of decision and process followed in making it (more judicial looking = more PF).
2. Nature of statutory scheme and the terms of the statute under which the body operates (final decision / determinative of the issue).
3. Importance of decision to the individuals affected.n
4. Legitimate expectations of person challenging the decisions.
5. Choice of procedure made by the body itself (SDMs are masters of their own procedure).
* If there is a high degree of PF that might auger the need for a hearing
* If there is a serious issue of credibility, PF requires credibility to be determined on the basis of an oral hearing or CE (***Singh***)
* Need to raise issue of oral hearing as soon as possible: ***Allard***

**PF Right to Cross Examine:**

* **There is no absolute right to an oral-hearing or cross examination (subject to statute)**
* 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 CE (***Innisfil***)
* Not necessarily if its not an adversarial structure (***Innisfil***)
* Did the party have an adequately effective method of contradicting witnesses by writing or otherwise such that a CE/hearing is not necessary?
* If there are other equally effective methods of answering the case against him, CE is unnecessary (***Strathcona***)
	+ Basically a CE through duelling export reports
* It isn’t up to the T to determine the likelihood of success of a CE. The importance is in allowing a party to further their case and to respond to the case they have to meet: ***Djakovic; Johnson v AB***
* Allard wanted oral to CE the assessor but Chair decides to proceed with written submissions (Act said board may hold any combo of written, electronic and oral hearings.
	+ 5th Baker Factor gives deference to agency’s choice of procedures

**Document Disclosure Requirements**:

* look at statute and then general admin law statutes (ATA)
* disclosure obligations depend on enabling statutes as well as general administrative law statutes
* ATA s.34: allows parties and/or ATs to summon witnesses/documents and apply to the court for compliance (only applies to SDMs who have this in their enabling statute)
* SDMs must disclose evidence they intend to rely on: ***Kane***
* *Audi alteram partem* requires that party and lawyer be present for any evidence given post hearing and have a chance to respond.

**Did Delay Cause PF Issues?**

* State-caused delay may result in a breach of PF: ***Blencoe***
* Delay can engage s7 (right to life, liberty and security of the person)
* Delay includes from state interference with psychological integrity – the interference must be state-imposed AND serious
* **Delay argument:** delay, without more, will not warrant a stay of proceedings as this would amount to a judicially-imposed limitation period
* **TEST for whether the delay is unacceptable and a stay should be ordered is that:**
	+ The damage to the public interest in the fairness of the administrative process should the proceedings go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted

**F: Remedies for Breach of PF**

Section 8 JRPA sets out available court remedies:

1. **Certiorari:** quashing decisions \*MOST COMMON
2. **Prohibition:** stops the action
3. **Mandamus:** orders performance
4. **Declaration:** states interpretation of the issue
* **All discretionary!** Can refuse remedy due to laches, acquiescence, unclean hands etc.
* Default position for a breach of PF must always result in quashing the decision (certiorari): ***Cardinal v Kent***
* Basically amounts to a correctness standard

**Does it fall under one of the FIVE EXCEPTIONS?**

1. Triviality/mootness
2. Exhausting internal remedies/prematurity/curing
3. Waiver
4. Unclean hands
5. Balance of convenience

**Was there a chance to respond?** Even if PF 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***

**Was evidence ignored?** if it is of marginal relevance, being that the court knew with “near certainty” what the result would have been, the breach of PF could be too insignificant to warrant a remedy: ***Compass Group Canada***

**Is there a Point in Seeking JR or is it Moot?**

* Remedies on JR are always discretionary and if there is no hope in hell of obtaining a different outcome, regardless of breach, the point is moot and no remedy will be granted: ***Moose Jaw Central Bingo Assn Inc***
* If you’ve already got the outcome you were seeking, there is no point in continuing a JR – what a waste of time – so it will be quashed as moot: ***Bago v Canada (Minister of Citizenship and Immigration)***
	+ TEST: is there any purpose, or will there be any practical effect on an individual’s rights in resolving the issue? Nope? MOOT.
		- Even if there is no purpose, sometimes the court may hear a matter if it is significant and will not otherwise get to court – consider the three ***Borowski*** factors here
			* Is there a judiciable interest (something for the court to decide)?
			* Does the person have a real and genuine interest in the matter?
			* Is there another reasonable means other than bringing the matter to court?
* Even with a PF breach, where it is certain the outcome would have been the same, and where there is concern for finality and judicial economy, a remedy can be refused: ***Mobil Oil Canada***

