What is Administrative Law?

In general, Administrative Law concerns the 'supervision' by courts of decision-making bodies making decisions pursuant to statute or the royal prerogative. Administrative law is concerned with deciding rights, obligations, and entitlements.

- **NB**: Entirely **statute-based**!
- Administrative law is 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.
    - Interface between the judicial branch of government and the executive branch of government.
- Public decision-makers, including administrative tribunals ministers and departmental officials, have no inherent power to make decisions that affect people's lives but for the statute that empowers them to do so.

Judicial scrutiny focuses on these **strict limits** of **authority** given to decision-makers by either **statute** or **prerogative** power.

- **The authority of Public decision-makers is categorically bound by the following:**
    - *The purpose and terms of the statute;*
    - *The regulations, guidelines, and by-laws;*
    - *The constitution;*
    - *The written and unwritten constitutional legal principles*
        - This includes the **rule of law** and its primary purpose to fetter or preclude executive arbitrariness (see below under the "rule of law" heading)
            - **Secession Reference**: 4 unwritten **constitutional principles** binding on every public and private person
                - Federalism;
                - Rule of Law and Constitutionalism;
                - Democracy;
                - Respect for Minorities.

Thus, the role of the court in administrative law's outer frame is to make sure, at a minimum, that the decision-makers do not step outside the boundaries of what they are legally empowered to do.

- Given the significant impact a decision could have on an individual and the fact that boards and tribunals are **not publicly accountable** in the same way that government is (for example: when passing legislation in the provincial legislature)
- In early AL jurisprudence, the key complaint was that tribunals recklessly intruded upon liberty, by mistake or through excessive zeal because tribunals were often ignorant of the law, bound by no law, free to disregard the evidence and the law, and unilaterally dispose of an individual's rights.
- Conflict of Court review of tribunal decisions arises because in many instances you are asking an "amateur" (The courts because they are often less specialized than tribunals) to overrule the "expert's" (the specialized tribunals) decision.
- The inherent tension in "the constitutional divide between the executive and judicial branches of government" has and will likely never be fully put to rest. This conflict is the crux of many of the administrative law decisions. The executive branch, which includes ministerial and tribunal decision-makers, must adhere to the rule of law and the constitution. On the other hand, reviewing courts must also accord respect to the democratically elected executive branch when engaging in judicial activism within the sphere of administrative law. The democratic will of the people is inherent in the legislative intent. Therefore, courts must weigh judicial review and their interference with administrative decision-making bodies against the legislature's express intent to **not** delegate tribunal functions to the courts.

What were the main reasons for government to establish administrative decision-making bodies?

- Desire to **depoliticize** certain decisions;
- **Greater access** to **justice** by **limiting costly** and **lengthy** court proceedings;
- The need for **greater specialization** and technical or subject matter expertise to make decisions than is possible or feasible to collect and retain within central government; **and**
- A **reluctance** to **enmesh courts** in matters **not suitable** to judicial review because of their **specific nature** or the **volume** of decisions that have to be made.

The Rule of Law

Administrative Law is chiefly concerned with the perpetual battle between parliamentary supremacy and the rule of law (first discussed in the landmark SCC **Secession Reference** and subsequently limited in **Imperial Tobacco**). Courts have to carefully balance parliament's jurisdiction to make laws against the rule of law which sets out that no one is above the highest law of the country: the constitution.

- **One of the primary and chief functions of the *rule of law* is to fetter or preclude the possibility of *executive arbitrariness*.** The rule of law seeks to prevent arbitrariness within the exercise of administrative decision-makers and other governmental bodies. Arbitrariness is concomitantly related to the notion of indifference by decision-makers in choosing the appropriate procedures to reach a certain outcome. Such indifference towards procedural obligations makes it more probable that the result will be unjust and/or unfair.

No Arbitrary Exercise of Government Authority:

In **Roncarelli**, the SCC concluded that every public authority, especially those with broad discretionary powers, are always constrained by the unwritten constitutional principle of the rule of law, even if the enabling legislation is silent as to its applicability. Further, the court concluded that the rule of law aims to prevent any arbitrary exercise of government authority:

- *"... there is **no such thing as absolute and untrammelled "discretion"**... no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."*

Access to Justice and the Rule of Law:

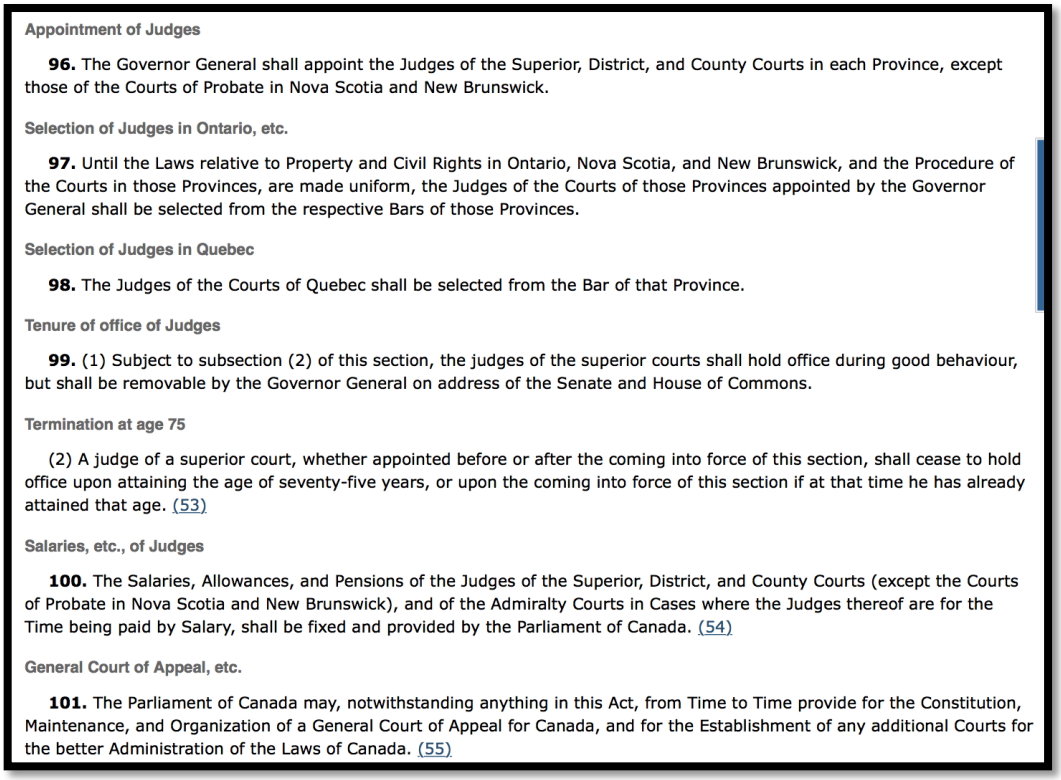
In **Trial Lawyers Association**, the SCC handed down a huge victory for **access to justice** advocates by striking down BC's court hearing fees. The court ruled that court hearing fees - intended to discourage frivolous claims and fund the system - were unconstitutional because they **impeded access** to justice and therefore **jeopardized** the **rule of law** itself.

