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| **PROCEDURAL FAIRNESS** | | |
| **1. Establish Duty** | | |
| - There is a general duty of fairness, which applies to statutory decision makers [**Nicholson**].  - The duty of procedural fairness lies on every public authority making an administrative decision which affects the rights, privileges or interests of an individual [**Cardinal, Knight**]  - However, there is no procedural fairness duty in the context of purely legislative action [**Reference Re Canada Assistance Plan**]  - There may also **not** be a PF duty in the case of an emergency [**Cardinal**] | | |
| **2. Establish Content of Duty** | | |
| *(A) NEED TO DETERMINE SCOPE OR EXTENT OF THE PF DUTY USING THE* **BAKER FACTORS**[**BAKER**]:  **1. What is the nature of the decision and the process followed in making?**   * **(a)** Whether the decision is legislative/political in nature and affects the community as a whole (low) 🡨🡪 adjudicative decision that turns on questions of fact and law and affects the interests of a single individual (high) * **(b)** The process for making the decision is and indication of the nature of the decision * Quasi-Judicial tribunals require high level of PF, while polycentric policy making bodies require low level of PF * The more the tribunal looks judicial, the more PF that is required   **2. What is the nature of the statutory scheme and the terms of the statute under which the body operates?**   * PR requirements higher where the function of DM within the statutory context is to adjudicate disputes * PF requirements lower when function is primarily one of managing competing interests * If the tribunal is final/determinative = higher PF, if there is additional appeal = lower PF   **3. What is the importance of the decision to the individual(s) affected?**   * Procedural protections higher where statutory purpose is to decide rights of an individual and the decision may have serious adverse consequences for that individual * Employment is on the significant end of the decision making spectrum and attracts high PF level   **4. Were there any legitimate expectations of the person challenging the decision?**   * Refers to procedural expectations and not substantive expectations   **5. Was there any choice of procedure made by the tribunal itself?**   * Tribunal’s are the master of their own procedure   **6. Other?: Not exhaustive categories** | | |
| *(B) Need defensible conclusion with strong reasoning as to whether the PF is* ***low, medium or high*** | | |
| At a minimum, PF requires that a person (1) be told the case to be met, and (2) be given an opportunity to respond [**Nicholson**] | | |
| **3. Identify Procedural Fairness Issues** | | |
| **Remember: *If the statute says something unfair is okay, then that dominates. If the statute is silent about something, then it is subject to the CL presumption of PF.*** | | |
| **(A) Individual 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 decision maker would not decide fairly? [Committee for Justice]**  **-** Pre-hearing comments will not necessarily give rise to RAB unless they give the impression that the DM has a closed mind [**NFLD** **Telephone**] | **(B) Institutional Bias**  **TEST: would a fully informed person have a RAB in a substantial number of cases decided by the tribunal [Matsqui]**  **However,** the tribunal can be as biased as the statute says it can be – the CL duty to be fair **only applies where the statute is silent about procedure [Ocean Port] *(applies to procedural rules that the tribunal created themselves)***  **BUT,** potential to argue that Ocean Port was about ***licensing***, and a more judicial tribunal dealing with ***disputes*** would require more independence **[McKenzie]**  - Criteria for independence is not absence of influence but **freedom to decide according to conscience and opinions [IWA v Consolidated Bathurst]**  - **Highest level of institutional independence indicated by**: (1) security of tenure; (2) financial security; (3) institutional independence over administration **[Valente]** | |
| **(C) Reasons**  **Any challenge on reasons is subject to a reasonableness analysis in SOR.**  - In certain circumstances, PF will require some form of reasons, but they are not always required and the **quality** of those reasons is **not** a matter of PF [**Baker**]  - Must satisfy **Dunsmuir** criteria of **JUSTIFICATION, TRANSPARENCY, AND INTELLIGIBILITY.**  - Where reasons seem inadequate court must first seek to fill gaps with reasons which might have been given (Presumption of Adequacy) [**Newfoundland Nurses**]  - SEE CAN for features of good reasons | **(D) Oral Hearings/Cross Examination**  **(i)** To determine if an oral hearing is required, first ***look at the statute***!  **(ii)** At CL, **NO** absolute right to an oral hearing and cross-exam; consider **whether the party had adequately effective method of contradicting witnesses by writing or otherwise,** such that cross-exam/oral hearing was not necessary **[County of Strathcona]**  - Reasons to have an oral hearing: complexity, **credibility** [**Singh**], barriers;  - If right to oral hearing, incidental that you have a right to cross-exam [**Innisfil**]  - Important to renew request for oral hearing throughout process [**Allard**] | **(E) Document Disclosure**  Different disclosure requirements based on (1) enabling statute and (2) ATA;  ATA S34 – allows parties or tribunals to summon witnesses/documents and apply to court for compliance  ATA S40(3) privileged evidence is not admissible in a tribunal  **Must disclose anything that you intend to rely on [Kane]**  **Must not** hold private interviews with witnesses or hear evidence in the absence of a party whose conduct is impugned and under scrutiny **[Kane]** |
| **(F) Delay**  **- Quash or Stay of Proceedings Based on Section 7 –** if psychological harm that is (1) state imposed and (2) serious [**Blencoe**]  - State caused delay may require remedy for breach of PF if there is no significant psychological harm but the party’s ability to make their ***case is significantly impaired*** (ie. inability to answer complaint due to faded memories, loss of essential witnesses, loss of evidence); however, **delay without more will not warrant a stay of proceedings at CL** [**Blencoe**], but could get **stay of proceedings.**  - **Abuse of process –** delay may permit admin remedy for abuse of process where administration of justice would be brought into disrepute. Required unacceptable delay where **the damage to the public interest in the fairness of an admin process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted [Blencoe]** | | |
| **4. Conclusion** | | |
| Denial of right to a fair hearing (ie. violation of procedural fairness) **must always render a decision invalid** [**Cardinal**]  No breach is too trivial – the decision must be quashed [**Cardinal**] | | |
| **5. Exceptions** | | |
| **Despite Cardinal, the Court always has the discretion to refuse to grant a remedy [Moose Jaw Central Bingo]** | | |
| **(A) Triviality/Mootness**  (Triviality) Where there is **nothing new or significant** in the post-hearing submissions a breach of PF related to those submissions will not justify the quashing of the decision [**Westfair Foods**]  (Triviality) If the breach is insignificant and the court knows with near certainty that the decision will be the same if quashed and sent back to the tribunal, the Court will uphold the decision due to lack of practical utility [**Compass Group**]  (Mootness) If the decision of the Court will have no practical effect on party’s rights, will decline to decide [**Bago**]  (Mootness) When legal outcome is 100% certain, there will be no remedy for PF breach [**Mobil Oil**] | | |
| **(B) Exhausting Internal Remedies/Prematurity/Curing**  *Remedy may not be granted where error was or could have been cured either in the original hearing process or by additional avenues of appeal under the statute:*  - Where there is a convenient alternative remedy, granting JR is discretionary and involves consideration of expediency, expense, and the efficacious administration of justice [**Harelkin**] (Exhausting Appeals)  - Could will **not permit JR of preliminary decision**s except where there is some special circumstances otherwise permitting the Court to intervene [**Zundel**] (Prematurity)  - Special circumstances include an **absence of jurisdiction**, particularly where the exceptional circumstance will save the petitioner ***time and expense*** [**Secord**] (prematurity)  - Appellate tribunals can **cure** breaches of natural justice of PF by an underlying tribunal [**Taiga Works**] | | |
| **(C) Waiver**  **Waiver requires that the party must know or reasonably have been expected to know that a breach of PF took place. Must have the necessary sophistication to understand that rights are being breached and may object [Kvelashvili]**  - **Allegations must be raised at earliest practicable opportunity** [**Cougar Aviation**]  - If not raised at the tribunal, barred from raising at JR [**Cougar Aviation**] | **(D) Unclean Hands**  ***Where equitable relief will not achieve the goal which it is being requested but will advance some other oblique purpose, the Court will look closely at the true purpose of the JR application.* If the true purpose is to obtain an improper result, application will be refused [Cosman Realty]**  **-** If the applicant engaged in **misconduct** that causes the tribunal to be biased against him, his hands are unclean and he cannot get a remedy [**Jaouadi**] | **(E) Balance of Convenience**  **Even if a party is entitled to a remedy, the Court has the discretion whether to grant it [Mining Watch]**  **-** Consideration includes whether there will be any disproportionate **impact/prejudice to 3rd parties** [**Mining Watch**]  **(F) Collateral Attack**  **Cannot use JR to collaterally attack another decision [United Steel]** |