**Has the Problem Already been Cured?**

* 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

**Curing happens in two ways:**

1. In a stacked decision making system where the appellate division DM can take steps to “cure” breaches by lower DMs: ***Taiga***
2. Curing may also take place where there is an alleged error in some preliminary ruling (i.e. the admission of expert evidence) but that the outcome of the final decision fixes or makes irrelevant any argument about the preliminary issue

**Has JR Been Sought Before Exhausting Internal Appeals?**

* Where there is an adequate alternative remedy in the form of an internal appeal mechanism, *certiorari* should not be granted except under special circumstances:  ***Harelkin v University of Regina***
* Has your client exhausted all other adequate means of recourse for challenging the decision-maker’s action? (***Harelkin***)
	+ Does the statute provide for a right of appeal?
	+ What is the scope of the appeal that the statute permits?
	+ Is it by right or do you need leave of the court?
	+ Is there a stay of the original decision-makers decision?

**Has JR Been Sought Prematurely?**

* It’s premature to proceed with JR before seeing the outcome of a complete administrative proceeding
* It is premature to apply for JR for an interlocutory decision
* The Court will not permit judicial review of a tribunal’s preliminary determinations, except where there is some special circumstance otherwise permitting the court to intervene, such as absence of original jurisdiction or some other overwhelming prejudice: ***Zundel v Canada (HRC)***
* A special circumstance in which the alternate remedy was not an adequate one as it would be a waste of time and resources to go through the original and appeal process when there is a jurisdictional issue from the outset: ***Secord v Saint John Board of Commissioners***

**Can it Reasonably be said that the Party has Waived their Right to Complain?**

* 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 v Canada***
	+ Depends on the state of the parties’ **actual or presumed knowledge and sophistication**
		- It’s more difficult to imply waiver against an unsophisticated and unrepresented party than against a party with counsel
	+ Promotes efficiency by giving tribunals opportunities to correct/manage PF problems
* If you do not pursue your request, you may be deemed to waive your right: ***Allard*** – deemed to have waived his right to an oral hearing, therefore, he was not denied a fair process
* Allegations of bias must normally be raised at the earliest practicable opportunity – if not taken in timely fashion, an objection will be regarded as waived: ***Cougar Aviation Ltd***
* For waiver to be effective, the party must know or reasonably have been expected to know the facts necessary to understand a breach of PF took place – must also have the necessary sophistication to understand that their rights are being breached and they may object: ***Kvelashvili v Canada***

**Did the Party Come to the Court with Unclean Hands?**

* JR is an equitable, discretionary remedy flowing from the inherent jurisdiction of the superior Courts
* The court must look closely at the purpose for JR. If JR is being requested for an improper purpose, the remedy should be refused: ***Cosman Realty Ltd v Winnipeg*** (initiating proceedings in order to delay and not to seek real remedy)
* When you lie on the stand under oath during your testimony, you’re an idiot and must bear full responsibility for perjury – can’t expect a remedy when you come to the Court with unclean hands: ***Jaouadi***

**Is there a Balance of Convenience to Consider?**

* Balance of convenience considerations will include any disproportionate impact on the interest of third parties: ***MiningWatch***
* Balance of convenience isn’t a fairness error, but a substantive error – however, it is likely also available for PF errors

**Collateral Attack**

* United Steel Workers used a bogus lawsuit challenging the safety of foreign workers, but were unable to articulate a justiciable issue and were really trying to attack the government’s decision to allow temporary foreign workers
* There was no reviewable decision on the issue other than an email
* The court must look closely at the purpose for JR. If JR is being requested for an improper purpose, the remedy should be refused: ***Cosman***

**STANDARD OF REVIEW**

Where **deference was intended**, the courts will review the SDM on the basis of **REASONABLENESS.**

