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# 

# What is Administrative Law?

* 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
* The Court views itself as a separate and equal branch of government: ***Vilardell v Dunham***
  + Setting of court hearing fees – infringement on access to justice and the judicial branch

# Sources of Administrative Justice

* *Constitution Act, 1867, Constitution Act, 1982, Canadian Bill of Rights*

Sources of Administrative Law:

* **Grant of Statutory Authority:** Primary source of administrative justice is a grant of statutory power – from the enabling/home statute: legislation that confers the authority on the decision maker/tribunal
* **Private contract**: collective/commercial agreement provisions for an arbitrator
* **COMMON LAW principles** (can remedy gaps in statutes and enable SDMs to carry out their legislative mandate):
  + Administrative tribunals or statutory decision makers are the master of their own procedure: ***Prasad v Canada***
    - Absent explicit statutory directives, tribunals or SDMs can do what they want
    - Codified in the ***Administrative******Tribunals******Act*** – a menu for enabling/home statutes to pick and choose from – a default position for some provisions
  + It is a statutory interpretation principle that a tribunal or SDM has **implied or incidental powers** necessary to give effect to general statutory grants of authority (procedural or substantive) – the powers of any administrative tribunal must be explicit in the statute, but can also exist by necessary implication from the wording of the Act, its structure and its purpose: ***Bell Canada v Canada (CTRC)***
    - In order to fulfill its mandate, the court decided the CRTC must also have the power to revisit and revise the interim orders it had already made

# Limits of Administrative Justice

Two main limits on administrative law are:

1. **The Rule of Law**

* *Constitution Acts*, 1867 and 1982
* Canadian Bill of Rights

1. **Judicature Provisions**

* *Constitution Act,* 1867 Section 96
* Power of courts to supervise administrative justice system

## Rule of Law

* A fairly vague constitutional principle contained only in the preamble but elaborated on in *Reference re Secession of Quebec*, limited in *British Columbia v Imperial Tobacco Canada Ltd*
* Fills in gaps rather than supplanting the express language of the constitution

Features:

* No arbitrary exercise of government authority (***Roncarelli***)
* Equal application of the law
* Equal access to the law (***Vilardell***)
* Clarity
* Performable
* Independent judiciary
* Avoid retroactive changes to the law
* Coherence
* Publicly promulgated (not secret)

## Judicature Provisions

**Section 96 of the *Constitution Act, 1867***

* **Appointment of Judges** –
  + Only the federal government may create what are basically courts – provinces cannot create administrative bodies which look too much like a court
  + Section 96 creates inherent jurisdiction for the courts re AT
  + Reserves the appointment of judges to the federal government
  + Provincial government cannot set up de facto courts through tribunals
  + Also can’t insulate tribunals through JR
* **Privative Clauses** – something that says that the decision of the tribunal/administrative body is final and conclusive and isn’t open to question or review by a court – the court can’t issue a remedy re an administrative decision
  + Meant to insulate the administrative body from judicial review, but are actually constitutionally incapable of eliminating judicial review due to S96 *Constitution Act, 1867*
    - If it isn’t subject to JR, then it’s basically a court and provinces can’t set these up
    - ***Crevier v AG (Quebec)*** – struck down portions of the statute purporting to insulate the tribunal from JR
    - Uniformity of law is threatened if provinces create a patchwork of laws without court supervision

## Three Steps to a Province Creating an Administrative Tribunal (*Re Residential Tenancies Act*)

1. Does the power or jurisdiction conform to the power or jurisdiction exercised by the courts at the time of confederation?
   1. No – tribunal is OK. Yes – go to step 2.
2. Consider the function within an institutional setting, not just the procedure. What is the nature of the question the tribunal must decide?
   1. If it is adjudicating private disputes between parties then it’s usually judicial
3. If their power is to be exercised judicially, then you must review the tribunal’s function as a whole.
   1. Are the impugned judicial powers subsidiary to the general administrative functions of the tribunal?
   2. Are the powers incidental to some broader legislative policy goal?

* The tribunal scheme is only invalid where the adjudicative function is the sole/central function of the tribunal – ie the tribunal is acting like a S96 court.

## Charter

* Like the Constitution Act, 1867, the Charter is entrenched and imposes limits on the authority of AT
* ***Nova Scotia (Worker’s Compensation Board) v Martin; Laseur*** – Courts and SDMs may not apply invalid laws
  + If the SDM has the power to consider questions of law relating to a provision, that power normally extends to assessing the constitutional validity of that provision
* “The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch.  The *Charter* belongs to the people.  All law and law‑makers that touch the people must conform to it.  Tribunals and commissions charged with deciding legal issues are no exception.  Many more citizens have their rights determined by these tribunals than by the courts.  If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.” – McLachlin CJ dissent in ***Cooper v Canada (HR Comm)***

## Human Rights

* HR legislation isn’t constitutionally entrenched, but generally held above ordinary statutes – quasi-judicial
  + Ex: S4 of BC’s *Human Rights Code* – the code prevails if there is a conflict between it and any other enactment
* A tribunal is authorized to consider human rights legislation as long as they have the general authority to otherwise decide questions of law: ***Tranchemontagne***
* BC’s *ATA* has removed jurisdiction over the *Human Rights Code* from some tribunals due to ***Tranchemontagne***

## Statutory Interpretation

* **S8 of BC’s *Interpretation Act*** – legislation is to be construed in such a fair, large, and liberal manner as to best attain the purposes of the legislation
* Common law principle of statutory interpretation – ***Driedger’s* rule**: the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament – approved in ***Rizzo & Rizzo Shoes***

## Administrative Tribunals Act

* ATA is a menu of provisions the legislature can pick and choose from to grant or limit an AT
* Limited the jurisdiction of many tribunals to address the *Charter*, constitutional and human rights issues
  + Response to ***Martin*** and ***Tranchemontagne***
* Section 44, 45, and 46.1 (different levels of jurisdiction) may be constitutionally invalid given ***Martin*** and ***Tranchemontagne*** – the government shouldn’t be able to limit access to basic constitutional protections

## Judicial Review Procedures Act

* Procedural Statute that sets out the method of seeking JR and remedies
* Section 8 sets out available court remedies:
  + **Certiorari:** quashes decision
  + **Prohibition:** stops the action
  + **Mandamus:** orders performance
  + **Declaration:** states interpretation
* Discretion to refuse remedy due to laches, acquiescence, unclean hands etc.
* S11 sets no time limit for applying for JR BUT **S57 *ATA*** sets out a 60 day default if the enabling statute is silent
* **Courts can extend the time limit if** it is satisfied there are serious grounds for relief, reasonable explanation for delay, and no substantial prejudice.

## Administrative law vs. Private Law

Sometimes unclear to use admin law or private law (e.g. tort or contract etc)

Ex: public office holder loses job – should she sue for breach of K or should she seek JR of the SDM who made the termination decision?

* ***Air Canada v Toronto Port Authority*** – sets out factors to consider re applicability of JR vs. private law remedies (TPA wasn’t acting in a public capacity so there was no JR):
* **Factors to consider re: applicability of JR v private law remedies:**
  + Character of the matter for which review is sought
  + Nature of the SDM and its responsibilities
  + Extent to which decision is based in law vs. private discretion
  + Body’s relationship with other schemes/parts of government
  + Is the SDM an agent of the government or otherwise directed by a public entity?
  + Suitability of public law remedies
  + Existence of compulsory power
  + Conduct has attained serious public dimension \*exceptional!
* BUT ***Canada (AG) v Mavi*** – court found sponsors of immigrants, who signed a contract with the government to guarantee immigrants’ obligations, were entitled to *some* PF, despite the contract-based nature of the dispute, before the government enforced the debt
  + This area of law is unclear!

# Procedural Fairness

* Privative clauses don’t apply to serious errors as courts must exercise their constitutional mandate to supervise SDMs
* **There is an inference that the enabling statute requires SDMs to act fairly/legally – if not, they’re exceeding their jurisdiction by acting outside the scope of their legislative authority and privative clause**

Two basic rules of fair decision making:

* 1. *Audi alteram partem* (hear the other side)
  2. *Nemo judex in sua causa* (no person shall judge their own cause)
  + INTERPRETATION: courts will assume the legislature didn’t intend to oust these concepts, subject to express language or necessary implication: ***Kane v Bd of Governors of UBC***

Some government action is not subject to PF:

* + Legislating:  ***Re Canada Assistance Plan (BC), AG (Can) v Inuit Tapirisat***
  + Government budget-making
  + High-level allocation of resources

**General duty of PF owed:**

The degree of PF required varies on the spectrum of decision-making between judicial and political, but there is a **general duty of fairness owed**: ***Nicholson*** (right to be treated fairly, not arbitrarily)

* + N was a police officer – fired after 12 months, *Police Act* provided for a hearing for 18+ months service, but was silent regarding PF for less than that
  + Municipality did not act fairly and so decision was quashed
* The **content of PF is based on common law**, but it can be displaced expressly by statute
  + The provisions must respect S96, the rule of law, and the *Charter*

**Legislative action and PF:**

* Look to the provision and the scheme as a whole to discern the degree to which the legislature intended PF principles to apply: ***AG (Can) v Inuit Tapirisat***
  + IT was unhappy with the CRTC holding a hearing a deciding the phone rates for Bell – petitioned the cabinet to change the rate, and they said no without a hearing or submissions – no PF or duty was met by hearing process
  + **LEGISLATIVE ACTION GENERALLY DOES NOT ATTRACT PF DUTY**
  + **LOOK TO ENABLING STATUTE TO DECIDE IF PF REQUIRED, AND IF SO ITS CONTENT**
* Even where there are legitimate expectations, they don’t need to be met and can’t found a PF dispute over the introduction of a new legislation: ***Re Canada Assistance Plan (BC)***
  + Would paralyze government if it did – fetter their freedom or that of their successors
  + **No PF duty in the context of purely legislative action: *Re Canada Assistance Plan (BC)***

**Duty of PF lies on every public authority making decisions that affect an individual’s rights, privileges or interests:**

* The duty of PF lies on every public authority making an administrative decision, which is not legislative and which affects the rights, privileges, or interests of an individual: ***Cardinal v Kent Institution\*\*\****
  + C was transferred to solitary confinement during a hostage situation (an emergency) without an inquiry made by the director and then refused to release him, without providing C reasons or giving him a chance to be heard – HOLDING: no PF for first decision as it was an emergency, PF for refusal was to inform C of the reasons for his intended decision and give C a chance to state his case
* **NO BREACH OF PF IS TOO TRIVIAL**
  + **If a SDM breaches PF duty, the decision must be quashed**

**Determine the Existence of Duty of PF and then the Content**

The content of PF is variable and depends on the context of each case as well as a number of factors: ***Knight v Indian Head School***

* + **1) FACTORS TO DETERMINE EXISTENCE OF DUTY OF PF**:
    - 1. Nature of the decision to be made
      2. Relationship existing between that body and the individual (master/servant = no PF, officer holder at pleasure = some fairness)
      3. The effect of the decision on the individual’s rights
  + **2)** **Employment matters may engage PF where an employee is a public position** and the **employer is operating under a statute**
  + **3) Content of PF is variable and depends on circumstances**
    - Neither the contract nor statute specifically accorded the right of PF (employee of a school board which terminated him with three months’ notice, but sought JR because the school board didn’t give him a chance to comment on the case) – HOLDING: low PF duty owed and was satisfied because K knew of problems and had opportunity to respond even outside formal hearing

**Dunsmuir on Duty of PF In Employment (including Public Office Holder)**

* ***Dunsmuir***  significantly narrows ***Knight*** – it’s wrong to apply PF requirements over and above contractual requirements
  + Basically reverses ***Knight*** – doesn’t matter whether the public office holder is appointed or under contract – always recourse available where the employee is a public office holder and the applicable law leaves him without any protection when dismissed