- While court hearing fees are ***permissible* in principle**, those that present "**undue hardship**" to litigants, such that they are discouraged from accessing the court system, violate core jurisdictional principles within the Constitution: "The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. Therefore, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts and impermissibly impinge on s. 96 of the Constitution Act, 1867.

Section 96 Courts: "Does the Enabling Legislation Violate S. 96 by Encroaching on Superior Court Jurisdiction"

The section 96 jurisdictional analysis applies **only** when the tribunal's **entire existence** is impugned. If the tribunal itself may be **infringing** on **superior** court **jurisdiction**, a section 96 analysis may be **applicable**.

Section 96 to **101** of the **Constitution Act, 1867** establish and outline the jurisdictional authority and protection of superior courts.



Appointment of Judges

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, etc.

97. Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

99. (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age. (53)

Salaries, etc., of Judges

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada. (54)

General Court of Appeal, etc.

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada. (55)

There is an argument for implying a **constitutionally guaranteed right to judicial review** of administrative action – one that trumps parliamentary supremacy in this context – and it has centered on section 96 of the Constitution Act, 1867.

Section 96 provides that the appointment of superior court judges is the **sole responsibility** of the **federal** government and that **superior** courts have **inherent jurisdiction** to review administrative decisions. **Inherent jurisdiction** refers to the jurisdictional superiority enjoyed by superior

courts over any authoritative right bestowed on administrative decision makers by enabling legislation. Superior courts are ***only*** able to judicially review **inferior administrative tribunals** and may **never** judicially review ***other*** superior courts! Hence, when provinces attempt to create ADMs that are exempt from judicial review, **they are substantively attempting to create unreviewable superior courts.**

Re Residential Tenancies Act established the 3-part test to determine whether an AT is substantively acting like a S. 96 court and therefore unconstitutional because the provincial enabling legislation is deemed ultra vires provincial authority because it violates s. 96:

- **1) Historical Inquiry:** Is the decision in question similar to one that, at the time of confederation (1867), would have been exclusively within the power of a superior, district, or county court to make? CL courts have interpreted this first branch of the test broadly with the aim of protecting s.96 courts' jurisdiction.
    - **Not Similar in nature** → AT is constitutional
    - **Similar** → Move to #2 (AT may be unconstitutional)
- **2) Judicial VS Legislative/Administrative Power:** A judicial power is where there is a private dispute between parties, adjudicated through the application of a recognized body of rules and in a manner consistent with fairness and impartiality. **Adjudication of private disputes between parties then usually judicial. The more policy oriented the dispute is, then the less judicial the tribunal is construed to be.**
    - **Judicial** → Move to #3 (AT may be unconstitutional)
    - **Legislative/Administrative** → AT is constitutional
- **3) Contemporary Character:** Even if the decision-making power was historically under the jurisdiction of a superior, district, or county court, has the decision-making power in its contemporary institutional setting sufficiently changed its character such that it cannot conform to the jurisdiction of a court?
    - Are the impugned judicial powers subsidiary to general admin functions of tribunal?
    - Are the powers incidental to some broader legislative policy goal?
        - **Contemporary character sufficiently different than in 1867** → AT is constitutional
        - **Contemporary character not sufficiently different than in 1867** → AT is ***unconstitutional***

Scheme only invalid where the adjudicative function is sole or central function of the tribunal – tribunal acting like a s.96 court.

Statutory Authorization and Rights Documents

The Charter, Constitution, and Human Rights Legislation

Jurisdiction to Hear Charter / Constitutional Issues

In the **Nova Scotia v Martin** and **Nova Scotia v Laseur** decisions, the SCC established if the enabling legislation **confers express authority** on the ADM to **consider questions** of **law** relating to **provisions** of the **enabling act**, then such a power ***generally*** **extends** to assessing the **constitutional validity** of the same. In his **Cooper** dissent, McLaughlin CJ succinctly states the above principle: "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**."

Jurisdiction to Hear Human Rights Issues

An additional authoritative limit on ADM authority is set by human rights legislation. Although not formally constitutionally entrenched, human rights legislation has been substantively considered authoritatively superior and quasi-judicial to ordinary legislation.

To illustrate the superior authoritative shadow cast by human rights legislation, we can look to s. 4 of BC's **Human Rights Code**:

> **Code prevails**
> 4. If there is a conflict between this Code and any other enactment, this Code prevails.

Courts have generally treated the applicability and jurisdictional questions respecting human rights legislation similar to Charter and Constitutional issues. In **Tranchemontagne**, using similar reasoning to the **Martin** and **Laseur** decisions, the SCC ruled that ADMs generally enjoy jurisdictional authority to hear and decide human rights legislation as long as the enabling legislation grants general authority to hear questions of law. Following **Tranchemontagne**, the BC legislature **removed jurisdiction** over the **Human Rights Code** from some tribunals pursuant to **section 46** of the **ATA.** The **constitutional validity of these sections remain unclear,** especially considering their direct contradiction of the **Tranchemontagne, Martin,** and **Laseur** decisions.

Specific Statutes Limiting Scope of SDM Authority

In BC, **two specific** statutes limit the authoritative scope of SDMs:

1) **The Administrative Tribunals Act** (ATA)
2) **The Judicial Review Procedures Act** (JRPA)

The Administrative Tribunals Act (ATA)

The **ATA** can be viewed as a **menu** of **provisions** limiting or **granting** particular statutory decision-making **authority**. Legislatures may cherry-pick which particular ATA provisions to import into enabling legislation.

Following **Tranchemontagne**, the BC legislature **removed jurisdiction** over the **Human Rights Code, Charter**, and **Constitutional** isues from some tribunals pursuant to **Sections 44**, **45**, and **46** of the **ATA.** However, the **constitutional validity of these sections remain unclear,** especially considering their contradictory nature to the **Tranchemontagne, Martin,** and **Laseur** decisions.

Section 57 of the **ATA** sets out a 60-day time limit to seek leave for judicial review after a final decision has been issued. Courts may extend the time limit if satisfied that 1) there are **serious grounds** for relief, 2) a **reasonable explanation** for the **delay** is proffered, and 3) extending the time limit will **not** cause **substantial prejudice** to 3rd parties.

The Judicial Review Procedures Act (JRPA)

The **JRPA** is a **procedural** statute setting out methods for seeking judicial review and concomitant remedies.