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| **SUBSTANTIVE REVIEW IN BC** | |
| **1. What is the source of the standard - Is there evidence that the ATA applies?** | |
| - If **YES** (e.g. enabling statute from BC), then continue with this analysis; If **NO**, then use ***Dunsmuir*** SOR Analysis.  - Explicitly state whether or not the ATA applies | |
| **2. Does the Enabling Statute State whether Section 58 or Section 59 Applies?** | |
| **No**, continue. **Yes**, skip to 4a or 4b, respectively. | |
| **3. Determine whether the tribunal has a privative clause:** | |
| **Must be a PC within the meaning of section 1 of the ATA**: “provisions in the tribunal’s enabling Act that give the tribunal **EXCLUSIVE AND FINAL JURISDICTION** to inquire into, hear, and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within the jurisdiction is final and binding and not open to review in any court.”  *- If the PC is unclear as to “exclusive jurisdiction,” can use PAFA as a last resort* [**United Brotherhood of Carpenters**]  - If Section 58 of the ATA is listed in the enabling statute, can assume that the PC meets the definition of a PC under ATA. But still need to look at whether the tribunal has exclusive jurisdiction over that particular issue/question. | |
| **4(a). If it meets the definition of a PC use SECTION 58.** | **4(b). If it doesn’t meet definition of a PC, use SECTION 59:** |
| **(i) Determine the Nature of the Question/Issue and applicable SOR:** | **(i) Determine the Nature of the Question/Issue and applicable SOR:** |
| **Make sure that the question/issue is within the PC exclusive jurisdiction in the enabling statute, otherwise use PAFA;**   1. Finding of Fact = Patently Unreasonable 2. Question of Law 3. Exercise of Discretion 4. PF/Natural Justice = Fairness 5. Other matters outside exclusive jurisdiction= Correctness | **Make sure that the question/issue is within the PC exclusive jurisdiction in the enabling statute, otherwise use PAFA;**   1. Discretion = Patently Unreasonable 2. Findings of Fact = Reasonableness 3. PF/Natural Justice = Fairness 4. Question of Law = Correctness |
| **5. Content of the Applicable SOR:** | |
| *Even though the ATA applies and dictates the SOR, still need to look to* ***CL in order to determine the content of that standard****:* | |
| **Reasonableness:**  **Justification, transparency, and intelligibility within the decision making process, and whether the decision falls within a range of acceptable outcomes [Dunsmuir]** | **Correctness:**  **No deference – court will undertake its own analysis of the question and decide whether it agrees with the DM. If not, it will substitute its own view [Dunsmuir]** |
| **Patently Unreasonable:**  PU is codified in the ATA but must be calibrated as the CL changes. Dunsmuir does not trump the ATA, so have to look to the CL before Dunsmuir for definition of PU [**Khosa**]  - **Difference between unreasonable and patently unreasonable is the** **immediacy or obviousness of the defect** [**Southam**]  - If the defect is apparent on the face of the tribunal’s reasons, then the tribunal’s decision is patently unreasonable. If it takes some significant searching to find the defect, then the decision is unreasonable, but not patently unreasonable [**Southam**]  **-** **A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not [United Steelworkers]** | |
| **6. Outcome of Judicial Review** | |
| *Applying the SOR to the facts of the case, what do you think the outcome will be and why?*  ***- If applicable,* Good place to mention that findings of fact based on credibility attract a lot of discretion because the decision maker sees the evidence first hand [Dr. Q]**  - *Does not inform SOR because given to you by the Act, but may assist in finding that this was not a PU finding because the decision maker was in the best position to make findings about credibility* | |