Three scenarios where private law on employment **may** not apply:

* 1. Where the public employee is not protected by contract (judges, Ministers of Crown, other officials with constitutionally defined state roles)
  2. Where the public officer serves at pleasure and can be summarily dismissed
  3. Where the duty of PF flows by necessary implication from a statutory power governing the employment relationship

**Calibrating the Content of PF**

**Five factors for calibrating the content of PF**: ***Baker***

* 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)
     + NOT EXHAUSTIVE FACTORS

## Limits on Procedural Fairness

* PF requires that rights, privileges or interests be affected: ***Cardinal, Knight***
* *Generally* **PF applies only to final or de facto final decisions**, rarely to preliminary decisions, or investigations
* **Not applicable to legislative, policy, or purely legislative decisions**:  ***Reference re Canada Assistance Plan, Inuit Tapirisat*** – but **generally applicable to municipal bylaws**: ***Wiswell v Metropolital Corporation of Greater Winnipeg***
  + ***Wells v Newfoundland*** – they can do whatever they want within their constitutional boundaries because they are bound by electorate review (political accountability)
  + **TEST for scope of disclosure:** Has the public been provided with a reasonable amount of information so that reasonably informed representations could be made at the hearing?: ***VICFAN v Langford***
    - Required disclosure depends on the circumstances of the case
* **Legitimate expectations may create PF for SDMs**, **but** not for legislators and don’t create substantive rights, just potentially procedural rights

## Framework for Content of PF

* 1) Use ***Cardinal/Knight*** to **determine whether there are rights, entitlements, obligations** that affect an individual and are of specific and administrative nature, rather than general and political
* 2) Use ***Baker*** in order to **calibrate the applicable degree of fairness**
* 3) Look at specific cases – ie: regarding oral hearings, cross examination, notice, etc, to further flesh out the particular argument for each PF issue

# Procedural Fairness: Independence and Bias

**PF Requires Free from Reasonable Apprehension of Bias in SDMs**

* PF also requires that decisions be made free from reasonable apprehension of bias – **TEST**: 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***
* SDMs must provide **written reasons** where important issue at stake or where further appeal is permitted under statute: ***Baker***
* **TEST for 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 and Liberty***
* Justice not only needs to be done, it must also be perceived to be done: ***Rex v Sussex Justices***

**TWO TYPES OF BIAS:**

* + **Personal** bias: family, personal dislike, financial, prior statements, prior decisions
  + **Institutional** bias: DM might be free from bias, but the context raises a reasonable concern as to whether the DM will/can have an open mind (ex: investigator both recommends charges and decides whether to impose them – affirmation bias)
* **REMEDY: Certiorari** (quashing) because there is a breach of PF

**TWO EXCEPTIONS:**

* + 1. Bias issue must be raised before the SDM if they are reasonably apparent – if not raised, this is deemed to be a waiver of the issue
    2. Nature of the statutory regime – common law can be displaced by statute, but statutory regimes will be interpreted narrowly to exclude PF breach

**OPINIONS / COMMENTS:**

* Most people will have some sort of opinion, and absent pecuniary or other demonstrable interests, this should not displace the assumption that the SDM will conduct himself fairly: ***Committee for Justice and Liberty v NEB*** – dissent, but modern rule utilizes this view – adopted in ***Newfoundland Telephone v Newfoundland***
* **WHERE SOMEONE MAKES STRONG COMMENTS REGARDING THE MATTER PRE-HEARING:** The test is one of the reasonably informed bystander and reasonable apprehension of bias only occurs if the board member pre-judges the matter to such an extent that any representations made to the contrary would be futile: ***Newfoundland Telephone***
  + Strong opinions made beforehand are fine as long as those statements didn’t indicate that the mind is so closed
  + At the hearing stage, a greater degree of discretion is required – the member kept making comments after the hearing started so there was reasonable apprehension of bias

**INDEPENDENCE:**

* **Three indicia of independence** re: judges: ***Valente*** – *Charter* S11(d) applies to **require independence and impartiality**
  1. Security of tenure (most tribunals is 2-5 years)
  2. Financial security (set pay or case by case pay?)
  3. Institutional independence over administration of tribunal (how do cases get assigned? Chair vs adjudicators)
     + These should be used in assessing institutional independence from government or other institutional stakeholders to avoid reasonable apprehension of bias – still look at the nature of the SDM, issue it’s deciding, and the statutory context it operates within
* ***Valente*** is gold standard of independence
* May not be followed depending on required standard of PF from ***Baker*** five factors
* BUT can argue lack of independence if less than ***Valente***

**DELIBERATIONS:**

* The SDMs must hear the parties’ evidence and arguments – it is not a violation of the right to an independent DM for those board members to have a full board meeting to discuss issues with others, so long as they hear the evidence before them and they alone make the decision – a good way to use accumulated experiences and avoid inconsistencies on important policy issues: ***IWA v Consolidated-Bathurst***
  + The criteria for independence is not the absence of influence, but rather, the freedom to decide according to one’s own conscience and opinions

**TEST FOR IMPARTIALITY/BIAS:**

* The test for impartiality/bias is context driven (***Baker*** factors) – 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: ***Geza (KOZAK) v Canada***
  + An adjudicative body is held to a higher standard of impartiality
  + Immigration Refugee Board refused a claim from a group of Hungarian Roma applicants who said they were afraid of persecution from racist skinheads – the IRB tried to develop a leading case to assist with mass adjudication regarding this types of applicants – bias found in trying to limit the number of successful cases
* **INSTITUTIONAL BIAS TEST:** will there be a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases? If no, then no institutional bias, and must be considered on a case-by-case basis: ***CP Ltd v Matsqui Indian Band***
  + Proving institutional bias:
    - Nature of tribunal
    - Interests at stake
    - Other indicia, such as oath of office
  + Tribunal members lacked financial security so there was insufficient independence – despite the oath of office
* ***Regie*** applied the test, including the **addition of “in a substantial number of cases”**
  + Regie revoked the company’s liquor permits for disturbing public peace, under statutory authority – they JR’d on the basis that Regie didn’t comply with the impartiality and independence guarantee in the Quebec Charter
  + Also applied ***Valente*** criteria:
    - **Security of tenure**: sufficient to have fixed-term appointments, but can’t be removed at pleasure
    - **Institutional independence**: management of the tribunal can be generally supervised by the executive and there can be lots of contact between the tribunal and government, but the tribunal MUST have control over administrative decisions which bear directly and immediately on the exercise of their judicial function
    - **Financial security**: salary wasn’t statutorily set out – why reasonable apprehension of bias quashes the decision in this case

**OUTSIDE INFLUENCE DOES NOT VITIATE PF:**

* To hold that any outside influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is ridiculous: ***Khan v College of Physicians and Surgeons of Ontario***
  + Where counsel is connected with one of the parties to the hearing, an appearance of bias will result if that counsel participates in the decision drafting process
* 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***
  + Independence, like all PF, can be ousted by express statutory language
  + **There is no constitutional guarantee of independence since SDMs are not a court**
* Although it is explicitly provided for in the statute, so according to ***Ocean Port*** there is no common law procedural fairness issue, the Court says you can’t just put totally subservient and biased people in these positions just because the statute says there is no common law PF owed – these same people, in a judicial role, would have to be independent – it is an affront to the rule of law to be able to do this: ***McKenzie v Minister of Public Safety***
  + No security of tenure here and **the arbitrator is judge-like enough** due to the adjudicative nature of the *Residential Tenancy Act* – needs to be independent
  + If the tribunal is quasi-judicial enough, you can argue this point – the cowed sycophants – to overlook the statute
  + ***OCEAN PORT* IS STILL GOOD LAW**
* For the government to replace the chair and two vice-chairs on the labour board with ideological allies is not in excess of the Lieutenant Governor in Council’s power to influence the decisions of the Board of subverting its independence and impartiality as the government’s purpose was not at odds with S20 of the *Interpretation Act:* ***Sask Fed of Labour v Sask (AG)***
* Where an appointee serves at pleasure, they can be summarily dismissed and despite significant political interference, the court will not find a constitutional protection of independence: ***Keen v AG***
  + President of the Canadian Nuclear Safety Commission was fired because she shut down a nuclear facility that was unsafe, which was contrary to the wishes of the government that was just worried about supplying isotopes to other counties
  + ***Dunsmuir*** was cited as **“at pleasure” appointees have some PF rights**, which was fulfilled through the letter from the Minister stating his intention and that her reply was considered

# Administrative Law Reform – Tribunal Independence

* **Notion of fairness – ability to make judgements with an open mind, independence is a means of achieving impartiality – independence of the SDM is valued as an aspect of the rule of law**
* Sources: common law and from constitutional or quasi-constitutional principles
  + A SDM should neither judge their own cause nor have any interest in the outcome of a case before them
  + The SDM must hear and listen to both sides of the case before making a decision
* *Charter* s7, s11(d) – presumption of innocence, Quebec *Charter* s23 – right to a full and equal, fair trial
* Many situations trigger the right to an independent and impartial proceeding

## Development of Tribunal Independence

* Started with concept of judicial independence
* ***Ocean Port*** made a move to saying there is no general constitutional guarantee of independence for tribunals
* Litigants once again pushed to have judicial declaration that tribunal independence is guaranteed by the *Constitution*
* ***Beauregard v Canada*** – no outsider should interfere, or attempt to interfere, with the way a judge conducts their case and makes their decision
* **Three objective structural conditions have been identified as necessary to guarantee independence: security of tenure, financial security and administrative control**
  + Also independence from interference in deliberations –adjudicative independence – not structural in nature, deals with relational matters and internal process of deliberation by individual SDMs
* **TEST for adequate tribunal independence:** whether a reasonable, well-informed person having thought through the matter would conclude that an administrative SDM is sufficiently free of factors that could interfere with his or her ability to make impartial judgments
* ***Canadian Pacific Ltd v Matsqui Indian Band*** – tribunals are subject to the ***Valente*** principles, but the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue
* ***Regie*** – the Court reasoned that what must be avoided is that adjudicators face the possibility of being simply dismissed at the pleasure of the executive branch
  + The Court held that administrative control was sufficient and there was no evidence shown that the Minister could affect the decision-making process
* Pay for a tribunal member is legislatively set but can be disproportionate to the skill contributed, especially for part-time members

## *Ocean Port* and *Keen*: Parliamentary Supremacy vs Warding off Independence

* ***Ocean Port*** – Liquor Appeal Board members also require more security of tenure than what was offered through “at pleasure” appointments – the decision to suspend a licence closely resembles a judicial decision and that the penalty was one of serious economic consequence
  + Could have also prosecuted these contraventions in a Provincial court, and for a lessor penalty
  + SCC – no freestanding constitutional guarantee of administrative tribunal independence
  + Judicial independence has historically developed to protect the judiciary from interference from the executive branch, but tribunals are not separate from the executive
  + **The will of the legislature should prevail in determining how much independence any tribunal should have**
  + As a general rule, tribunals do not attract *Charter* or quasi-constitutional requirements of independence – however, by virtue of the nature of their work, some tribunals may be subject to these protections
* ***Keen v Canada*** – directive power was used to require the commission to taking into account of the health of Canadians who required use of medical isotopes but directive powers were only for directives of “general application on broad policy matters” to be issued to the commission
  + Emergency enactment of legislation to reopen nuclear reactor
  + Keen applied to FC for JR – whether she received adequate PF in the manner of her dismissal
    - Court held the circumstances of her termination were sufficient to satisfy the requirements of fairness for an “at pleasure” appointment
  + **Applied *Dunsmuir* which provided that a lower level of PF is required on termination of an “at pleasure” appointee –** PF is needed to ensure that public power is not exercised capriciously
  + The loss of livelihood is a factual element that also seems to fit well with *Baker*’s requirements for a higher duty of PF – lots of challenges with this decision!!!
* Some provincial jurisdictions reinforced their legislative enactments to ensure that tribunal members have fixed terms of appointment – **s3 *ATA*** suggests that tribunal members be appointed for an initial term of two to four years with reappointment for additional terms of up to five years