Where **little or no deference is intended** the SDM will be reviewed on the basis of **CORRECTNESS.**

**REASONABLENESS:**

* The deferential standard.
* Where the decision is a matter of law, a mix of fact and law or a discretionary decision, a decision will be said to be unreasonable where the decision is “not supported by any reasons that can stand up to a somewhat probing examination”: ***Southam***.
* Unreasonable where “there is no analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.” (***Ryan***)
* **Distinction from PU:** “The difference between ‘unreasonable’ and ‘patently unreasonable’ lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal’s reasons, then the tribunal decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.” *Southam*

**CORRECTNESS:**

* The least deference that court can give a SDM.
* The court will give no deference at all and will judge the decision on the basis of whether it is correct in law. A court may substitute its own opinion for that of the SDM.

Always warrants a correctness standard:

1. General questions of law of central importance to legal profession **AND** is **outside the expertise of the SDM**: ***Mowat, CUPE***
2. A constitutional question**: *Cuddy Chicks***
3. Determining the boundaries of jurisdiction between **competing tribunals**: ***Figliola***
4. True questions of jurisdiction or vires – in the narrow sense of having the authority to hear the matter, rather than ancillary issues: ***Bibeault***
5. Concurrent jurisdiction with the courts over the same subject matters/actions: ***Rogers*** [really only applies to *Copyright Act*, but includes any situation where T and Court would be held to different SORs]
6. Questions of law that are not within the home statutes or an associated statute with which the tribunal has specialized expertise/familiarity: ***Southam***

**PATENT UNREASONABLENESS:**

* Was the highest deference that the court could give an SDM (prior to *Dunsmuir*).
* The decision had to be so egregious it was patently unreasonable.
* The ATA specifies the standard of patent unreasonableness.
* ***Khosa*** said PU will continue in BC despite ***Dunsmuir*** but the content of the expression and precise degree of difference it commands will necessarily continue to be calibrated according to general principles of administrative law.

**DISCRETIONARY DECISIONS:**

Decision where law does not dictate a specific outcome OR where the AT is given a choice of options within a statutorily imposed set of boundaries.

**TEST** for **SOR for substantive discretionary decisions**:

PAFA analysis with more discretion re: 4th factor [Question of Law]. 🡪 Highly discretionary and fact-based nature of decision affords more deference. // Baker said of discretionary decisions:

1. Must be made within the bounds of jurisdiction set out in the statute.
2. Should be considerable deference to the SDM by the courts in reviewing exercise of discretion and determining the scope of the SDMs jurisdiction.

Discretionary decision will be set aside IF:

* It’s arbitrary
* Considered irrelevant evidence
* Failed to consider relevant evidence
* Failed to take into account statutory requirements
* **Now also if it fails the relevant SOR**
* “A discretionary decision of a tribunal made in good faith, within the scope of its statutory authority and pursuant to fair procedure will be permitted to stand”: ***Baker***

**PAFA/PPEQ**

Introduced in CUPE, replaced the preliminary/collateral question test that was critiqued in *National Corn Growers* (where Ts were not entitled to deal with preliminary/collateral issues of law).

CUPE introduced PAFA (ATs could lose jurisdiction when their decisions were so patently unreasonable as to be rationally unsupportable).

**PPEQ** (created in *Southam* and applied in *Pushpanathan*)

* **P –** Privative Clause
* **P –** Purpose of Legislation
* **E –** Expertise of SDM
* **Q –** Nature of Question

|  |  |  |  |
| --- | --- | --- | --- |
| **PRIVATIVE CLAUSE** | **PURPOSE OF ACT** | **EXPERTISE** | **NATURE OF QUESTION** |
| **>** Absence of PC does not = higher scrutiny > Presence of full PC = deference> Full PC language = “final and conclusive” and “no appeal lies”> Other words will suffice if equally explicit> If statute permits appeals, then more searching standard applicable | **>** Is there a delicate balancing between difference constituencies in a polycentric arrangement? Then there is more deference.> Is the statute primarily concerned with disputes between individuals? Then less deference.> Qualifications of members can be a consideration of purpose. | **>** What is the expertise of tribunal?> What is the court’s expertise relative the tribunal?> What is the nature of the specific issue before the SDM in relation to its expertise?> Note the relative nature of expertise! | **>** The broader the proposition, the less deference, unless other implied or express legislative intent> Note: the more general the question and the broader its implications, the less deference given.> Can be rebutted by statute.> Home statute? |