Sections 5 through **10** of the **JRPA** set out available remedies available to reviewing courts

Section 8 of the **JRPA** sets out a reviewing court's discretionary authority to refuse relief on any ground

Unlike the **60-day limit** pursuant to **section 57** of the **ATA**, **section 11** of the **JRPA** states that, subject to any other applicable legislation or potential prejudice to 3rd parties arising from the granting of an application for judicial review after considerable time has elapsed, **no time limit** exists for judicial review applications.

Procedural Fairness

Procedural fairness is ***not*** an exercise interested in the **actual substance of the decision** of the tribunal, but rather in the **procedures** followed by the tribunal **in arriving** at said decision. Courts ask if this particular issue *should* be reviewed and, if so, if the administrative decision-maker used the proper *procedures* in *reaching* their decision. Procedural fairness promotes a better-informed decision-making process, leading to better public policy outcomes, and helps to ensure that individuals are treated with respect in the administrative process and are ensured a right to participate in the same.

It is a generally accepted principle that **enabling statutes**, whether or not expressly stated, **requires** SDMs to **act fairly, legally, and respect the rule of law and principles of natural justice**.

PRACTICE POINT: It is always easier to challenge a tribunal decision within the real of Substantive review rather than Procedural Fairness. This is because courts generally accord great deference to the tribunal being the master of their own procedures

2 Main Common Law Principles Enshrined in Procedural Fairness Obligations

- **Procedural Fairness is comprised of 2 requisite elements:**
  - **1) The right to be heard**: *Audi alteram partem*
  - **2) The right to an independent and impartial hearing***: Nemo judex in sua causa*
    - This refers and revolves around bias and independence

STEP 1: Threshold

The first part of any procedural fairness review is the threshold analysis outlined by the court in **Knight**. This analysis is ***not*** concerned with **what** potential procedural rights would encompass, ***but only seeks to answer*** **the** ***preliminary*** question of whether there should be ***any*** entitlement to procedural fairness. In other words, the court is asking whether it should review the administrative decision-maker's procedures or whether it is more appropriate to conclude that whatever the decision-maker decides to do by way of procedure is sufficient.

Generally, if an administrative decision-maker makes a decision that affects an ***individual's rights, privileges, or interests***, there will be some minimum entitlement to procedural fairness (some exceptions still exist to this rule). Fairness is a minimum duty that must be met and courts ask whether the procedural protection provided in particular circumstances was *adequate, not ideal*: **Nicholson** and **Cardinal v Kent**

Knight Threshold Test (All 3 Elements Must be Satisfied)

Formerly, proceedings had to be judicial or quasi-judicial to pass the threshold test. **Nicholson** abolished this requirement and held that the common law threshold question must now revolve around the duty of fairness.

The common law duty of fairness can only be invoked where circumstances satisfy a threshold based on three factors set out by the Supreme Court in **Knight**. In **Cardinal v Kent**, the SCC held that whenever **all 3** elements are satisfied, a claimant will be entitled to certain **participatory** rights including pre-hearing rights, such as rights related notice, disclosure, discovery, and delay, as well as hearing rights, such as rights related to the form of hearing, counsel, examinations, and reasons for judgment.

Highlight of the most important element from the third element of the Knight test (see below):

- The court in **Knight** concluded "the right to procedural fairness **exists only** if the **decision** is a **significant** one **and** has an **important impact** on the **individual**. **Loss** of **employment** against the office holder's will **is** such a decision."

Element 1: The Nature of the Decision to be Made by the Administrative Body

Intro

Nicholson distanced itself from the former need to distinguish between **judicial**, **quasi-judicial**, and **administrative** decisions within the threshold analysis. The SCC held that even in cases of **silent legislation** respecting procedural fairness obligations, SDMs **owe** a **general duty of fairness** to all applicants. Reviewing courts must interpret this general duty in a ***contextual*** and ***flexible*** manner. If the decision-maker largely **resembles a superior court** and its functions, **some level** of procedural fairness obligation arises. Finally, in **Inuit Tapirisat** the SCC took its previous **Nicholson** decision a step further and **categorically abolished** the **administrative** and **quasi-judicial distinction** within the **threshold** analysis. It ruled that the question respecting the ***existence*** of procedural fairness obligations is **no longer dependant** on such often-semantic and confusing differences.

The SCC ruled in **Cardinal v Kent** that a duty of procedural fairness **lies** on **every statutory** decision-making authority making **administrative** decisions **not resembling legislative action** and which affects the **rights**, **privileges**, or **interests** of an individual.

Legislative/General *VS* Administrative/Specific:

The court in **Knight** ruled that decisions of a ***legislative** and **general*** nature can be **distinguished** from acts of a more ***administrative** and **specific*** nature. Generally, governmental actions such as legislating, government budget-making, and high-level governmental resource allocation do **not** attract procedural fairness obligations.

Administrative and **specific** **(PF Likely)**

Administrative and **specific** decisions **require** ***at least some*** level of procedural fairness: **Knight**

- In **Baker**, the SCC references the **Cardinal v Kent** decision with approval and held "the fact that a decision is **administrative** and affects 'the rights, privileges or interests of an individual' is **sufficient** to trigger the application of the duty of fairness.

Legislative and **general** **(PF Not Likely)**

Legislative and General decisions generally do **not** require procedural fairness:

- The SCC reiterated in **Re Canada Assistance Plan (BC)** that procedural fairness obligations "do **not** apply to a body exercising **purely legislative** functions". The court concluded that "**Legislative** and **general**" **means** that the provision applies to **many parties** as opposed to a **single identifiable individual**.
- The legislative and general procedural fairness exemption **includes policy** decisions that can be categorized as "**general**", "**broad**", "**public policy**" and/or "**political**" in nature. **Contrast** this with administrative acts of **highly specific** and **individualized** nature which impose procedural fairness obligations: **Matsqui Institution Disciplinary Board** and **Knight** and **Imperial Oil**
    - As an aside, the **Inuit Tapirisat** decision established that for a decision to be "**legislative**" in nature, the **body** making the decision does **not** have to be **the *legislature***. Rather, the ***decision** itself* must have this "legislative and general" character.
- In **Inuit Tapirisat**, the SCC held that **primary legislation** and **legislative action** is **generally not** subject to procedural fairness **obligations**. The court concluded that the only procedural fairness obligation owed to citizens is that proposed legislation receive three readings in the Senate and House of Commons and the subsequent Royal Assent. The ***Cabinet*** itself is **generally legislative** and general thereby attracting **no** procedural fairness: **Inuit Tapirisat**
    - This factor is **not determinative**. **Cabinet** is **not always immune** from the duty of fairness: **Inuit Tapirisat**
    - **Cabinets** making **policy-laden** decisions, based on **broad** considerations of **current political**, **economic** and **social concerns** will generally **not attract** procedural fairness obligations: **Inuit Tapirisat**
        - **Example**: Rate-setting commissions like the CRTC was held to be a generalized, not individualized, activity: **Inuit Tapirisat**
- **Delegated Authority**: Courts have largely held that **delegated rule-making** authority and **subordinate** legislation such as **bylaws fall within** the **scope** of **legislative decisions** and **are therefore *exempt* from procedural fairness obligations**.
    - **EXCEPTION:** Some limited **exceptions** to this general and/or legislative rule apply: In cases where **subordinate** legislation is put into place with the **intent** of **affecting** a **particular individual** or **identifiable group** within a community, the courts **may impose** procedural fairness **obligations** because such individual licensing decision-making falls outside the general and/or legislative categories: **Homex**