## Reasserting the Push for Independence

* ***Bell Canada v Canadian Telephone Employees Association***– suggested a spectrum of decision-making types in which highly adjudicative tribunals endowed with court-like powers and procedures could require more stringent requirements of PF, including a higher degree of independence
* ***McKenzie*** – issue of whether the position of residential tenancy arbitrators was protected from interference by constitutional guarantees, including guarantees of their security of tenure
  + In light of the extension of the principles of independence to classes of adjudicators other than superior and provincial court judges, the BCSC found that judicial independence should apply to residential tenancy arbitrators as well
  + **Rule of law required this result because the same matter would have been decided by decision-makers endowed with greater independence if landlord and tenant cases had not been carved out of the courts (residential matters used to be in courts)**

# Other Aspects of Procedural Fairness

## Was Notice of some sort Required?

* Often prescribed in the tribunal’s rules of procedure or in legislation governing hearing procedures
* Was it timely? Did it provide sufficient information for the person to make an informed response?
  + Based on reasonableness
* **RULE**: notice must be enough to provide a reasonable opportunity to present proofs and arguments, and to respond to those presented in opposition
* An ongoing duty

## What is the Extent of the Duty to Provide Reasons?

* Providing reasons is an obligation as part of PF – “some form of reasons”: ***Baker*** – doesn’t say that reasons are always required or that the quality of those reasons is a question of PF: ***Newfoundland Nurses’***
* Reasons must satisfy ***Dunsmuir***’s criteria of “justification, transparency, and intelligibility”
  1. Let’s parties understand why decisions are made
  2. Focuses the SDM’s mind
  3. Creates a body of decisions to assist stakeholders
  4. Helps parties and courts determine if there are grounds for JR (***Baker***)
* **Features of adequate reasons**:
  + Reader should be able to answer: why did the Tribunal reach that conclusion?
  + Rejection of important items of evidence should be explained
  + If there’s a finding of insufficient evidence, deficiencies should be explained
  + It should reference important factors required in applicable law and policy
* Reasons need not be given on every minor point raised during the proceeding – failure to mention one inconsequential piece of evidence is not determinative: ***Gichuru v Law Society***
  + Where substantive evidence/arguments are missing, it’s not PF, but possibly a substantive error
* If the reasons allow the reviewing court to understand why the decision was made and if it determines the conclusion is within a range of acceptable outcomes, ***Dunsmuir*** criteria are met – presumption of adequacy for reasons: ***Newfoundland Nurses’***
  + A wholesale failure to provide reasons will constitute a breach of PF, but otherwise, the duty has been met, regardless of adequacy or sufficiency
  + Three functions that reasons serve:
    - Disclose expertise in the subject area of the home statute
    - Justify the decision using transparent, intelligible and reasonable reasoning that all audiences can understand
    - llustrate that the outcome is also reasonable when more than one reasonable result is possible
  + ***Dunsmuir*** doesn’t suggest adequacy of reasons is a standalone ground for quashing a decision, or separating the reasons and the results analyses – adequacy of reasons is not an element of PF, but rather, integrated within the challenge to the substance of the decision
  + Any challenge to the reasoning or actual decision should be made in the reasonableness analysis
* Given the *ATA*, the assessment of reasons in BC is integrated into the substantive analysis under the appropriate SOR set out in the *ATA*: ***Phillips v WCAT***
* Tribunals don’t have to assess every possible interpretation in statutory provision nor do they have to comment on every issue raised by the parties: ***Construction Labour Relations v Driver Iron Inc***
  + Is the decision, viewed as a whole given record, reasonable?

## 

## Is an Oral Hearing Required?

* Look to the statute – is there clear language indicating this one way or another?
* If there is no clear language – go to the five ***Baker*** factors to determine whether an oral hearing is appropriate in the particular case

1. **The nature of the decision and the process followed in making it** (ex: more judicial-looking decision = more PF)
2. **The nature of the statutory scheme and the terms of the statute under which the body operates** (ex: final decision/determinative of the issue)
3. **The importance of the decision to the individual(s) affected** (ex: profession, employment, family, citizenship)
4. **The legitimate expectations of the person challenging the decision** (ex: pamphlets, websites, comments by staff/panel) – only regarding procedural rights, not substantive issues
5. **The choice of procedure made by the body itself** (SDMs are masters of their own procedure)
   * These factors are not exhaustive!!!

* If there is a serious issue of credibility, PF requires credibility to be determined on the basis of an oral hearing or cross-examination: ***Singh v Minister of Employment & Immigration***
  + Perhaps consider whether the goal can be achieved via telephone conference (ie does everyone need to be present? Necessary to see body language, etc?)

## Is there a PF right to Cross Examination?

* Where the rights of citizens are involved, and the statute (*Municipal Act*) affords the right to a “full hearing”, there needs to be clear language to curtail the right to cross examination: ***Innisfil Township v Vespra Township***
  + There is a right to cross-examination on the government’s projected population numbers – the language of the enabling statute is paramount – not every SDM is adversarial or deals with individual rights
* Did the party have an adequately effective method of contradicting witnesses by writing or otherwise, such that a cross-exam/oral hearing is not necessary? If there are other equally effective methods of answering the case against him, a cross-exam is unnecessary: ***Re County of Strathcona***
  + A rezoning application where cross-exams weren’t officially allowed, but generally were anyway, but there was no PF issue found because there was basically a cross-examination through opposing reports of the expert report
  + There is no absolute right to an oral hearing and cross-examination – it’s subject to the enabling statute which is subject to the *Charter*
* A section that is modest in reach may not effectively displace the common law: ***Allard v Assessor of Area #10***
  + *Assessment Act* s55: “the board **may** hold any combination of written, electronic and oral hearings” – Allard requested an oral hearing to cross examine the assessor, but the Chair decided the appeal would proceed by written submissions
  + The Court held s55 gives the Board the power to choose the most efficient means given the volume of disputes – 5th *Baker* factor gives deference to the agency’s choice of procedures
  + Allard’s submission was accounted for and he was able to address what he wished to challenge (no need for a cross examination)
* It isn’t up the tribunal to determine the success of a cross examination, rather, the importance is in allowing a party to further their case and to respond to the case they have to meet: ***Djakovic v WCAT***
  + D had back injuries and requested to cross examine two physiotherapists from the clinic
  + WCAT attempted to gather the information from the clinic and eventually, the therapists denied knowledge – WCAT refused the request for cross examination on conclusion that it was unlikely for their testimony to change
  + BCSC applied the ***Baker*** factors and concluded there was a significant amount of PF due – quashed the decision and returned it to the tribunal for a rehearing
    - WCAT’s process is very similar to the courts and is the final appeal
    - Decisions are very important – this was to deal with an injury and his livelihood
    - The evidence from cross examination went to the central issue (did the injury occur?)
    - Cross examination would not have been burdensome to WCAT
    - Cross examinations are not just to test credibility, but also to jog memory
* ***Johnson v Alberta***: there was conflicting evidence between two groups of doctors with respect to the cause of the worker’s condition and the worker wanted to cross examine the doctors who opined his condition was not work-related – the Commission denied this on the basis that there were no clear errors, incomplete factors or unfounded conclusions
  + ABCA held that the Commission erred in its consideration – was there some other procedural method to resolve the fundamental disagreement between the doctors?
  + It was unnecessary to consider the ***Baker*** factors because the rules of procedure already permitted cross-examination on application if it was relevant – the Commission should have considered and applied the factors to their own rules
  + **SHANNON:** Court was confused about ***Baker*** – it’s always relevant to discretionary decisions relating to PF issues, because such decisions must be exercised fairly – ***Baker*** is necessary to calibrate the needed degree of PF

## What are the Document Disclosure Requirements?

* Disclosure obligations **depend on enabling statutes** as well as **general administrative law statutes**
* ***ATA*** **s34** – allows parties and/or tribunals to summon witnesses/documents and apply to the court for compliance (only applies to SDMs who have this section in their enabling statute)
  + **S40(3)** states that rules of evidence, such as solicitor/client privilege and spousal privilege, still apply in administrative proceedings
* SDMs must disclose any evidence they intend to rely on: ***Kane v UBC***
  + Kane appealed suspension regarding personal use of computers to the Board of Governors – he and his lawyer attended the meeting and were heard – the president was present throughout discussions, but didn’t participate – he did answer questions by the Board, but didn’t question Kane – The Board approved the recommendation
  + 6 considerations from the ***Baker*** factors:

1. It is the duty of the courts to give deference to bodies like the Board of Governors sitting in an appeal pursuant to legislative mandate
2. The tribunal must observe natural justice – to do otherwise, express language or implication must be found in the enabling statute
3. A high standard of justice is required when the right to continue in one’s profession/employment is at stake
4. The tribunal must listen fairly to both sides giving the parties a fair opportunity for correcting or contradicting any relevant statements that are prejudicial to their views
5. Unless expressly or by necessary implication empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses or hear evidence in the absence of a party whose conduct is under scrutiny
6. 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

* *Audi alteram partem* rule requires that Kane and his lawyer be present for any evidence given by the President in the post-hearing session and have a chance to respond

## Did Delay cause PF issues?

* State-caused delay may result in a breach of PF: ***Blencoe v BC (HRC)***
  + B commenced JR, two years after the accusation of sexual harassment and suffering severe depression since there was lots of media attention, to have the complaint stayed – claimed HRC lost jurisdiction due to delay as it caused him serious prejudice = abuse of process and denial of natural justice
  + SCC allowed the appeal – delay can engage s7, but not in this case
    - **It includes freedoms from state interference with psychological integrity – the interference must be state-imposed AND serious**
    - B’s psychological distress was not state-imposed but more likely due to his own actions and the media, also not serious enough
  + DELAY ARGUMENT: delay, without more, will not warrant a stay of proceedings as this would amount to a judicially-imposed limitation period
    - There must be proof of significant prejudice to warrant a stay (ex: inability to answer the complaint – faded memories, essential witnesses have died/unavailable, evidence lost)
  + In exceptional cases, delay may permit a remedy for abuse of process where administration of justice would be brought into disrepute – one can apply this even where hearing fairness has not been compromised (ex: delay causing significant psychological harm to a person, attaching a stigma to a person’s reputation)
  + **TEST for whether the delay is unacceptable and a stay should be ordered:** 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
    - Here, only 5 months of unexplained delay – 24 months of total delay which was not inordinate given the complexity of the case – no abuse of process
  + REMEDY for delay according to the dissent:
    - A stay should not be the only or preferred form of redress – it should be limited where fairness of the hearing is compromised OR there is shocking or gross abuse of process
    - An order for expedited hearing is the most practical and effective remedy