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| **SUBSTANTIVE REVIEW OUTSIDE BC** | |
| **1. What is the source of the standard - Is there evidence that the ATA applies?** | |
| - If YES, use the ATA SOR Guide; if NO, explicitly state that there is no evidence of this and apply ***Dunsmuir*** framework (below) | |
| **2. Determine whether the jurisprudence has already determined the applicable SOR** | |
| **Exhaustive analysis is not required in every case to determine proper SOR. Courts must first ascertain whether the jurisprudence has already determined the degree of deference with regard to the question [Dunsmuir]**  **-** State that more information is needed in order to answer this question, but continue under assumption that no previous jurisprudence | |
| **3. Apply the SOR Analysis** | |
| **(A) Privative Clause** – is there a privative clause?   * If there is a PC, **strongly** indicates that deference should be given * But absence of PC clause is neutral and does not mean that no deference should be given [**Pushpanathan**] * The stronger the PC, the more deference is generally due [**Pushpanathan**] * When the question is one of fact, discretion or policy, or where the legal issue is intertwined with and cannot be readily separated from the factual issue, **deference will usually** **automatically** apply [**Dunsmuir**] * If there is a right of appeal then there is less deference depending on whether it is a ***narrow right of appeal.*** For example, a right of appeal about questions of law only is **not** a complete invitation for courts to intervene.   **(B) Discrete and Specialized Administrative Regime (purpose, nature of scheme) in which the DM has special expertise**   * What is the **expertise of the decision maker(s) relative to the Courts**? If they do not have more specialized expertise on the issue, then this will not warrant more deference [**Pushpanathan**] * If statutory purpose requires the tribunal to select from a range of remedial choices, to consider policy issues or to balance a number of competing interests (i.e. polycentric issues) a court may show greater deference [**Pushpanathan]** * If primarily concerned with disputes between individuals, then less deference [**Pushpanathan**] * Statute requires members to have certain qualifications = more deference [**Dr. Q**]   **(C) Nature of the Question**   * Deference where a DM is interpreting its own statute or statutes closely connected to its function with which it has particular familiarity [**Dunsmuir; Alberta Teacher’s Association**] * Deference may also be warranted where an admin DM has developed particular expertise in the application of a general CL rule in relation to a specific statutory context [**Dunsmuir**] * ***A question of law that is of central importance to the legal system as a whole and is outside the expertise of the DM will always attract a correctness standard* [Dunsmuir]** * Costs are not of central importance to the legal system [**Mowat**] * ***Questions of vires, jurisidtion between tribunals, constitutional questions regarding division of powers will also always attract a correctness standard* [Dunsmuir]** * Presumption of reasonableness will be rebutted where tribunal and court have concurrent jurisdiction [**Rogers**] * ***Overall, should attract deference unless falls into one of these categories:***  1. General legal question of central importance to legal system 2. Constitutional Questions 3. Questions regarding jurisdiction between tribunals 4. True questions of jurisdiction or vires (authority to hear matter) 5. Concurrent jurisdiction with the courts over same subject matter/actions 6. Implicitly, questions of law that are not within the home statute or an associated statute in respect of which the tribunal has specialized expertise/familiarity | |
| **4. Select the applicable SOR (most of the time will be reasonableness)** | |
| **Reasonableness:**  **Justification, transparency, and intelligibility within the decision making process, and whether the decision falls within a range of acceptable outcomes [Dunsmuir]** | **Correctness:**  **No deference – court will undertake its own analysis of the question and decide whether it agrees with the DM. If not, it will substitute its own view [Dunsmuir]** |
| **5. Outcome of Judicial Review** | |
| *Applying the SOR to the facts of the case, what do you think the outcome will be and why?*  ***- If applicable,* Good place to mention that findings of fact based on credibility attract a lot of discretion because the decision maker sees the evidence first hand [Dr. Q]**  - *Does not inform SOR because given to you by the Act, but may assist in finding that this was not a PU finding because the decision maker was in the best position to make findings about credibility* | |