Legitimate Expectation Not Applicable Within Legislative or General Gov't Action

The SCC, in **Re Canada Assistance Plan**, held that the doctrine of legitimate expectation does **not** apply within purely legislative and general governmental action.

Discretionary Decisions

Unfettered discretion granted by **statute**, especially if **Parliament used to perform that function** will usually **not** impose a fairness obligation: **Inuit Tapirisat**

Cabinet, Orders in Council, or Ministerial Decisions

Although Cabinet and ministerial decisions do **not** *formally* fall within the legislative and/or general procedural fairness exception, such conduct can be **easily characterized** as being *"legislative in nature"* and are **in substance** highly likely to be exempt from procedural fairness obligations: **Inuit Tapirisat** and **Idziak**

In **Thorne's Hardware v The Queen**, the 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**". The SCC took a strong position against examining the actions of Cabinet in making orders in council, which is a form of delegated rule making. The court reasoned that the **order in council** was an issue of "economic policy and politics" and courts "**cannot** enquire into the **validity** of those **beliefs**" or question the **government's motives**.

Preliminary Decisions

The **Knight** decision also established that the **finality** of the decision is a factor in within the threshold analysis. A **preliminary** or **interlocutory** decision will **not generally** require a procedural fairness duty, whereas a decision of a **more final nature** (especially final decisions *without* statutory rights of appeal) may require **some level** of procedural fairness.

- **EXCEPTION: However**, even in instances of **preliminary** decisions, **courts will** consider **other** relevant factors to determine whether any procedural fairness obligations **may nevertheless** arise:
  - If the **proximity** between the **preliminary** and **final decision** is such that the preliminary decision **materially impacts** and/or **determines** the final decision, procedural fairness obligations **may** arise: **Re Abel**
    - For **example**, the preliminary decision is merely **'rubber-stamped'** by the final decision-making body or the **preliminary** decision becomes **increasingly final** in nature: **Re Abel**

Element 2: The Relationship Existing Between that Body and the Individual

Knight held that the **3 employer-employee relationships** espoused by **Lord Reid** should be **amalgamated** into only **two** categories. Pure **master-servant** relationships do **not** attract procedural fairness obligations because such employment is **not** of **public** nature.

In sum, the **Dunsmuir** and **Knight** SCC decisions coupled with **section 22** of BC's **Public Service Act** **precluding** **public bodies** from **dismissing** employees **without cause**, results in procedural fairness obligations to arise whenever a public service employee is dismissed, regardless of whether the employment is at pleasure or for cause.

Although the **Dunsmuir** case formally limits the scope of procedural fairness obligations, the third threshold factor outlined by the court in **Knight** nevertheless applies and limits the **Dunsmuir** decision in substance. Since the loss of employment is a "significant" and "important" impact on the individual affecting his or her personal rights, privileges, and interests, the procedural fairness threshold will likely be overcome even in cases where **Dunsmuir** limits an individual's recourse to **private contract** law.

Private Employment Law Limits the Applicability of PF When Employees Are Protected by Contract:

The **Dunsmuir** decision **greatly limited** the reach of procedural fairness obligations by ruling that in cases where public officers have an **employment contract**, the ***contract itself*** (through private employment law), rather than procedural review, determined *what if any* procedural rights an employee is entitled to. The court outlined two **exceptions** to this general principle, both of which impose **at least some** procedural fairness obligation:

1) **Public** Employees **not protected** by **contracts** of employment; **and**
   a. Judges
   b. Ministers of Crown
   c. Other officials with constitutionally defined state roles
2) Public Employees subject to employment **at pleasure** (overruled by **section 22** of BC's **Public Service Act** which precludes dismissing any public employees without cause and hence gives rise to PF duties)

Element 3: The Impact of that Decision on the Individual's Personal & Property Rights, Privileges, Interests, and Licensing Rights

The **third** and **final element** within the threshold analysis requires the consideration of the impact of the SDM decision on the individual's personal and/or property rights, privileges, interests, and licensing rights. **Knight** concluded that there is a "**right** to procedural fairness ***only if*** the decision is a **significant** **one** ***and*** has an **important** **impact** on the **individual**." A minimum duty of fairness arises whenever the effect of the SDM's decision materially affects an individual's **employment** **status**, **nationality**, or **family relations**.

Example of **"significant & important"** → **Loss of employment**: Courts have recognized that the loss of employment against the office holder's will is a significant decision that could justify imposing a duty to act fairly on the administrative decision-making body: **Nicholson**.

- The court in **Kane** concluded that "a **high standard** **of justice** is required when the **right** to **continue** in one's **profession** or **employment** is **at stake**".

Personal, Property, and/or Land Rights:

In **Homex,** Justice Dickson held that whenever the ***personal***, ***property***, or ***land*** rights are targeted "***directly***, ***adversely*** and ***specifically***", procedural fairness is **required** to **some degree**.

Cooper established that before a **public** body can **limit** or **abrogate** the **property** **rights** of citizens, it **must first** give the individuals concerned an **opportunity** to be **heard**. The **Homex** decision elaborated on this **Cooper** principal and concluded that it

is **not** "**necessary** for the legislature to provide **explicitly** for a **hearing**... on the **contrary**, where **statutory** bodies **seek** to **limit** ***property*** rights, the courts will **imply** a right to be **heard** ***unless*** there is an **express** declaration to the **contrary**."