# Tribunal Standing on JR

* The SCC limited the role of the tribunal, even where the statute permits, to an explanatory role within its home jurisdiction. Allowing an administrative board the opportunity to justify its actions and to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions: ***Northwestern Utilities*** – adopted in ***Henthrone v BC Ferry Services Inc***
  + In BC, the ***JRPA* S15** says a tribunal has the right to be a party
    - Use of the word “party” only indicates an intention that the SDM be permitted to appear at the hearing – the extent of the role of the SDM if an appearance is made is undefined: ***Quintette Coal Ltd v Assessment Appeal Board***
    - A tribunal can’t be considered a full party and limitation is proper, given the conscious directive of the legislature: ***Northwestern Utilities***
  + Check the enabling statute for the tribunals
* Tribunals can never speak to PF or the correctness of their decision as this gives rise to impartiality issues: ***Northwestern Utilities*** – can’t speak to the merits of the decision: ***Downs Construction Ltd v BC***
  + Caveats: a narrow jurisdictional question or if there is no one else there to speak to it or PF questions setting out a procedure is more a question of law, so can be spoken about
    - Narrow questions of jurisdiction: whether something is within their jurisdiction to enter into inquiry
  + The board has plenty of opportunity to make its reasons prior to JR – as a party, it would be a complete adversarial confrontation with a party or the issue it rule against
  + If the SOR is patently unreasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions – board expertise may be useful to show the reasonableness of something that may otherwise be seen as patently unreasonable – BUT they cannot argue correctness: ***Paccar***, ***Buttar***
    - ***Paccar*** permits the tribunal to demonstrate that its decision was not patently unreasonable
    - There can be practical problems with arguing an SOR when the tribunal may not learn the proper standard under after the reviewing court delivers its reasons – tribunals take no pride in arguing that a decision meets a minimal rationality test: ***United Brotherhood of Carpenters and Joiners of America***
    - Other exceptions to the rule in ***Northwestern*** arises where the tribunal is defending a long standing policy or where there is no one else to argue the other side: ***BC Hydro v WCB***
  + A tribunal can impartially submit some arguments on topics like jurisdiction when someone else is pursuing a valid appeal – it’s a different story to let the tribunal itself appeal when no one else wants to appeal. It would turn the tribunal into a litigant, the enemy of a citizen/government, just because they won in the superior court: ***Brewer v Fraser Milner Casgrain***
* Aside from reconfiguring reasons, adding new arguments, or making submissions about matters of fact not already engaged by the record, there should be no absolute prohibitions on providing submissions to the court – whether a tribunal can participate and to what extent is a matter of balancing considerations: ***Leon’s Furniture Ltd v Alberta***
  + Considerations:
    - The existence of other parties who can effectively make the necessary arguments
    - The appearance of independence and impartiality of the tribunal
    - The effect of tribunal participation on the overall fairness (in fact and in appearance) of the proceedings
    - The role assigned to the tribunal under the statute
    - The nature of the proposed arguments
* The right of appearance in statutory appeals should mirror those same rights in JR: ***BC (Securities Commission) v Pacific International Securities Inc***
* The principal behind tribunal participation is to enable the reviewing court to make an informed decision as to why one interpretation was or should be preferred to another: ***Tribunal Interveners***
  + A tribunal seeking intervener status must persuade the court that:
    - The case is of precedential significance
    - The tribunal can contribute to the proceedings in a way not reasonably expected of the parties
    - The principle of impartiality can and will be respected (ex: written submissions that address the merits of the decision do not offend this principle)
* Courts must balance being fully informed with maintaining tribunal impartiality – this is context dependent in assessing the seriousness of the impartiality concern and the need for full argument: ***Children’s Lawyer***

**Costs and Tribunal Attendance in Court**

* The general rule of costs is that it follows the outcome, but for tribunal attendance in court, the rule is reversed and tribunals never have costs award against them
  + EXCEPTIONS: ***Lang***
    - Misconduct or perversity in the proceedings before the tribunal (***Henthorne*** is an example of this)
    - If the tribunal overreaches and says more than they ought to – something beyond what is appropriate

**Why it’s Important for Tribunal to be in Attendance**

* If they aren’t in attendance, the petitioner has too much of an advantage
* judges are not experts in all fields
  + The tribunal is in the best position to draw the attention of the court to those considerations, given their special expertise: ***Paccar*** – can provide the court with submissions from a neutral and forward-looking perspective: ***Pacific Newspaper Group Inc*** 
    - Distinguished ***Paccar*** from ***NW Utilities*** because that was a correctness standard and this is a reasonableness standard, so the tribunal must have the opportunity to bring things to light where they have expertise
    - Expertise demands deference only where it is coherent
    - ***Lang*** confirms ***Paccar*** is good law in BC

**Tribunals can speak to:**

* + SOR analysis
  + Questions of narrow jurisdiction (whether they can enter into the inquiry)
  + The record before the tribunal at the time it heard the appeal
  + Reasonableness/patent unreasonableness of a decision – whether or not the decision meets the standards as it was identified
  + PF issues, only if there is no other party
* Standing issues can arise between tribunals and the same rules that apply to a tribunal in court apply in the face of another tribunal
* Tribunals can’t bootstrap – can’t give reasons during JR that weren’t given during the tribunal proceedings to try and justify themselves: ***Northwestern Utilities***
  + - CURRENTLY, courts allow supplementing, but not new reasons: ***Newfoundland Nurses’***
* Interlinked, large organizational structures, under the court’s discretion, can be labelled different parties and be permitted to argue the merits of the associated party’s decisions: ***Baharloo v UBC***
  + The circumstances of large organizations create special considerations and the Court must adopt a reasonable approach when called upon to apply the strict rule in ***Northwestern Utilities*** – the doctrine should not be applied so literally that the result would be contrary to common sense
  + The court found that UBC had full party standing to make representations concerning the merits of the decision made by the Senate Committee
  + Where there is a division of authority recognized by statute, the separate and distinct roles of the component parts of the organization dispel any concern that a particular DM’s impartiality will be adversely affected by granting a right to make submissions on the merits to another component part of the organization
* ***Henthorne*** denotes the current status of BC – judges are not necessarily of like mind regarding how much tribunal participation actually discredits impartiality – SCC needs to clarify tribunal standing! Until this is clarified, BC favours ***Northwestern Utilities*** with some exceptions raised in ***Paccar***.

# Historical Progression of Standard of Review

* Standard of Review represent the tension between parliamentary supremacy and rule of law
* The decision to use SDMs rather than courts is a clear intention of the elected body that deliberately prefers tribunals to courts and makes this choice clear through the use of a privative clause
* It demonstrates the legislator’s legitimate choice of preferring speedy and inexpensive decision making, through developing expertise within particular silos, over that of the courts – a policy choice that is open to Parliament or the legislature
* These factors all point to deference to tribunal decisions – not necessarily to the tribunals themselves, but rather, as deference to the proper expression of elected legislators as to how certain types of rights and obligations are best resolved
* BUT this directly conflicts with the rule of law because the courts have never accepted that they can be excluded from playing at least a residual supervisory role where the rights, obligations and privileges of our society are at issue
* Until the late 1970s, JR turned on the notion of the “preliminary” or “collateral” question, essentially pulling questions of law outside the privative clause by labelling them as collateral questions that had to be answered before the tribunal could exercise its jurisdiction to decide a matter
  + Legal questions were not protected by the privative clause and were subject to a correctness review
  + The courts loved this because they basically acted as appellate decision makers – but they were familiar with appellate review (correctness of law and perverse & capricious on facts)
* This excessive intrusion 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, especially where the legislature has told the courts to GTFO via privative clauses
  + NBLC replaced striking union members with management despite a statutory provision that said they shall not replace striking employees or fill their position with any other employees
  + The Board determined that the employer’s actions undermined the provision but NBCA quashed their decision because the Board’s interpretation of the provision is a collateral/preliminary matter wrongly decided by the Board
  + SCC: 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
    - **Even with a privative clause, jurisdiction can be lost if the SDM is so patently unreasonable that it cannot be rationally supported by legislation – can be lost through:**
      * Bad faith
      * Decision based on extraneous matters
      * Failing to consider relevant matters
      * Breach of PF
      * Misinterpreting the provisions of the Act to go outside its bounds
    - Given the ambiguity of the clause, the Board’s interpretation was in the range of reasonable options – the Board didn’t exceed the bounds of the statute and given their expertise, the Board was allowed to err as long as the error wasn’t patently unreasonable
  + **Questions of law are held to a patently unreasonable standard and questions of jurisdiction are held to a correctness standard – a more deferential approach to legal questions**
* SOR was then confirmed as constitutionally valid in ***Crevier*** and ***Residential Tenancies***, since tribunals didn’t offend S96 as courts could still JR/supervise
* If the question at issue concerns a legislative provision limiting the tribunal’s powers, a mere error will cause it to lose jurisdiction and subject the tribunal to JR: ***Bibeault***
  + If it is a question at law, it will only exceed its jurisdiction if it errs in a patently unreasonable manner – a tribunal which is competent to answer a question may make errors without being subject to JR
  + Union case involving competing union certifications and the arbitrator was required to interpret ss45, 45 of the *Quebec Labour Code* which was determined by the SCC to be a jurisdictional conferring issue
  + **The Court developed PAFA** to determine which questions were within the jurisdiction of the SDM
    - Look at the **wording** of the enactment conferring jurisdiction
    - **Purpose** of the statute creating the tribunal
    - **Reason** for its existence
    - Area of **expertise** of its members
    - Nature of the **problem** before the tribunal
* ***Southam*** decided there needed to be a middle ground between patently unreasonable and correctness and so, introduced the reasonableness standard
  + **An unreasonable decision is** one that is not supported by any reasons that can stand up to a somewhat probing examination
  + **The difference between unreasonable and patently unreasonable** lies in the immediacy or obviousness of the defect – if super obvious, apparent on the face, patently unreasonable, but if it takes significant searching or testing to find the defect, then only unreasonable.
  + Two daily papers were owned by S and they owned some shit, including other papers and equipment, the Competition Tribunal ordered the sale of one of the papers – S appealed
  + There was no strong privative clause, but it is an expert tribunal – considering the nature of the problem and the applicable law, plus the expertise but not privative clause, called for another SOR
  + **Created a more unified and complete version of PAFA = PPEQ**
* The central inquiry in determining the SOR exercisable by a court is the legislative intent: ***Pushpanathan***
  + Privative Clause:
    - **The absence of one does not signify higher scrutiny, but the presence of a full privative clause calls for deference**
    - A full privative clause includes something that says the tribunal has final and conclusive jurisdiction and there is to be no appeal/review by the courts (other words are fine if they are equally as explicit)
  + Purpose of the Act and Provision:
    - **Is there a delicate balancing between the different constituencies? Is it polycentric? If yes, then that signals more deference.**
    - **Is the statute primarily concerned with disputes between individuals? If yes, then that signals less deference.**
    - How are members qualified?
  + Expertise:
    - What is the expertise of the tribunal?
    - What is the court’s expertise relative to that of the tribunal?
    - What is the nature of the specific issue before the SDM in relation to that expertise?
  + The Nature of the Question: Law vs Fact:
    - **The broader the proposition, the less deference is to be afforded, unless there is other implied or express legislative intent**
  + HOLDING: No privative clause, statutory right of appeal, expertise not engaged and a question of law all led to correctness being the relevant SOR

## SOR for Discretionary Decisions

* 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 TEST for SOR for substantive discretionary decisions: *Baker***
  + **PAFA analysis but more discretion regarding the fourth factor – the nature of the problem in question: highly discretionary and fact-based nature of decision affords more deference**
* Two central ideas: ***Baker***
  + The decision must be made within the bounds of the jurisdiction set out in the statute
  + There should be considerable deference to the SDM by the courts in reviewing exercise of discretion and determining scope of the SDM’s jurisdiction
* Discretion must be exercised reasonably, in accordance with the rule of law: ***Baker***
  + PAFA Analysis:
    - P: no privative clause and leave required from the FCTD for JR and serious issue of general importance: less deference
    - P: deference plus exemption clause: more deference
    - E: SDM was the Minister’s delegate: more deference because of the expertise in immigration matters
    - Q: discretionary and fact-driven: more deference
      * HOLDING: Standard: reasonableness
* A discretionary decision will be set aside if: ***Baker***
  + 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** – in most cases, it will be patent unreasonableness, in ***Baker*** it was reasonableness because of the absence of the privative clause
* **TEST** for appellate courts reviewing lower court JR decisions: ***Dr. Q v College of Physicians***
  + Dr. Q was a perv and took advantage of a patient – he denied this but the College believed the patient over him and decided to suspend him for 18 months
  + 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