**AFTER PAFA:**

* PAFA was vague and permitted considerable debate, thus leading to unpredictability in terms of the appropriate SOR
* The distinctions between the SORs themselves was hazy

**TWO CRITICAL DEVELOPMENTS POST-PAFA (TWO BRANCHES):**

* *The Administrative Tribunals Act* (codifies and preserved PU standard in BC)
	+ Codifies SOR pre-*Dunsmuir*
* *Dunsmuir v New* *Brunswick*, 2008 SCC (collapses SOR into unified, simplified standard but not in BC)
* PAFA has been criticized for codifying SOR in statutory language while also requiring CL and for requiring circular reasoning. (***United Brotherhood***, ***Kerton***)

**Keys for Understanding PAFA in BC:**

***Khosa*** said PU will continue in BC despite ***Dunsmuir*** but the content of the expression and precise degree of difference it commands will necessarily continue to be calibrated according to general principles of administrative law.

* In BC, we may have regard to PAFA as a last resort where the privative clause is unclear or the statute does not adequately describe whether the issue is within “exclusive jurisdiction” of the tribunal
	+ Always better to review the privative clause to determine this
	+ After this transition period, JR decisions generally have much shorter SOR analyses and start to apply the test more quickly–appears that the ATA set out what it intended to do in the short term

**DUNSMUIR ISSUE** (If AT does not derive its authority from the ATA, *Dunsmuir* applies at Common Law)

1. **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 it hasn’t already been determined, **apply the SOR analysis**:

* 1. **Presence of a Privative Clause:** Look to the existence of a privative clause [which indicates degree to which the legislature intended for Courts to have. Mean to insulate AT from JR.
	2. **Discrete and special administrative regime with special expertise** (combines purpose + expertise from PAFA)
* Refer to PPEQ table above, considering factors from purpose and expertise as one factor.
	1. **What is the nature of the question**?
* Most of the time SOR will be reasonableness, but consider exceptions after analysing the first two factors. Even when they are met, correctness may apply in rare cases.
* Except for Concurrent Jurisdiction, the exceptions have to do with the nature of the question.
1. This will most likely lead to a **presumption of reasonableness** where interpretation their home statute or any laws closely tied to this: ***Mowat***
* 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*** [exemplified in *McLean* and *Sattva*)
	+ Tribunal’s decision to accept late claims should be given deference (*Mzite*)
	+ Review of a preliminary decision should be rare (*Mzite*)
	+ Judge should not substitute his view of the evidence for the tribunals, provided the decision made in relation to the evidence was reasonable (*Mzite*)
1. BUT: the following **exceptions will generally REQUIRE CORRECTNESS**:
	* 1. General questions of law of central importance to the legal profession **AND** it is **outside the expertise of the SDM**: ***Mowat, CUPE***
		2. A constitutional question**: *Cuddy Chicks***
		3. Determining the boundaries of jurisdiction between **competing tribunals**: ***Figliola***
		4. True questions of jurisdiction or vires – in the narrow sense of having the authority to hear the matter, rather than ancillary issues: ***Bibeault***
		5. Concurrent jurisdiction with the courts over the same subject matters/actions: ***Rogers*** [really only applies to *Copyright Act*, but includes any situation where T and Court would be held to different SORs]
		6. Questions of law that are not within the home statutes or an associated statute with which the tribunal has specialized expertise/familiarity: ***Southam***

IF IT IS **REASONABLENESS** [will usually be 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***

IF IT IS **CORRECTNESS:**

* There is not a range of acceptable interpretations. The court may impose what it considers the “correct” interpretation to the question of law on the tribunal, quashing a decision that would potentially survive a more deferential SOR.