Licensing Decisions:

Licensing decisions break down into **3 categories** (**McInnes v Onslow Fane (England)**):

1) **Forfeiture**: Highest level of PF obligation: 'forfeiture cases' where an **existing** benefit such as a licence is **terminated** or revoked.
    a. The court in **McInnes v Onslow Fane (England)** concluded that licensing **forfeiture** gives rise to **at least some** level of procedural fairness. The court discussed the critical distinctions between the 3 categories: 'It seems plain that there is a **substantial distinction** between the **forfeiture** cases and the **application** cases. In the **forfeiture** cases, there is a threat to take something away for some reason: and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges are plainly appropriate.
        i. **Example**: In **Re Webb and Ontario Housing Corp (Ontario CA)**, the Ontario court of appeal concluded that an indigent **mother** on **welfare** who **lost subsidized housing** due to **her noisy children** was **owed at least some** level of procedural fairness.
        ii. **Example**: In **FAI Insurances v Winneke (Australia)**, the court held that the longer a licensing right has been held by the applicant, the stronger his or her procedural fairness entitlement becomes.

2) **Expectation:** Medium level of PF obligation: an intermediate group of 'expectation cases' which differ from the application cases only in that applicant has some **legitimate and reasonable expectation** from what has already occurred that his or her application, such as for a licence renewal, will be granted.
    a. The court in **McInnes v Onslow Fane (England)** concluded that the **intermediate** category, that of the **expectation** cases, may at least in some respects be regarded as being **more akin** to the forfeiture cases than the application cases. For although in form there is **no forfeiture** but **merely** an **attempt** at **acquisition that fails**, the **legitimate expectation** of a **renewal** of the licence or **confirmation** of the membership is one which **raises** the question of what it is that ***has happened*** to make the applicant ***unsuitable*** for membership or licence for which he was ***previously*** **thought suitable.**
        i. There are **2 meanings** attached to "legitimate expectation" within this category: PF applies to both!
            1. **Substantive:** Reasonable expectation of a certain substantive outcome
                a. **Example:** Applying for a **license renewal** for which the applicant **remains fully qualified** gives rise to a **reasonable expectation** of a **substantive outcome** requiring **some level** of procedural fairness: **Baker**
            2. **Procedural:** A reasonable expectation of certain procedures from promises or past practices
                a. **Example:** The applicant **must** be **aware** of the **old practices** and/or **procedures** in order to make a reasonable procedural expectation argument: **Baker**
                b. **Example:** The applicant is **not required** to show **detrimental reliance** on the impugned procedural expectation: **Baker**
                c. **Example:** The **past practice** and/or **procedure must** be **"clear, unambiguous and unqualified"**: **CUPE v NB Liquor Corp**
    b. **Cannot** use doctrine in a way that **affects Parliament's ability** to **legislate effectively**: **Re Canada Assistance Plan**
    c. **Cannot** use doctrine to **demand substantive outcomes**, **only** procedural safeguards: **Re Canada Assistance Plan**
        i. **Trick to get around the substantive outcome exception**: A ***promise*** of an ***outcome*** can be seen as an **exercise** of the administrative decision-maker's **discretionary power**; the court can then grant *mandamus* and require the tribunal to follow through: **Mt Sinai ???/ Read this case… don't understand**

3) **Pure Application**: No PF obligation: 'application cases' where the grant of some **new** right or **privilege** is sought.
    a. The court in **McInnes v Onslow Fane (England)** concluded that in **application** cases, on the other hand, **nothing** is **being taken away and generally** there are **no charges**, and so **no requirement** of an **opportunity** of **being heard** arises. The distinction is well-recognized, for in general it is clear that the courts will **require natural justice** to be observed for ***expulsion*** **from** a social club, **but not** on an **application for** ***admission*** to it.
        i. **Example:** in **McInnes v Onslow Fane (England)**, the court held that an **initial application** to be a licensed boxing manager does **not** give rise to any procedural fairness obligation.

Step 1: Statutory Abrogation or Ouster of Procedural Fairness Obligations

Enabling Statute

It is important to note that if the *enabling statute either specifies or denies certain procedural fairness rights*, then the *enabling statute* ***prevails*** *over common law*. However, if the enabling statute is silent as to procedural fairness obligations, we may turn to the common law to inform the silent legislation.

- Because administrative decision-makers are statutory creatures, they derive all of their powers and duties from the express language of their enabling legislation. The duty of fairness can be **modified** or **abrogated** by legislation and thereby trump common law jurisprudence, but only by express language or "necessary implication": **Knight** and **Brosseau**.
- A statute may be interpreted as providing an "**exhaustive scheme**", in which case any absences of Procedural fairness guarantees will be interpreted as intentional. Such a necessary implication of procedural fairness obligations due to the encompassing nature of the enabling legislation forces you to go to Constitutional or Bill of Rights documents: **Singh**
- **Your Only Recourse**: If a statute says you can't get your PF, find a more authoritative and broader statute such as the Charter or Bill of Rights.

Statutory Authorization to Make Unfair or Unreasonable Decisions:

The enabling statute may **never** authorize an administrative decision-maker to make decisions that are patently unreasonable, unfair, biased, or otherwise violate the principals of natural justice. If an enabling statute were to state the same, a court during JR would find such a statute invalid. **A tribunal must *never* make arbitrary decisions**.

Delegated Authority

- In addition to the enabling statute, it is also extremely important to check the **rules, bylaws, and regulations** pursuant to which the administrative decision-maker operates. *It is important to keep in mind that such **delegated** rules and regulations go beyond the express content of the enabling legislation.*
    - **Example of delegated authority and rule-making:** For example, in **Baker**, the guidelines issued by the minister of immigration set out the basis on which immigration officers are to determine whether an individual deserves humanitarian and compassionate consideration.

Conclusion of Threshold Analysis: Does a PF duty exist?

Based on the above discussion respecting the three requisite elements outlined by **Knight**, I conclude that the threshold **has been overcome** and the applicant is **owed** a duty of procedural fairness.

STEP 2: Content "How MUCH or what LEVEL of PF is appropriate?"

General Introduction to Content discussion:

Although the previous threshold analysis established that a procedural fairness obligation **exists**, at this stage in our analysis we **remain unaware** of the **specific *content*** or ***degree*** of said obligation.

The SCC in **Baker** identified **5 relevant factors** in determining the ***contextual level or content*** of procedural fairness. The court did not intend this list to be exhaustive and intended the content analysis to be a contextual exercise. The SCC held that the requirements of the duty in particular cases are driven by their particular circumstances. The simple **overarching requirement** is **fairness**, and this '**central'** notion of the 'just exercise of power' should **not** be diluted or obscured.

In **Knight**, the SCC reiterated this principle holding that "the concept of procedural fairness is **eminently variable** and its **content** is **to be decided** in the **specific context** of **each** case".

Fundamental Participatory Rights Underlying Baker Content Factors:

Baker emphasized that **underlying** the **content** analysis are the **fundamental participatory** rights enshrined within the duty of procedural fairness. Such **participatory** rights **ensure** that "that administrative decisions are made using a **fair** and **open procedure**, **appropriate** to the **decision** being made and its **statutory**, **institutional**, and **social context**, with an **opportunity** for **those affected** by the decision to **put forward** their **views** and **evidence *fully*** and have them **considered** by the decision-maker."