# Substantive Review in BC and Elsewhere

* Post-PAFA – the ***ATA*** and ***Dunsmuir*** were two critical developments in relation to substantive review

## Administrative Tribunals Act

* BC enacted the ***ATA*** to explicitly tell the courts the legislator’s intent – SUPPOSEDLY avoided the need to undertake PAFA to figure out the intended SOR
* Froze the approach to SOR in 2004 – recent developments aren’t necessarily reconcilable with the statute
* **Defining a privative clause:** a provision in the tribunal’s enabling Act that gives 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 those matters within its jurisdiction is final and binding and not open to review in any court
* **Defining a tribunal:** a tribunal to which some or all of the *ATA* are made applicable under the tribunal’s enabling Act
* **IF THERE IS A PRIVATIVE CLAUSE, use S58:**
  + 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) a) **Question of Fact**: patently unreasonable – look to ***Southam***: immediacy and obviousness of the error
  + 2) a) **Question of Law**: patently unreasonable – look to ***Southam*** immediacy and obviousness of the error
  + 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!
  + 2) b) **Question of PF**: whether the tribunal acted fairly – look to the ***Baker*** factors
  + 2) c) **All other matters**: correctness
* **IF THERE IS NO PRIVATIVE CLAUSE, use S59:** 
  + 2) **Questions of Fact**: reasonableness or set aside if there is no evidence
  + 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!
  + 5) **Question of PF**: whether the tribunal acted fairly – look to the ***Baker*** factors
  + 1) **All other matters**: correctness
  + 1) **Questions of Law**: correctness
* Sometimes it was difficult to determine whether a question of fact, law, or discretion was within the “exclusive” jurisdiction of the tribunal as intended by the legislature – it may have been necessary to consider PAFA still
  + BCCA says that PAFA continues to apply to the characterization of jurisdictional questions under the *ATA* because the term “jurisdiction” isn’t defined in the Act: ***United Brotherhood of Carpenters and Joiners of America v BC***
    - CRITICISM: what is the point of codifying SOR if we’re still going back to the common law?
      * ***Kerton v WCAT***: it makes no sense to apply PAFA to ***ATA*** standards because PPEQ is asked at some point during the sections and it would be circular
        + Just determine whether the privative clause covers to matter at issue

## Dunsmuir v New Brunswick

Facts: D was a civil servant at the DOJ and he was fired, but given severance. He claimed he was entitled to PF as well as the contractual remedies. The arbitrator agreed, but the trial judge and NBCA said nope.

* **PF owed when firing public servants:**
  + ***Knight*** stands for the proposition that there is always recourse available where the employee is a public office holder AND the law leaves them without any protection when dismissed
  + Here, D had a contract and he was a public office holder – the *Civil Service Act* stated that contract principles applied, so no PF was owed
* **Simplifying PAFA and removing the patently unreasonable SOR:**
  + Majority hates PAFA – uses nicer words to say that it’s stupid
  + **Reasonableness**:
    - Collapses the old patently unreasonable and reasonableness standard into one – which is *still* confusing and unclear
    - Reasonableness is concerned mostly with the existence of **justification, transparency and intelligibility** within the decision-making process but also with whether the decision falls within **a reasonable range of possible, acceptable outcomes** which are defensible in respect of the facts and the law
    - Refers to both the process of articulating the reasons and to outcomes
  + You don’t always need an exhaustive review to determine the SOR – if it has already been determined, don’t repeat (ex: correctness for constitutional questions)
  + Para 55 sets out the **factors for application of the reasonableness standard:**
    - **A privative clause:** statutory direction indicating the need for deference
    - A discrete and special administrative regime in which the SDM has **special expertise** (seems to combine purpose and expertise)
    - **The 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 SDM will always attract a correctness standard: ***Toronto v CUPE***
      * Otherwise, a question of law that is not as important may attract a reasonableness standard and deference where the other two factors indicate
* SOR was reasonableness in this case because the issue was within the arbitrator’s enabling statute and expertise, and there was a privative clause – but his decision was unreasonable
* Suggests you can use pre-***Dunsmuir*** jurisprudence to assist in setting the SOR – old cases suggesting reasonableness or patent unreasonableness is just reasonableness today
* Imports some PF features, in the sense of adequacy of reasons, into the substantive analysis and also adds context as a significant aspect
* Still issues with the tension between rule of law and parliamentary supremacy, as well as, what is reasonableness anyway? Binnie J talks about a range of meanings under that test

## Canada (HRC ) v Canada (AG) – [Mowat]

Facts: M applied for legal costs after a successful sexual harassment/discrimination case and the CHRT determined it had authority to order costs under the *CHRA* – FCA said it did not have that authority.

* SCC:
  + SDMS are generally given deference in the legal interpretation of their home statutes and any laws/rules closely tied to this – reasonableness SOR
  + BUT general questions of law that are both of central importance AND outside the adjudicator’s specialized area of expertise warrant a correctness SOR
  + This decision was within the CHRT’s home statute and did not engage a question of central importance – further, it was based on a fact-driven remedy fashion for M based on her evidence
    - SOR was reasonableness
  + The provision allowed the tribunal to compensate for any expenses incurred by the victim – awarding costs wasn’t reasonable as costs is well understood to be different from expenses or compensation – while HR legislation must be interpreted liberally and purposively, statutory language must also be respected in its ordinary and grammatical sense and harmoniously with the scheme and object of the Act
  + **Clarifies the two-step process for determining the SOR** (pg 16-17)
    - 1) Ascertain whether there is jurisprudence on how much deference to accord already
    - 2) Where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review – the focus of the analysis remains on the nature of the issue that was before the tribunal under review (***Khosa***)
    - **Factors that determine whether an SDM is entitled to deference: *Dunsmuir***
      * Existence of a privative clause
        + Presence or absence is not determinative, but the existence could point to deference: ***Dunsmuir, Khosa* para 25-26**
      * A discrete and special administrative regime in which the SDM has special expertise
      * The nature of the question of law
        + **Deference and a reasonableness SOR where:**

The Tribunal is interpreting its own home statute or related rules/law: ***Dunsmuir***

The Tribunal has particular expertise in the application of a general common law/civil law rule in relation to a specific statutory context: ***Dunsmuir*****para 54, *Khosa* para 25**

* + - * + **No deference and a correctness SOR where:**

The Tribunal is interpreting a constitutional question **OR**

A question of central importance to the legal system, outside of the tribunal’s expertise **OR**

True questions of jurisdiction or *ultra vires* the scope of the tribunal’s statutory authority

## Alberta v Alberta Teachers’ Assc

* Exceptions to the reasonableness SOR should be construed very narrowly – “the category of true questions of jurisdiction is narrow indeed. Since ***Dunsmuir***, this Court has not identified a single true question of jurisdiction”

Facts: The commissioner didn’t extend the timeline for 22 months and didn’t issue its merits decision until 29 months after the initial deadline. ATA sought JR on the basis that the commissioner lost jurisdiction by not extending the 90 day deadline, but he had issued several decisions that indicated the extension didn’t have to be granted within the 90 day period. The “must” was therefore regarding that an extension must be given if the merits take more than 90 days, not that the extension must be given within the 90 days. **The Court affirms the general rule that you can’t raise new things on JR, but because the commissioner’s views were already known, it didn’t cause prejudice to that parties.**

* The matter was otherwise properly before the commissioner and that provision was ancillary to a larger grant of power so it should be subject to a reasonableness SOR – the commissioner’s interpretation was reasonable
* 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

## *Rogers Comm Inc v SOCAN* – concurrent jurisdiction exception

SCC: retreat from reasonableness always being the SOR for interpretation of the enabling statute

* While the Board is often called upon to interpret its enabling statute, the *Copyright Act* in carrying out its mandate, the court is also called upon to do so during copyright infringement proceedings and on appeal, the lower court’s interpretation would be held to a correctness standard so it wouldn’t make sense for the court to JR the tribunal’s interpretation of the same act on a reasonableness standard
* As per ***Dunsmuir***, **because there is concurrent jurisdiction, the SDM cannot be said to have a discrete and special administrative regime – so a correctness standard applies**
  + The concurrent jurisdiction rebuts the presumption of reasonable

## McLean v British Columbia (Securities Commission), SCC 2013

SCC chose the reasonableness standard

Both parties had a reasonable interpretation of the word “events”

Court had to show deference – as soon as tribunal meets basic requirement

As long as SDM met the basic requirement of “reasonableness”

CA erred in applying a “correctness” SOR because Courts should defer to a SDM interpreting its own statute or statutes closely connected with its function. Presumption not rebutted in this case

## When does the Correctness SOR apply?

* The general expectation is reasonableness for facts and reasonableness for law when interpreting their home statute
* **The following categories may still attract correctness:**
  + A general legal question of central importance to the legal profession
  + Constitutional questions
  + Questions regarding jurisdiction as 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

## ATA After Dunsmuir

* ***Dunsmuir***confused everyone because it took out patent unreasonabless so now the ***ATA*** didn’t fit properly with the common law
* Everything got worse with ***Khosa***:
  + Facts: K was convicted for criminal negligence causing death in a street race. Authorities order his deportation which he appealed to the Immigration Appeal Division but they exercised discretion and refused the appeal
  + The IAD was divided in large over how to interpret K’s expression of remorse – the *Federal Courts Act* already provided what appeared to be a standard of review relating to questions of fact: only reviewable if they 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**
  + The SCC issue was whether this ousted *Dunsmuir* or whether it was merely an indicator of the legislator’s intent to be taken into account and concluded that it did not oust *Dunsmuir*
    - A reasonableness SOR was applicable as the provision assisted the *Dunsmuir* analysis – **it was a contextual analysis for determining the SOR**
      * IAD was operating within its expertise
      * The purpose was to grant exceptional relief within the overall policy context of an immigration regime
      * The nature of the question is deciding a factual issue in the context of a discretionary decision
      * There was a privative clause of sorts as leave was required to the FCTD
  + Binnie J suggests that it merely lists grounds for review and doesn’t actually set out the SOR, which would be where *Dunsmuir* would not be applied so the *ATA* is safe
  + IAD’s decision was reasonable as its application of the relevant factors and the outcome was within the range of acceptable outcomes
  + Binnie J was just a confusing, or maybe confused, guy – stated that 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

## Viking Logistics v BC (WCB)

Facts: WCB overpayments - Board policy stated that interest would only be payable on application and not from the date of overpayment. V attacked this policy since the amount was ~$500,000 and said it shouldn’t apply since it was patently unreasonable. WCAT said the policy wasn’t patently unreasonable so applied it.