**CONSTITUTIONAL JURISDICTION:**

**Enabling Statute Incorporates ATA (Inside BC):**

**1. Look at the Enabling Statute –** does it include any ATA sections that indicate authority over constitutional issues?

* **ATA 44(1)** – does not have jurisdiction over constitutional questions
* **ATA 45(1)** - Does not have jurisdiction over constitutional questions relating to the Charter
* **ATA 46.1(1)** – May decline jurisdiction to apply HR Code
* **ATA 46.1(2)** – May decline jurisdiction to apply HR Code subject to subsection (2)
  + ***Subsection 2*** – Does not have jurisdiction over a question of whether there is conflict between HR Code and any other enactment

**2. If no, then proceed to Martin Test (below). If yes to 44 or 45, refer to section 1 definition of “constitutional questions:”**

* **(1)** “***Constitutional Questions***” means any question that requires **notice** to be given under ***section 8*** of the Constitutional Questions Act

**3. Refer to Section 8 of the Constitutional Questions Act:**

* **8(2)** If in a cause, matter or other proceeding (a) the **constitutional validity or constitutional applicability of any law is challenged**, or (b) an application is made for a **constitutional remedy**, the law must not be held to be invalid or inapplicable and remedy not granted until after notice of the challenge or application has been served on the AG
* **8(1)** “***Constitutional remedy”*** means a remedy under section 24(1) of the Charter

*Summary*: Questions about constitutional validity or applicability of any law or applications for constitutional remedy trigger the notice requirement to AG, which means that they are constitutional questions.

*[Note]:* Do **not** say that section 44/45 applies so cannot consider anything at all to do with the Charter and/or Constitution – only closes the door for matters where tribunals would hold that a law is invalid or inapplicable or could give a constitutional remedy

**Enabling Statute does NOT Incorporate ATA (Outside BC):**

1. Cite **DISSENT** from ***COOPER*** for principle that tribunals may apply and interpret the Charter (for bonus points, cause why not)

**2. Apply the Martin test for whether constitutional issues are within the jurisdiction of the tribunal:**

* **(1) Does the tribunal have jurisdiction under the enabling statute, either explicit or implied, to decide questions of law arising under the challenged provision?** 
  + (1A) Explicit Jurisdiction must be found in the **terms of the statutory grant of authority;**
  + (1B) Implied Jurisdiction must be discerned by looking at the **statute as a whole:**
    - Relevant factors in determining this include:
      * (1) Whether deciding questions of law is necessary to fulfill statutory mandate of the tribunal;
      * (2) The interaction of the tribunal with other elements of the admin system;
      * (3) Whether the tribunal is adjudicative in nature;
      * (4) Practical considerations including capacity to consider questions of law
* **(2) If yes, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the Charter;**
* **(3) BUT, a party may rebut this presumption by:** 
  + (A) pointing to an explicit withdrawal of this authority by the legislator; or
  + (B) convincing the Court that an examination of the statutory scheme clearly leads to the conclusion that the legislator intended to exclude the Charter from the scope of the tribunal’s jurisdiction over questions of law

**In exam context, don’t jump from more than one way to interpret provision to Charter values analysis – first stop and determine whether you can form an opinion about how to interpret based on scheme as a whole – if you are still torn between two interpretations, then start applying charter values doctrine**