**ATA ISSUE**

**The *ATA* doesn’t apply if:**

* Outside BC
* Enabling statute excludes the *ATA* or is silent [must spell out derives its authority from the ATA]
* It’s a federal tribunal
1. **Look to the enabling statute: see if it derives authority from ATA [cannot apply to other provinces or federal entity]. 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. **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. **Question of Fact** 🡪 patently unreasonable – look to ***Southam***: immediacy and obviousness of the error, plus ***United Steelworker***’s ***Speckling*** principles!
	3. **Question of Law** 🡪 patently unreasonable – look to ***Southam*** immediacy and obviousness of the error, plus ***United Steelworker***’s ***Speckling*** principles!
	4. **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. **Question of PF** 🡪 whether the tribunal acted fairly – look to the ***Baker*** factors
	6. **All other matters** 🡪 correctness – mere error: ***Bibeault***
3. **IF THERE IS NO PRIVATIVE CLAUSE, use S59:**
	* Look to enabling statute
	* What is SDM’s area of expertise?
	1. **Questions of Fact** 🡪 reasonableness or set aside if there is no evidence
	2. **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. **Question of PF**: whether the tribunal acted fairly – look to the ***Baker*** factors
	4. **All other matters**: correctness – mere error: ***Bibeault***
	5. **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***

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Privative Clause?** | **Question of Fact** | **Question of Law** | **Discretionary Decision** | **Procedural Fairness** |
| **YES:** Go to **58** 🡪 | **PU** [58 (2)(a)] | **PU** [58(2)(c)] | **PU** [58(2)(a)] | **“fairly”** [58(2)(b)] |
| **NO:** Go to **59** 🡪 | **R** [59(2)] | **C** [59(1)] | **PU** [59(3)] | **“fairly”** [59(5)] |

**From ATA: “private clause”** means provision 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 T to which some or all of the provisions of this Act are made applicable under the tribunal’s enabling Act

**STATUTORY DELEGATION OF AUTHORITY**

= a directive in the SDM’s enabling legislation that permits the tribunal to create rules for further subordinate legislation (such as regulations and policy).

## Framework for Questions about Delegated Authorities (*Thermotharem*):

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 sub-delegation 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?

**Why Delegate?**

* Expertise (know better than legislators)
* Legislature’s lack of time and info to make all the decisions necessary

**Risk of Delegation:**

* Risk of not following wish of legislature
* Risk of not respecting the wishes of the ultimate principal – the public
* Agent may follow own view/value rather than public/principals
* Agent may be seeking to further own interests
* Issues of accountability and control

**Controlling Risks:**

* Process requirements such as requiring public consultation
* Royal commissions/inquiries
* Legislative oversight
* Judicial review/oversight

***Delegatus non potest delegare* (cannot sub-delegate)**

* This principle worked in the early states of admin law, but has become increasingly difficult to maintain in the modern admin state. It has become very impractical to insist that a minister to whom power has been delegated exercise it.
* Overly strict: would require the re-writing of many statutes to permit sub-delegation by necessity

**Carltona Doctrine**

* This led to the Carltona Doctrine, which essentially is a partial antidote to the delegatus non potest delegare common law rule
* The CD provided that as long as a power conferred on a minister is exercised in that minister’s name by departmental officials in accordance with the department’s normal administrative practice, there is no need for a specific power of subdelegation
* The CD applies to both decision making and administrative action, and to delegate rule-making authority
* Now codified in the respective *Interpretation Acts* of the provinces and the fed
* See *Interpretation Act*, section 23
* ***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.

**Were there 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

**Is FETTERING an issue?**

* 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***

**STANDING**

Re standing of ATs on JR, two issues can arise:

1. The scope of participation (in a proceeding initiated by another person);
2. Right to initiate a proceeding (can a tribunal appeal if their decision has been quashed?)

ATs don’t JR their own decisions but if they lose a JR, can they seek leave to appeal?

**Law of costs**

Exceptions to the rule that costs are not awarded against the AT:

1. Misconduct of the AT
2. Appears and does something it ought not to do (Lang)

Often protected by immunity clause in statute

If you want to put an AT on edge, raise STANDING, because it can raise spectre of inappropriate conduct.