* BCSC decided that the SOR was patent unreasonableness, but the issue was whether this standard under the *ATA* was now just reasonableness given *Dunsmuir* and Binnie’s comment in *Khosa*
  + The court agreed with ***Pacific Newspaper Group Inc v Communications, Energy and Paperworkers Union of Canada*** since it was closer in time
    - The content of patent unreasonableness and the degree of deference it demands must be considered in view of general principles of administrative law, including the court’s discussion of this standard in ***Dunsmuir***
  + 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: **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**

## Coast Mountain Bus Company Ltd

* Binnie in ***Khosa*** was saying that **an SOR stipulated by legislation must be interpreted in the common law context** – he was not saying that the common law meaning should affect the interpretation of the legislation and observed that effect must be given to the SOR of patent unreasonableness prescribed by S58, despite this no longer existing at common law after *Dunsmuir*

## United Steelworkers etc v SWIU

* **BCCA in *Coast Mountain Bus Company* settled the issue of applicability of the patent unreasonableness standard under S58 *ATA***
* The Court adopted the principles of patent unreasonableness 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***

## Patent Unreasonableness Standard Now

* The standard in the *ATA* is to be treated as it existed prior to ***Dunsmuir*** and just treat Binnie J’s comment in ***Khosa*** with a degree of caution

# Statutory Delegation of Power

* Typically a directive in the SDM’s enabling legislation that permits the tribunal to create rules for further subordinate legislation, such as regulations or soft law (policy)

## Why Delegate?

* **Expertise** – impossible for legislators to have sufficient expertise to understand and evaluate all the various, detailed requirements in the vast range of areas that comprise the regulatory and welfare state – unable to make optimal rules
* Even if they had the expertise, legislators **lack the time and information** to make all the decisions necessary for the functioning of the current regulatory and welfare state
* Power to make requirements may be delegated in order to increase flexibility – to allow the requirements to be changed as new information arises
* Soft law is much more easily adaptable to changing circumstances because making soft law, as opposed to rules, is less likely to involve time-consuming and costly procedural steps
* Raises questions about democratic legitimacy, given differences in how regulations and guidelines are made

## Risks of Delegation

* Party making rules or soft law is not following wishes of the legislature – principal-agent issues
* Legislature or the party making the rules or soft law may not be respecting the wishes of the ultimate principal – the public
* The principal’s lack of expertise, information or time means that the principal has difficulty ensuring that the agent is actually acting in the principal’s best interests in carrying out the task
* **Two risks from delegating power:**
  + Agent may follow its own view/values rather than the principal’s view or values in making the rules or soft law
  + Agent may not even be attempting to further the public interest; it may be seeking to further its own interest
* Legislators may delegate in order to further their own interest
* A concerning trend in delegated legislation is the involvement of private parties in making rules – raises questions about accountability of and control by legislators over these actors

## Controlling the Risks

* **Process requirements such as requiring public consultation**
* **Royal commissions/Inquiries**
* **Legislative oversight**
* **Judicial review/oversight**
  + Courts didn’t like delegated authorities and the common law principle of *delegatus non potest delegare* was affected in order to restrict the devolution of decision making and regulation making powers – **the delegate must not themselves delegate their statutory authority to another**
    - Became seriously problematic with the increasing size and complexity of the administrative state as it is ridiculous to assume the minister could be the one to do everything to do with that delegation of power

## Carltona Doctrine

* A partial antidote to the problematic common law rule to not further delegate a delegation of power
* 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
  + Applies to both decision making/administrative action and to delegate rule-making authority
* Now codified in provincial and federal *Interpretation Act*s

## The Queen v Harrison

Facts: The Crown appealed an acquittal and the accused raised an objection to jurisdiction stating that the notice of appeal didn’t comply with S605(1) of the *Criminal Code* which stated that the Attorney General or counsel instructed by him may appeal to the court and the notice of appeal was signed by JE Spenser, Counsel for AG – the letter bore the letterhead of the AG and was signed by an official in the department

* BCCA said that the *Criminal Code* required the instructions to come directly from the AG or Deputy AG, but the SCC said that’s wrong - S605 includes implied authority for the AG to delegate the instruction of counsel
  + 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
  + It’s completely reasonable to assume that the department official, a director, had authority to instruct counsel

## Edgar v Canada

* An example that notes the Carltona Doctrine, but finds against it because of an express contrary statutory intention

Facts: E helped Canadian Customs catch her employer, Amway, in defrauding them in duties and she applied for the award available under the statute. E was ultimately refused by the Deputy Minister of National Revenue – the Court noted that the Deputy Minister was permitted to make the decision according to the **s23 *Interpretation Act* which provides that a Minister of the Crown includes his deputy.**

* OCA said while this is true, **it is subject to a limitation: “unless a contrary intention appears”** – the pivotal words in the Regulations are “the Minister may, IN HIS SOLE DISCRETION” which indicates a contrary intention and requires the Minister himself to make the decision – E was entitled to a declaration of this effect
* Other leading cases that show the Caltrona Doctrine can be ousted when the legislature demonstrates a contrary intention – when the basic words “the Minister may” is modified:
  + ***Ramawad v Canada (Minister of Manpower of Immigration)***: “in the opinion of the Minister”
  + ***Quebec (AG) v Carrieres Ste-Therese Ltee***: the Minister, himself = in person

## Thorne’s Hardware Ltd v The Queen

* Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings
* SCC held that 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*
  + Cabinet quite obviously believed it had reasonable grounds and the Court cannot enquire into the validity of those beliefs
  + Being motivated by public policy and financial issues is not acting in bad faith, it is merely politics and polycentric balancing of interests

## Globalive Wireless Management Corp v Public Mobile Inc

* Updates *Thorne’s Hardware* and 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
* It’s important to ensure the decision of the Governor in Council is as a SDM and not another type of authority

Facts: Globalive won a federal bid for cellphone bandwidth, but concerns were raised about whether they were “Canadian controlled” as required under the *Telecommunications Act*. CRTC said they were not Canadian controlled as per the Act and so they couldn’t win the bid – the Governor in Council was pissed with this so exercised authority under the Act to reconsider the decision to find Globalive was Canadian controlled. Telus sought JR.

* FCTD said that the Governor in Council considered irrelevant factors
* FCA broaden ***Thorne’s Hardware*** – states that “egregious example of bad faith or misconduct” meant any error that offended the SOR or fairness
* It was reasonable for the Governor in Council to have found it was Canadian controlled as different people could see this differently, which means it was a reasonable decision

## CN Railway

Delegation:

* Section 40  of the *CTA* confers broad authority on the G in Cl to address any orders or decisions of the Agency, including those involving questions of law.

Where Parliament intends to limit the G-in-C’s authority, it does so expressly, but the only inherent limitation here is that the matter must already have been decided by commission.

Before you apply Dunsmuir, must ask if Cabinet is exercising a statutorily

## Enbridge Gas Distribution Inc v Ontario (Energy Board)

* SOR is correctness where the matter was viewed in the more traditional *ultra vires* framework or the more recent PAFA
* Government can be taken to court for failure to fulfill statutory procedural requirements

Facts: Enbridge are major gas distributors, which is distinctly different gas vendors, and challenged a rule made by the Ontario Energy Board that allowed gas vendors to decide how consumers would be billed for both the sale and distribution of gas. Enbridge argued the Board didn’t have jurisdiction to make the rules and regardless, didn’t follow the proper procedure in making the rules.

* OCA: S44(1) of the Act gives the Board jurisdiction to make rules that have the force of law - The words of S44(1) read in their grammatical and ordinary sense confer ample jurisdiction for the Board to make the billing provisions in the rules and its harmonious with the scheme and object the Act and the intent of the legislature – it regulates an important part of the gas distribution business which is a manifestation of one of the fundamental purposes of the Act.
* **Is the subordinate legislation (the rules) *ultra vires* the rule-making jurisdiction granted by the statute?**
* Court applies a correctness standard and accords no deference to the Board’s view of their jurisdiction
  + 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
* Procedural Fairness Issue:
  + The process was not improper
  + S45(2) requires the Board to give notice to interested parties of the anticipated costs and benefits of the rules it proposed to adopt which is intended to give interested parties an opportunity to make submissions – it gave notice and parties had numerous occasions to make representations – Enbridge themselves participated to a considerable extent in the development of the rules

## Skyline Roofing Ltd v Alberta (WCB)

* **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 they are benefit conferring**

Facts: The policy here made labour contractors the worker of the prime contractor, for WCB assessment purposes. The Board had made the binding policy in 1999, but it made the policy as of 1982, almost 17 years earlier.

ABQB:

* Since statutorily-authorized policies can have the force of law, the general presumption is that such policies can't be made to apply retroactively
* People need to know what the law is to make decisions about their conduct – a constitutional principle. The power to make retroactive policies will not be inferred unless the statute requires it.
* The revised policies will stand, but only as of the day it came into force and the Board here could not apply the policy retroactively, as it didn’t have the authority – BUT the Court concluded that wasn’t what they were doing anyway, so the appeal failed

## Canadian Forest Products Ltd v BC

* Retroactive rules, or rules that may have a retroactive effect, even if not truly retroactive, will be presumptively inconsistent with the statute unless clearly and explicitly authorized
* The remedy is that the rule will be declared invalid

Facts: The *Forest Act* said that stumpage fees were calculated at the date of scaling, but that these rates could be amended. A Manual was created setting out when the fee would be amended, permitting amendment even after scaling. Canfor appealed a decision affirming the reappraisal of the stumpage rate for a cutting permit issued to Canfor in January 2005 – they were ordered in March 2007 to pay an increased stumpage rate backdated to the day following the issue of the cutting permit. Canfor argued that the statute precluded retroactive redetermination of stumpage rates to timber already harvested and scaled. Also, as subordinate legislation, the Manual couldn’t conflict with the terms of its parent statute and the inconsistencies were *ultra vires* the Minister’s powers

* BCSC agreed with the application

## Thamotharem v Canada (Minister of Citizenship and Immigration)

Facts: The Refugee Protection Division dismissed the respondent’s claim for refugee protection and he subsequently successfully sought JR. The issue that arose was whether the Chairperson of the IRB had the necessary delegated authority to issue “Guideline 7”, which allegedly infringed a refugee’s entitlement to a fair hearing by re-ordering questioning so that the refugee protection officer started questioning rather than the refugee’s advocate. Guideline 7 was issued by the Chairperson of the Board pursuant to the statutory power to “issue guidelines to assist members in carrying out their duties” as per the *Immigration and Refugee Protection Act*.

* Guideline 7 was challenged on the grounds that 1) it deprives refugee claimants the right to a fair hearing and 2) even if there is no PF breach, the Chairperson should have introduced the new standard of questioning as a rule of procedure under the *IRPA*
* FCTD held that G7 was an unlawful fetter on the exercise of discretion and remitted the matter for re-determination on that basis, but the FCA restored the RPD decision
* The Guideline is not a breach of PF, but in some cases, the Board may need to depart from the order of questioning in the Guideline. In such a case, a member’s refusal to do so, on request by a party, may constitute a breach of PF
* **The Guideline does not fetter members’ exercise of discretion in holding hearings because it permits the members to depart from it, thereby maintaining their discretion.** Therefore, it’s not necessary to issue it as a rule, rather than a guideline.
* The Chair could change the process through either a rule or a guideline, so long as the statutory process was followed – didn’t need an express grant of statutory authority to issue guidelines to members.
* 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
* If it were intended as a rule, it should have been issued under the *IRPA* and been subject to the scrutiny in Parliament, but it wasn’t worded to fetter discretion or to amount to a rigid rule – example of legislative oversight

## Soft Law vs Discretion

* Soft law includes: Policy statements, Guidelines, Manuals, Handbooks, Interpretation bulletins
* Soft law helps the tribunal to:
  + Develop consistent decision making, especially with large tribunals
  + Informs the community of the SDM’s thinking of an issue and gives predictability
  + Let’s the SDM readily adjust to day-to-day experiences
* There’s an inherent tension between the benefits of certainty and consistency and of the flexibility and fact-specific solutions

## 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?**

# Can Tribunals Consider Constitutional and Human Rights Issues?

* Courts took this jurisdiction very seriously as their own back in the day, but this has changed since a recognition that the *Charter* and the *Constitution* reflected the fundamental law of the law – in denying access to these basic principles before a tribunal, courts were in effect denying access to justice
* Courts began to accept that at least some SDMs had the authority or jurisdiction to consider these questions, and broadened the scope of such tribunals by relaxing the meaning of “questions of law” generally to meaning questions outside the enabling statute
* **TEST**: Where a tribunal was entitled to consider questions of law, even if only within its enabling statute, the courts assumed that the legislator intended that 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: ***Cooper v Canada (HRC)***
* **IN BC AND ALBERTA** – refer to the *ATA* to determine whether you can raise *Charter* and other constitutional arguments before the tribunal
* **OUTSIDE BC AND ALBERTA** – refer to common law, particularly ***Martin*** to determine if you can raise Charter and other constitutional arguments before the tribunal