Baker Criteria 2: The nature of the STATUTORY scheme and the TERMS of the STATUTE Pursuant to Which the BODY Operates

The **Baker** decision delineated **several factors** that have been recognized by the courts as relevant for the process of **calibrating** the contextual **degree** or **content** of the duty of procedural fairness.

The **Kane**, **Knight** and **Brosseau** decisions established that the **duty of fairness, including bias and independence,** can be **modified** or **abrogated** by either **express** statutory language or by "**necessary implication**". Because legislation always trumps common law jurisprudence, such legislative limits must be closely inspected. Accordingly, logic dictates that my content analysis will be more efficient and beneficially structured by beginning with the **second Baker** factor. Setting out whether any procedural fairness obligations have been intentionally fettered or entirely ousted prior to scrutinizing the other **Baker** factors, results in a much

more lucid analytic foundation. Finally, we must be cognizant that statutory interpretation is always grounded in the *common law presumption that legislatures always intend to respect procedural fairness*.

Based on the facts of the case, it would be helpful to have additional information respecting the enabling statute and what, if any, specific procedural fairness obligations it requires. In the alternative, we must presume that the statute is either silent, fetters, or completely ousts certain procedural fairness duties…. CONTINUE NICHOLSON RIGHT BELOW…

Silent Statute Respecting Procedural Fairness Obligations:
Nicholson established that in circumstances where the enabling legislation is silent as to procedural fairness obligations, SDMs **must respect the general duty of fairness** and **not** act **arbitrarily**. The SCC ruled that the **general duty of fairness** must be applied in a ***flexible*** and ***contextual*** manner. On facts of the case, the court held that the SDM **owes** officer Nicholson the **opportunity** to **know** the case **against them** and **to be heard**.

May Never Oust Substantive Review Obligations:
As an aside, even though legislators may expressly choose to oust or limit procedural fairness obligations, they may never do the same within the realm of substantive review. Specific procedural rights may be gotten rid of, however, legislation may **never authorize** or **legitimize** a SDM to **make** an **unreasonable** or **patently unreasonable decision**!

The **Baker** decision outlined the **second** material **factor** to inform courts in their analyses of the appropriate content of procedural fairness arising from a set of circumstances: the "**nature** of the **statutory scheme** and the **terms** of the **statute pursuant** to which the **body operates**".

Delegated Authority (Informs the analysis of *enabling* statute: see above)
In addition to the enabling statute, it is also **extremely important** to check the **rules, bylaws, and regulations** pursuant to which the administrative decision-maker operates. *It is important to keep in mind that such **delegated** rules and regulations go beyond the express content of the enabling legislation.*

2 types of delegated authority:

- **Regulations** and **Rules**: Regulations and Rules are **legally binding** requirements and the authority or power to make them must be expressly granted by the enabling statute.
- **Guidelines** and **Procedures**: **Soft** law, while also developed by the executive, is **not** legally binding. Hence, **specific** authority to make soft law does **not** have to be provided by statute.
    - **Example of delegated authority and rule-making:** In **Baker**, the immigration minister used his delegated authority to issue guidelines setting out the basis on which immigration officers should decide whether an applicant deserves humanitarian or compassionate exemptions. Although not legally binding, the court was informed by these guidelines and found them to be material

"Exhaustive Scheme"
A statute may be interpreted as providing an "**exhaustive scheme**", in which case **any absences** of **Procedural fairness guarantees** in the enabling legislation will be **interpreted** as **intentional**. Such a **necessary implication** will be interpreted as the legislative intent to fetter or oust procedural fairness **obligations: Singh**

- In such circumstances, an applicant must find a more authoritative or broader source of law to circumvent the intentional fettering or abrogation of PF duties by the legislature. Possible recourse may be found in **Constitutional**, **Charter**, and/or **Canadian Bill of Rights** arguments: **Singh**
    - **Example:** Legislation is exhaustive, however, it **fails** to expressly guarantee oral hearings. Such a conspicuous absence will be interpreted to be an intentional act by the legislature to oust the oral hearing obligation.

Finality of Decision:
Baker established that the relative finality of a decision is directly correlated to the level of procedural fairness obligation. **Final decisions** generally attract a **higher level** of procedural fairness. In contrast, the requirement of procedural fairness may be **minimal** within the context **investigatory**, **preliminary, or interlocutory** steps forming part of the formal decision-making process. Such preliminary actions are usually subject to **very minimal** procedural fairness obligations.

- Nevertheless, a **high degree** of fairness protection will be required if a decision maker **must make** a **final** decision **and** such **investigatory** and/or **preliminary** steps are **requisite** elements to said final decision.

Privative Clause:
Baker ruled that the existence of a privative clause militates in favour of a **higher degree** of procedural fairness. Nevertheless, it is important to analyze and consider the **relative strength** of the applicable privative clause. If the clause precludes both judicial review of the SDM decision and gives exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions,

reviewing courts will generally conclude that such a **strong** clause **generates** a **very high degree** of **finality**. The **higher** the **level** of **finality** of a decision, the **higher the degree** of procedural fairness will be required.

Availability of Appeal:
In circumstances where the enabling statute **precludes** or is **silent** as to a **statutory right** of **appeal**, a **higher** degree of procedural fairness protection arises. This is mainly due to the finality of the decision and the fact that the only possible remedy is to seek judicial review.

Type of Employment:
In sum, the **Dunsmuir** and **Knight** SCC decisions coupled with the **Public Service Act**, results in procedural fairness obligations to arise whenever a public service employee is dismissed, regardless of whether the employment is at pleasure or for cause. In light of the general threshold issues surrounding employment categories, courts generally accord a **higher degree** of procedural fairness whenever a dismissal or suspension **materially affects** the personal rights, privileges, and interests of the applicant.

Baker Criteria 1: The nature of the DECISION and the process followed in making it

The **first** content factor outlined in **Baker** is "the **nature** of the **decision** being made and the **process followed** in making it." The **closeness** of the **administrative** process to the **judicial** process indicates that **more** procedural fairness is required.

Judicial, Quasi-Judicial, and Administrative Distinction: More Judicial-Looking = More PF
In the landmark **Nicholson** decision, the SCC largely abandoned the historically important distinction between **judicial**, **quasi-judicial**, or **administrative** decision-making bodies in determining the ***threshold*** issue. However, these distinctions remain relevant in our ***content*** analysis of procedural fairness.