**Deference:**

**Nfld Nurses:** a tribunal’s “decision should be presumed to be correct even if its reasons are in some respects defective” given that tribunals are “specialized decision makers [who] routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counterintuitive to a generalist.”

***Leon’s***: the Alberta Court of Appeal held that where an applicant and a respondent are present and participating fully in the proceedings, “there is little need for the tribunal to be involved. Where the tribunal is adjudicating over a dispute between two adversarial parties, it is especially important that the tribunal remain neutral.”

***Thibeault***: Whether a tribunal has standing to defend the merits of the decision under review is a matter for the reviewing court's discretion. The court must strike an appropriate balance between the two fundamental values, the need to maintain tribunal impartiality and the need to facilitate fully informed adjudication on review. While I stress this balancing exercise is discretionary in nature, it is appropriate to provide some general guidance. The following potentially relevant factors are in no way intended to be exhaustive. It is not possible to give examples of all of the relevant factors to consider as to the appropriate level of tribunal participation on judicial review (Leon's Furniture at para. 29).

[52] The need to maintain tribunal impartiality will generally be more important, and it will be less likely to be appropriate for a tribunal to argue the merits, if:

a) the tribunal is strictly adjudicative in function, rather than also inquisitorial or investigative (Leon's Furniture at paras. 20-21);

b)  the matter will be referred back to the tribunal for reconsideration if the petitioner is successful; or,

c)  the tribunal seeks to make arguments on review which are not grounded in, or which are inconsistent with, the published reasons for its decision (Children's Lawyer at para. 42);

[53] On the other hand, the need to facilitate fully informed adjudication will generally be more important, and it will be more likely to be appropriate for a tribunal to argue the merits, if:

a) there is no other respondent able and willing to defend the merits (Pacific International Securities at para. 41);

b) there is a challenge to the legality of procedural policies or guidelines that have been formally adopted by the tribunal;

c) a detailed analysis of matters within the specialized expertise of the tribunal is necessary and the court is unlikely to be able to comprehend or analyze those matters without the assistance of counsel for the tribunal.

54  I consider this last factor to be a modernization of Mr. Justice Taggart's statement for this Court in B.C.G.E.U. (at 153), adopted by Mr. Justice LaForest for the Supreme Court of Canada in Paccar (at 1016), that "the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area".

**EVIDENCE**

**1. Tribunals are masters of their own procedure**

**2. Evidence is an aspect of procedure**

> But admission of evidence will only come up at the SOR stage, since admitting evidence (like hearsay for example) is not a PF violation

> Can be a PF violation not to admit relevant evidence

> not a breach of PF to admit evidence does not constitute a PF breach but it **may go to the reasonableness of the decision** as part of **substantive review**

**3. The strict rules of evidence do not** **apply to tribunals**

> Tribunal can consider hearsay [unless its admissibility would amount to a clear denial of PF]

 > s.40 of ATA allows for hearsay evidence.

> ***Silver Campsites, Cambie Hotel***: Tribunals not bound by rules of evidence applicable to court of law. Tribunal entitled to draw inferences from facts. Not necessary for plaintiff to testify to make out compensatory claim (HR code people can bring complaints on behalf of others).

 > Must consider what weight to give evidence (probative value)

> photocopies are acceptable (non-notorized documents) – as long as you can be reasonably confident in their accuracy

**4. Whether evidence is admitted depends on its relevance**

> When in doubt admit and assess probative value later

**5. Not all evidence should be given the same weight**

**>** Evidence has different probative value and credibility must be weighed: ***Cambie Hotel***

**6. Tribunals can take “judicial notice” – make inference based on common sense or generally accepted facts**

**ATA:** Information admissible before tribunal proceedings

* + **40(1)** The Tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

**Court Act**:

* + **42(1)** In concluding a hearing, the tribunal may do any or all of the following:
	+ (a) receive, and accept as evidence, information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law
	+ (b) Ask questions of the parties and witnesses
	+ (c) inform itself in any way it considers appropriate