## Human Rights Legislation

* **The concern with HR jurisdiction for tribunals other than HR tribunals was overlapping jurisdiction and lack of expertise, but limiting these issues to court actions was problematic**
  + Many issues before other tribunals often carried subordinate HR concerns
  + Should a person have to split their case? This fractures proceedings and undermines the administrative law system
* **TEST**: Same as constitutional and Charter issues: Did the legislator grant the tribunal the jurisdiction to decide general questions of law? If yes, the courts presumed this demonstrated an intention that tribunals also had jurisdiction over HR issues: ***Tranchemontagne v Ontario***

## Why Raise a Constitutional or Human Rights Issue?

* Charter and HR legislation supersedes a tribunal’s enabling statute, including procedural and substantive provisions
* The *Constitution* is the supreme law of Canada and HR legislation prevails over anything else if there are conflicts – they trump errythang

## Cuddy Chicks v Ontario (Labour Relations Board)

* The SCC stated three criteria for a tribunal to be able to decide constitutional issues:
  + The Tribunal “must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought”
  + Nature of the tribunal’s expertise AND
  + Whether the AG can or will participate in the proceedings before the Board
* Tribunals DO NOT have the power to strike down the law – they can only treat it as invalid for the purposes of the decision before it
* **SOR for constitutional questions of law is correctness**

Facts: The union for the chick hatchery filed a complaint to the LRB challenging the constitutionality of a provision of the Board’s enabling statute stating it violated the right to freedom of association under the *Charter*. Cuddy Chicks disputed the ability of the Board to consider constitutional questions, but the Board found that it was able to by virtue of its requirements under the *Charter* and the *Constitution Act*

## Cooper v Canada (HRC), 1996

Facts: Two airline pilots filed an HR complaint alleging the mandatory retirement provision was discriminatory and challenged the provision under the *Canadian Human Rights Act*. HRC concluded that their complaint could not over the *CHRA* provision and refused to refer the matter to the CHRT. The pilots appealed unsuccessfully to the FC and arrived at the SCC.

* If a tribunal has the power to consider general questions of law, then it must be able to address constitutional issues
  + While the CHRC was entitled to interpret and apply its enabling statute, this limited legal jurisdiction was insufficient to establish that they could consider general questions of law
  + The Act sets out a complete mechanism for dealing with HR complaints, nothing about determining questions of law and there was nothing in the scheme of the Act that suggested that either
  + The role of the CHRC is to deal with the intake of complaints and screen them, but it’s not an adjudicative body, so their striking down of the *Charter* provision (what they assumed would happen with a referral to the CHRT) was an adjudicative role outside its mandate
* Just because a SDM can interpret parts of its enabling statute doesn’t mean it has the power to interpret the Charter, as these are conceptually different
  + Also HRTs have no special expertise with respect to questions of law, unlike labour arbitrators or boards
  + The decision was likely to be JR’ed anyway, so it’s better to go straight to court
  + The loose evidentiary rules were unsuited to constitutional litigation
* McLachlin dissented saying that the *Charter* is not some holy grail which only judicial initiates of the superior courts may touch – it best serves efficiency and value in HR legislation and the *Charter* that both the CHRC and CHRT be able to decide the constitutionality of *CHRA* – very popular opinion!

## \*\*Nova Scotia (WCB) v Martin\*\*

Facts: S10B of the *Workers’ Compensation Act* and the associated regulations precluded individuals suffering from chronic pain from receiving workers’ compensation benefits, and this was argued to be contrary to s15 (equality) of the *Charter*.

* **SCC: EXPRESSLY REJECTS *COOPER***
  + Particularly where it distinguishes between limited and general questions of law and where it suggests that an adjudicative function was a prerequisite for a tribunal’s constitutional jurisdiction
  + Affirmed the main principles from *Cuddy Chicks*:
    - No government actor can apply an unconstitutional law due to constitutional supremacy
    - Agreed with McLachlin’s dissent in *Cooper* – that Canadians should be able to assert the rights and freedoms of the *Constitution* in the most accessible forum available, without the need for parallel proceedings before the courts
    - Tribunals **can** be the most well-informed, expert view of the issues at stake
* **TEST for whether constitutional issues are within the jurisdiction of the tribunal:**
  + Under the tribunal’s enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*
  + **A party may rebut this presumption by:**
    - Pointing out an explicit withdrawal of this authority by the legislator OR
    - Convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislator intended to exclude *Charter* jurisdiction
* Here, WCAT was explicitly authorized to determine all questions of fact and law and the decision could be appealed on any question of law, which triggers the presumption that the tribunal can decide constitutional issues
* Even if there was no express authority, it would have been implied because WCAT:
  + Was independent from the WCB
  + Could dictate its own procedure
  + Considered all relevant evidence
  + Recorded oral evidence for future reference
  + Extended time limits, etc
  + Had members that were lawyers, and
  + The AG could intervene if it wished

## *ATA* in Response to *Martin –* jurisdiction conferring or not

* Enabling statutes will choose one of S44 or S45
* **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**

## Kinds of *Charter* Challenges

* **S2(d)** – freedom of association: ***Cuddy Chicks***
* **S15** – equality – forced retirement at 65: ***Cooper***, chronic pain: ***Martin***
* **S7** – guarantees access to fundamental principles of law where life, liberty, or security of person is at stake
  + Problem: admin law issues rarely engage life, liberty, or security of person outside of immigration/deportation
  + Security of person may not include mere economic rights, which is the subject matter of most tribunals
* **S10&11** – right to counsel, search and seizure, double jeopardy, and the independent and impartial tribunal are some aspects of the penal/criminal provisions which may apply

## Section 7 Cases

### *Irwin Toy Ltd v Quebec (AG)*

Facts: Consumer protection legislation purported to prevent television advertising directed at children under 13.

* The Court found a violation of S2(b) but found it justified under S1 and disagreed with S7 on the grounds that only a natural, living person can enjoy S7 rights. As well, S7 is not intended to protect bare property/economic interests, unless these economic rights were “fundamental to human survival.”
* A lot of SDMs won’t attract S7 rights because the interests, rights, or obligations in question will fall short of being fundamental to human survival

### *Blencoe v British Columbia (HRC)*

* Delay can engage S7 rights, but not in the case as his psychological distress is not state imposed, but more likely due to his own actions, the civil action and the media scrutiny and wasn’t sufficiently serious
  + Can apply outside of penal/criminal matters
  + Includes freedom from state interference with psychological integrity
    - Psychological interference must be state imposed AND serious

## Section 10/11 Cases

### *R v Wigglesworth*

* Relevant to all protections under S11 because the case provides guidance on what constitutes an “offence” for the purpose of engaging S11 protections
* This is important because, particularly in regulatory and disciplinary environments, the same conduct or misconduct may give rise to an administrative penalty or disciplinary tribunal type proceedings AS WELL AS criminal code prosecution

Facts: K was in a serious car accident and was brought to Constable W for a breathalyser and questioning. W asked who was driving and K said it was his sister. W went Neanderthal and grabbed K by the throat, choking him and then slapped K – K then agreed to fault. K lodged a complaint and the investigation substantiated his allegation. W was given a fine at tribunal, although it was possible for jail time, and Crown Counsel proceeded with assault charges at the same time. W argued he was being charged twice for the same offence – PCJ agreed, noting the potential for jail time under the *RCMP Act*. Sask SC said the conviction under the *RCMP Act* was not of a criminal nature and thus not an offence for S11 and Sask CA agreed.

SCC: An offence under S11 is only engaged where the offence relates to control of **an activity that is of a public nature, intended to promote public order and welfare within a public sphere of activity**, then that matter is the kind that falls within S11. This is **different from private, domestic, or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity.**

* In the context of private, domestic activities, S11 might be applicable in the presence of true penal consequences – imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large
* BUT S7 might be available where S11 is not

## Charter Values

* Residual tool of statutory interpretation where the statute is ambiguous – the rules of statutory interpretation direct an interpretation that is consistent with Charter values
* Discretionary decision-making must be made consistently with Charter values

## Charter Values: Statutory Interpretation Context

### *Bell ExpressVu Limited Partnership v Rex*

Facts: B provides direct-to-home television programming and encrypts its signal to control reception. R sells decoding systems to Canadian customers that enable them to receive and watch US DTH programming and provide US mailing addresses to their customers. B brought an action requesting an injunction to prohibit R from doing the aforementioned, pursuant to the *Radiocommunication Act*. S9(1)(c) says that no person shall decode encryption signals without the authorization of the lawful distributor of the signal. One argument was that S9(1)(c) should be interpreted narrowly so as to comply with the Charter value protecting freedom of expression.

* SCC: Charter value interpretation is only used where there is ambiguity as to the meaning of the provision – S9(1)(c) was not ambiguous and so it was not necessary to resort to the Charter.

### *Dore v Barreau du Quebec*

Facts: D had an ongoing dispute with a judge who was ultimately disciplined by the judicial committee. The Bar suspended Dore for 21 days and issued a formal reprimand. Dore agreed that the reprimand generally fell within the Bar’s disciplinary discretion, but argued that the reprimand offended the Charter value of his right to freedom of expression and therefore, shouldn’t stand.

* They applied a balancing/proportionality test: 1) consider the statutory objectives, 2) ask how the Charter value at issue will best be protected in view of the statutory objectives
  + **The proportionality exercise requires the DM to balance the severity of the interference of a Charter protection with the statutory objective**
* On JR, the question is whether the decision reflects a proportionate balancing of the Charter protections at play
* The reprimand was upheld because the infringement was mild and reflected an effort to balance the value with the valid statutory public interest objective of ensuring moderation and civility in a profession that demands it even in the face of difficult circumstances

## Human Rights Legislation

* SDMs are authorized to consider human rights legislation as long as they have general authority to otherwise decide questions of law: ***Tranchemontagne v Ontario***
  + Dealt with benefits denial to alcoholics which was argued to be discrimination under the HR Code
  + SCC put a lot of weight on the fact that HR Code didn’t reserve exclusive jurisdiction to the Ont. HRT
* In BC, the *ATA*, has removed jurisdiction over the HRC from some tribunals because of *Tranchemontagne*
* ***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

* Problems arise where tribunal jurisdiction overlap because there is no hierarchy amongst tribunals as there is within the courts and between the courts and tribunals
* Where do the boundaries of where one tribunal ends and the other begins

### *BC (WCB) v Figliola*

Facts: The review officer accepted that he had jurisdiction over the *HRC* and concluded that the Board’s chronic pain policy – fixed sum compensation – was not contrary to S8 and therefore, not discriminatory. The complainants appealed this to WCAT, but the legislation was amended removing WCAT’s authority to apply the *HRC* before the appeal was heard – WCAT could not hear it, but JR was still available. Instead of JRing, the complainants filed a complaint with the HRT, repeating the same S8 arguments. WCB brought a motion asking the HRT to dismiss the complaints, arguing that under S27 of the *HRC* the Tribunal had no jurisdiction and that under that provision, the complaints had already been appropriately been dealt with by the Review Division. HRT rejected both arguments and found that the parties should receive a full Tribunal hearing.