- **Baker** established that decisions which may be construed as **judicial**, **quasi-judicial,** or **adjudicative** in nature are likely to demand a *higher degree* of procedural protection than **purely administrative** or **regulatory** decisions: *"The **more** ... a decision **resembles** judicial decision making, the **more likely** it is that **procedural protections closer** to the **trial model** will be required by the duty of fairness."*
    - **Quasi-Judicial** and **Judicial** Decisions involve decision-making processes affecting **individual parties** or single **companies** or adversarial issues between **two private** parties. Such decisions militate in favour of a **high degree** of procedural fairness: **Baker**
    - In contrast, if a decision-maker is making a **general**, **broad**, and/or **polycentric** decision that affects many different individuals, then such a decision is considered **administrative** and militates in favour of a **low degree** of procedural fairness: **Baker**

Baker held that a **Discretionary** decision is "**very different** from a **judicial** decision, since it involves the exercise of **considerable discretion** and **requires** the consideration of **multiple** factors". Hence, **discretionary** decisions **coupled** with **polycentric or multiple elements** militate in favour for a **high** degree of procedural fairness.

Baker Criteria 3: The IMPORTANCE of the decision to the individual affected

A **third factor** designated by the **Baker** decision in determining the nature and extent of the procedural fairness obligations owed is "the **importance** of the **decision** to the **individual** or **individuals affected**."

The content and degree of procedural fairness obligations **increases *in proportion*** to the **importance** of the **particular decision** to the **person** it **affects**. The impact of a decision on an individual person(s) has been **generally held** to constitute a "**significant factor affecting** the **content** of procedural fairness": **Baker**

- Recall that the applicant in **Baker** was faced with the court's finding of factors militating **against** imposing procedural fairness obligations based on the **highly discretionary** and **polycentric nature** of the decision. The court was nevertheless informed by the **overriding importance** and **impact** of the third factor – the importance of the decision to the applicant, her family members, and the potential hardship faced by her children. This ultimately led the court to find in the applicant's favour and grant a **medium** level of procedural fairness protection.

Employment Status, **Nationality**, **Liberty**, **Citizenship**, or **Family Relations**
In **Kane v UBC**, the SCC referred to the context of employment and noted that "a **high standard** of justice is required when the right to continue in **one's profession or employment** is **at stake**." However, **many things short** of **adverse impact** on a party's **career** or **livelihood** may support claims for greater procedural fairness.

- **Note**: **Section 7** of the **Charter** has been interpreted not to cover **economic** matters such as loss of licensing, licensing renewal and/or licensing applications

The **Knight**, **Baker**, and **Nicholson** decisions concluded that a **high degree** of procedural fairness arises whenever the effect of the SDM's decision **materially affects** an individual's **employment status**, **nationality**, **liberty**, **citizenship**, or **family relations**.

Example of **"significant & important" → Loss of employment**: Courts have recognized that the loss of employment against the office holder's will is a significant decision that could justify imposing a duty to act fairly on the administrative decision-making body: **Nicholson**.

- The court in **Kane** concluded that "a **high standard of justice** is required when the **right** to **continue** in one's **profession** or **employment** is **at stake**".

Personal, Property, and/or Land Rights:

In **Homex,** Justice Dickson held that whenever the ***personal***, ***property***, or ***land*** rights are targeted "***directly***, ***adversely*** and ***specifically***", procedural fairness is **required** to **some degree**.

Cooper established that before a **public** body can **limit** or **abrogate** the **property rights** of citizens, it **must first** give the individuals concerned an **opportunity** to be **heard**. The **Homex** decision elaborated on this **Cooper** principal and concluded that it is **not** "**necessary** for the legislature to provide **explicitly** for a **hearing**... on the **contrary**, where **statutory** bodies **seek** to **limit** ***property*** rights, the courts will **imply** a right to be **heard** ***unless*** there is an **express** declaration to the **contrary**."

Baker Criteria 4: The LEGITIMATE EXPECTATIONS of the parties

The **fourth factor** introduced by **Baker** is "the **legitimate expectations** of the **person challenging** the **decision** may also determine what procedures the duty of fairness requires in given circumstances." The court **must ask** in **what circumstances**, *if any*, an individual should be entitled to certain ***procedural*** rights if a **representation** of some form has been made that such procedural rights would be forthcoming. In **Canada**, the doctrine of legitimate expectation does **not** give rise to **substantive** rights and is **strictly limited** to the **procedural** realm: **Baker**

- **NB**: This substantive exclusion finds its genesis in the courts' recognition that administrative decision-makers **must** have the **capacity** to **change** their **mind prior** to issuing **final** decisions.

Legitimate Expectation can arise out of conduct such as representations, promises, or undertakings or past practice or current policy of a decision-maker. Such representations must be "*clear, unambiguous and unqualified*": **Baker**

- **Example**: Pamphlets, websites, Manual of Rules of Practice and Procedure (MRPP), comments by staff, panel comments

It must be noted that the doctrine of legitimate expectation does **not** require **proof of reliance** on any alleged representations: **Baker**

- **Example**: If a person has been led you to understand that he will be afforded a particular procedural protection such as an oral hearing prior to a final decision. In such circumstances, the person may have a reasonable expectation that an oral hearing will be held and the courts may require the administrative decision-maker to hold such an oral hearing.

An **international instrument** *ratified* by Canadian legislators **may**, in *certain limited* circumstances, give rise to a legitimate expectation. However, the court in **Baker** held that the ratified articles of an international convention **failed** to do so because the ratified document is **not** "the equivalent of a **government representation** about how…**applications will** be decided, nor does it suggest that any rights beyond the participatory rights…will be accorded."

Legitimate Expectation Not Applicable Within Legislative or General Gov't Action

The SCC, in **Re Canada Assistance Plan**, held that the doctrine of legitimate expectation does **not** apply within purely legislative and general governmental action and no procedural fairness obligation arises in such circumstances.

Baker Criteria 5: The PROCEDURES chosen by the tribunal

The **fifth Baker factor** stipulates that the content analysis should "take **into account** and **respect** the **choices** of **procedure** made by the **agency itself**, **particularly** when the **statute leaves** to the decision-maker the **ability** to **choose** its **own procedures**, **or** when the agency has an **expertise** in **determining** what procedures are **appropriate** in the circumstances"

The decision-maker will have **superior** knowledge of **not only** its needs but also the needs of the community it serves, and its **procedural choices** are **worthy** of **judicial deference** as a result: **Baker**

Master of Own Procedures Versus Daily Realities:

The crux of this particular **Baker** factor is the recognition of certain **contextual factors** with which the impugned SDM must grapple with on a daily basis. Reviewing courts must give **curial deference** to the **realities** of a **high volume of cases, plenary policy meetings, budgetary constraints, policy targets and/or limits, polycentric policy concerns, geographical application targets, and various other material indicators.**

To illustrate this two-sided jurisprudential dilemma, let's suppose that a reviewing court concludes that the decision-making body owes an applicant a high degree of procedural fairness leading to an imposition of duties **over and above** those chosen by the SDM itself. By imposing such additional procedural fairness requirements, the reviewing court may **negatively impact** the decision-maker's ability to function in a *cost-effective*, *efficient*, and *timely* manner. Such a **concomitant negative** outcome must be weighed against the reviewing court's decision to impose additional fairness duties while giving curial deference to the operational realities faced by the SDM: **Baker**

In **Indian Head School Division** and **Prassad**, the SCC reiterated that judicial interference with administrative decision-making must be done **cautiously** in order to preserve the doctrine of **parliamentary sovereignty** and respect tribunal decisions. The court also reminded us that

- "every administrative body is the master of its own procedure and need not assume the trappings of a court... the object is not to import into administrative proceedings the rigidity… that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair… **the aim is not to create 'procedural perfection' but to achieve a certain balance between the need for fairness, efficiency, and predictability of outcome**."