* Chambers judge set aside the HRT’s decision
* BCCA concluded that the Tribunal’s decision was not patently unreasonable and restored its decision
* SCC: The tribunal’s decision should be set aside and the complaints dismissed.
  + S27 does not represent a statutory invitation either to JR another tribunal’s decision or to reconsider a legitimately decided issue to explore whether it might yield a different outcome
  + 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
  + SOR per S59 of the *ATA* is patent unreasonableness – The tribunal based its decision to re-litigate predominantly on irrelevant factors and ignored its true mandate, so its decision was patently unreasonable.
  + The court reviewed principles for issue estoppel, collateral attack and abuse of process
  + Based on these principles, the tribunal should ask:
    - Is there concurrent jurisdiction to consider HR issues?
    - Whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal
    - Whether there was an opportunity for the complainants to know the case to be met and have a chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself
      * All these questions go to determining whether the substance of a complaint has been appropriately dealt with
* It is really a question of whether it makes sense to expend private and public resources to relitigate the same dispute over again

# Reconsiderations

Tribunal recognizes they have made a mistake and revisits their own decision.

Tension with *functus* doctrine – that once a DM has exhausted their statutory authority, then they are done.

## Chandler v Alberta Association of Architects

Facts: Pursuant to S39 *Architects Act*, the Practice Review Board of the AAA issued a report with 21 findings of unprofessional conduct, levying fines, suspension and ordering them to pay costs of the hearing, but their enabling statute only authorized them to make recommendations and report to a higher level Complaint Review Board.

* ABCA: upheld ABQB’s decision that the Board didn’t have jurisdiction to make findings or orders.
* The Board then notified the appellants that it would continue the original hearing to consider whether another report should be made and the architects applied for a prohibition order declaring the Practice Review Board no longer had authority to inquire into the architects
* ABQB: allowed the prohibition – found the Board had completed and fulfilled its function and thus, *functus officio* – when a tribunal’s mandate expires
* SCC concluded the Board was not *functus* and could issue the new report and recommendations
  + Where a matter is quashed or quashable (jurisdictionally unsound), it’s a nullity and *functus* doesn’t apply – since no decision consistent with the grant of authority was issued, the tribunal remains free to issue that decision

**Codified the CL Slip rule by ATA in s.53**

## *ATA* and Amending Decisions

**S53(5)** – this section must not be construed as limiting the tribunal’s ability, on request of a party, to reopen an application in order to cure a jurisdictional defect

## Fraser Health Authority v. WCAT, 2014 BCCA

**Reconsiderations:**

* Majority: reconsideration decision should be set aside because the WCAT tribunal at large does not have jurisdiction to review the decision of a panel entrusted with an appeal to determine whether it is patently unreasonable.
* Once SDM issues a decision it is functus officio, subject to a limited right to correct clerical errors in its decision or to reopen proceedings to correct errors of jurisdiction (Chandler).
* Section 253.1 of the Workers Compensation Act preserves this common law authority. Given decisions in Chandler and Dunsmuir, “errors of jurisdiction” mean “true jurisdiction”, not whether decision PU
* Legislatures cannot insulate administrative tribunals from judicial review (Crevier).
* Crevier does not support a common law power to reopen proceedings to determine whether a decision is patently unreasonable. It was not concerned with the distinction between errors of true jurisdiction and errors within jurisdiction which result in a loss of jurisdiction.
* Reconsideration decision a nullity; only JR original decision

# What are the Remedies for a Breach of Procedural Fairness?

* **S8 *JRPA*** sets out available court remedies:
  + **Certiorari** – quashes decisions \*MOST COMMON
  + **Prohibition** – stops the action
  + **Mandamus** – orders performance
  + **Declaration** – states interpretation of the issue
    - All discretionary! Can refuse remedy due to laches, acquiescence, unclean hands, etc
* The default position for a breach of PF must always result in quashing the decision: ***Cardinal v Kent***
  + The role of the court is to supervise the decision-making PROCESS, not the DECISION
  + **FIVE EXCEPTIONS** to the general rule:

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

## Is the PF Breach Trivial?

* **NO 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*** 
  + Submissions during a dismissal grievance included two new cases and the employer was told they would have an opportunity to respond, but the arbitrator issued his decision before the employer could respond, but specifically stated he didn’t rely on either of the two new cases
  + ABCA: overturned the chambers judge and restored the arbitrators decision because although PF was breached, the breach had next to zero impact on the decision since the cases were irrelevant
* Even if **EVIDENCE IS 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***
  + At the hearing, Compass adduced new evidence regarding the test to be applied to ascertain the labour bargaining scope, but the vice chair failed to mention this new evidence in allowing the union’s certification and the employer, Compass, fought for breach of their right to be heard
  + Both the chambers judge and BCCA denied JR because this evidence had barely any relevance – subsequent decisions on the same facts had confirmed the end result would be the same

## 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***
  + Liquor and Gaming Authority refused to grant a gaming license to MJCB and they requested a JR for two reasons: LGA had failed to consider relevant evidence so it had breached their right to be heard and the structure of the LGA lacked institutional independence
  + Chambers judge and Sask CA said nope – no PF violation, and even so, they had no hope of getting a licence because only two were allowed in the city and those were already issued = MOOT!
* 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)***
  + Bago requested a work permit and extension of her temporary resident status, and applied at the same time for permanent residency on the basis of her hubby being Canadian. Only the latter was successful.
  + Bago sought JR on the rejection and the minister sought to have it quashed as moot – she wanted to continue because it might help other immigrants in future cases – Court said it was a waste of time and 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?
  + Three rationales for the mootness doctrine:
    - The existence of an adversarial context
    - Judicial economy and the conversation of judicial resources
    - A need for the Court to demonstrate awareness of its proper function
* 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***
  + The legislation changed in 1990 and MOC applied again for many of the same wells that were rejected before.
  + No hearing was held as the Chairman responded that the application wouldn’t be put forward as any application had to be based upon the results of a fresh well and these were based on the original well so it couldn’t be a *bona fide* application
  + SCC agreed with the trial judge and NFCA that there should have been a hearing as there was no technical issue and didn’t require referral to the Committee technical evaluation, but despite this PF breach, the outcome was certain to be the same and therefore ordering a remedy would be nonsensical to do

## 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
* Three primary principles underlying the refusal to issue a remedy in cases of prematurity and curing:
  + Fragmented proceedings lead to inefficiency, cost, and delay
  + PF issues may become moot depending on the outcome of the administrative proceeding
  + The Court needs a full and complete record of the tribunal’s record and its decision to review
* Curing happens in two ways:
  + In a stacked decision making system so that the appellate SDM can take steps to cure breaches by lower SDM – as long as the appellate SDM had full substitutional authority at least over the PF issue, the appeal cures the error in the original decision so that it can’t be complained of on JR: ***Taiga Works Wilderness Equipment Ltd v BC (Director of Employment Standards)***
    - A delegate of the Director allowed a complaint by former Taiga employees without disclosing documents to T – T appealed to the Tribunal and the first member to hear the case found that T had been denied PF and determined he had authority to cure the defects and rendered a decision without remitting the matter to the Director.
    - T sought reconsideration of this decision and the second member concluded the first had failed to give T full opportunity to make submissions on the documents that were not initially disclosed – the first member heard the submissions to provide that opportunity and confirmed her original decision stating that T failed to identify key evidence in those documents, so, there was no unfairness from the Director
    - T sought JR of the second member’s reconsideration and the judge found that they acted fairly in the process
    - BCCA – appeal allowed – trial judge should have looked at the proceedings as a whole and not just the second member’s decision – **the first member erred in overlooking the procedural defects instead of curing them as she should have performed a fact-finding function to determine whether the Director relied upon those certain documents in their determination** – T’s submissions to the first member didn’t make the process fair
  + Curing may also take place where there is an alleged error in some preliminary ruling (ex: 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***
  + A student sucked at school and was told to leave the program – the *University Act* provided an appeal to a committee which was obligated to “hear and decide”, which only heard the university’s side in the absence of the student, who was never given the opportunity to be heard and so, launched a JR
  + The student had a further appeal to a committee of the senate
  + Sask CA and the SCC stated that **regardless of the unfair nature of the original committee’s decision, the student’s right of appeal provided him with an adequate alternative remedy – it had to be assumed that the senate committee would have reached the right decision, or else a superior level or court could have quashed it after that**

## Has JR been Sought Prematurely?

* It’s premature to proceed with JR before seeing the outcome of a complete administrative proceeding
* 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)***
  + Z made extremely anti-Semitic comments that amounted to hate speech – at the hearing, the HRC presented an expert in anti-Semitism and Z was denied the opportunity to cross-examine him and the tribunal also refused to allow an “expert” witness because the witness wasn’t impartial
  + FCTD ruled there was a PF breach and JR application wasn’t premature as the *Act* had a 30 day limit for appeal
  + **FCA say it was premature since these were interlocutory decisions and that limit was only for final decisions**
* Example of the exceptional circumstances that may overcome the issue of prematurity to have a court interfere on a preliminary issue: ***Secord v Saint John Board of Commissioners*** 
  + Two officers appeared before the Board to determine whether they had breached their duty – the commissioner, according to the statutory regime, was to be a current member of the police
  + The Chief of Police wanted to appoint someone who was a former member, so had him sworn in as a member in order to appoint him to hold a hearing under the *Police Act*
  + The officers challenged his validity as commissioner and the commissioner dismissed the application with written reasons so the officers sought JR – the commission argued prematurity and it’d be inappropriate to hear a JR on this interlocutory matter, plus, there was internal appeal available
  + NBQB: JR was not premature because the issue involved an attack on the very existence of the arbitrator (an attack on jurisdiction) – 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

## 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 take in timely fashion, an objection will be regarded as waived: ***Cougar Aviation Ltd***
  + You can’t keep PF breaches in your pocket for an easy JR win if you don’t like the outcome
  + Also, the inclusion on the evaluation committee of two members who were familiar with the incumbent bidder didn’t constitute a reasonable apprehension of bias
  + It was not a PF issue that Public Works didn’t retain an independent expert because the late amendment to the request for proposals was a clarification, rather than a significant change
* 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***
  + The applicants and the Board didn’t speak the same language and weren’t advised of the fact that they could refuse the change from a two member panel to a one member panel

## 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***
  + Cosmon apparently put in an application to delay construction and force the City to pay a higher price in order to meet its construction timetable and not actually because they had an issue with the jurisdiction of the City to expropriate land (vs Provincial jurisdiction) – improper purpose!
* 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 v Canada (Minister of Citizenship and Immigration)***
  + J claimed refugee status alleging that he was being persecuted for being Muslim and because of his ties to an opposition political party, which he admits that he actually lied about – the panel was pissed but continued anyways, even though J wanted them to recuse themselves on the grounds of reasonable apprehension of bias – J then sought JR on this interlocutory matter – but the Court said you lied so no JR for you.

## Is there a Balance of Convenience to Consider?

* Balance of convenience isn’t a fairness error, but a substantive error – however, it is likely also available for PF errors
* Balance of convenience considerations will include any disproportionate impact on the interest of third parties: ***MiningWatch Canada v Canada (Fisheries and Oceans)***
  + MW had no pecuniary interests in the litigation and stated that it was interested in this as a test case to protect a rescoping on a project of their own initiative – a declaration in their favour was enough, and did not require the awarding of the full remedy, which would have adversely affected a third party by rescinding already approved permits
  + CRITICISMS: arguments that the SCC erred in permitting the approvals and permits to stand in the face of a clear jurisdictional error
    - Absence of bad faith by one of the parties should not be a consideration in deciding not to grant relief – JR decisions requiring SDMs to act within their jurisdiction are not punitive, but rather about giving effect to legislation
      * Bad faith is a distinct ground for JR so it is unnecessary to consider it when granting remedies
      * This isn’t consistent with the rule of law because it tells SDMs they can ignore the statutory scope of authority as long as it isn’t intentional
    - Balance of convenience factors was inappropriate in this context because applicant should not have to catalogue potential harms – it should be enough that legislative provisions are there to protect public interest and that interest should be given weight by the Court – anything else amounts to the court re-weighing the legislative policy choices evidenced in the statute