Argument to *Counter* a Court's Finding that the Chosen Tribunal Procedures are Valid*:* If a reviewing court gives deference to the procedures chosen by the decision-maker itself, a party must attempt to persuade or educate the court that the impugned procedures are in fact not necessary or fail to reflect the compromises necessary to enable decisions to be made within a reasonable time frame and at a reasonable cost.

- So, try to point out that the tribunal's own procedures are in fact unreasonable in that particular context.

Enabling Statute Is Primary Source of ADM Authority. The Common Law may inform the procedural or operational gaps:
In **Bell Canada**, the SCC reiterated that the Legislature **shouldn't** have to **enumerate every single detailed authority** of administrative decision-makers. Although the enabling statute is **primary source** of ADM authority, the **Common Law** may **inform** some of the **authoritative gaps** of such legislation. To hold otherwise would be incredibly complicated and burdensome. Thus, it is **presumed** that, when for example legislation **confers** the **power** to **hold hearings** on tribunals, *then the right to call witnesses and hear certain evidence is **assumed***, even though it may not be expressly delineated in the legislation.

Section 11 of the ATA codifies the Indian Head School Division and Prassad principle that every administrative body is "master of its own procedure":

General power to make rules respecting practice and procedure

11 (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

(a) respecting the holding of pre-hearing conferences, including confidential pre-hearing conferences, and requiring the parties and any interveners to attend a pre-hearing conference;

(b) respecting dispute resolution processes;

(c) respecting receipt and disclosure of evidence, including but not limited to pre-hearing receipt and disclosure and pre-hearing examination of a party on oath, affirmation or by affidavit;

(d) respecting the exchange of records and documents by parties;

(e) respecting the filing of written submissions by parties;

(f) respecting the filing of admissions by parties;

(g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an application and specifying the time within which and the manner in which the party must respond to the notice;

(h) respecting service and filing of notices, documents and orders, including substituted service;

(i) requiring a party to provide an address for service or delivery of notices, documents and orders;

(j) providing that a party's address of record is to be treated as an address for service;

(k) respecting procedures for preliminary or interim matters;

(l) respecting amendments to an application or responses to it;

(m) respecting the addition of parties to an application;

(n) respecting adjournments;

(o) respecting the extension or abridgement of time limits provided for in the rules;

(p) respecting the transcribing or tape recording of its proceedings and the process and fees for reproduction of a tape recording if requested by a party;

(q) establishing the forms it considers advisable;

(r) respecting the joining of applications;

(s) respecting exclusion of witnesses from proceedings;

(t) respecting the effect of a party's non-compliance with the tribunal's rules;

(u) respecting access to and restriction of access to tribunal documents by any person;

(v) respecting witness fees and expenses;

(w) respecting applications to set aside any summons served by a party.

(3) In an application, the tribunal may waive or modify one or more of its rules in exceptional circumstances.

(4) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

STEP 3: Synthesis of all the Baker Factors Into a Single Level of PF Duty

Balancing the applicable **Baker** factors discussed above while remaining vigilant of the **fundamental participatory** rights **underlying** the common law procedural fairness duties, the duty of fairness owed in these circumstances is _____.

- **MINIMAL**
- **OF MEDIUM DEGREE**
- **GREAT**

The **applicable level** of procedural fairness derived from the content analysis is **then utilized** to **determine what particular** procedural fairness **duties** arise on the circumstances. A high degree of procedural fairness obligation militates in favour of granting many procedural fairness duties, similar in substance to superior court procedures. A low degree of procedural fairness obligation militates against granting many of the procedural fairness duties.

STEP 4: Choosing Specific PF Components & Compliance

As indicated above, once the **appropriate *degree* of procedural fairness** is determined via the **Baker** factors, we must next choose from a **range** of possible procedural fairness **components** the **ones** applicable to the circumstances. We must be cautious that "the **flexible** nature of the **duty** of **fairness** recognizes that **meaningful participation** *can occur in different ways in different situations*." The SCC in **Dunsmuir** buttressed this contextual approach and held that the parameters are **open** to argument and a **contextual** approach should be utilized. The **only metric** is whether the proceedings were ***conducted fairly or not***.

I again draw attention to the **fundamental participatory** rights **underlying** the duty of procedural fairness. A claimant whose important personal, economic, or property interests are affected by a tribunal decision in a fundamental way must have the opportunity to be heard. Such a participatory right generally gives rise to an opportunity to present all relevant evidentiary matter

respecting an applicant's case, and to have his or her case fully and fairly considered without a reasonable apprehension of bias or lack of independence.

Notice

Notice is the **most basic element** of the duty of procedural fairness. It is considered the starting point for participation in any administrative decision-making process. The requirements of notice are often set out in the tribunal's enabling legislation or rules of procedure or the statute governing hearing procedures (See **ATA** below). In situations lacking such procedural rules respecting Notice, we turn to the common law. Courts usually concentrate on the **timeliness** and **sufficiency** (See below list) of the duty to provide notice.

The requirement to provide notice should be understood as an **ongoing duty**. It arises prior to the making of a decision and continues throughout the course of a decision-making process. A party whose *rights, privileges, or interests* may be at stake is entitled to participate in a meaningful manner in the decision-making process, and must therefore be kept informed and apprised of any material issues or developments.

The overarching requirement of the duty of fairness is the idea of *reasonableness*. Therefore, the general rule respecting notice has been stated as follows: ***"Notice must be adequate in all circumstances in order to afford to those concerned a reasonable opportunity to present proofs and arguments, and to respond to those presented in opposition"***: **Brown and Evans, Judicial Review of Administrative Action in Canada**

The following questions are usually considered:

- **Who** is **proposing** to make a decision?
- **What** is the **nature** of the decision to be made?
- **When** will the decision be made?
- **Where** will the decision be made?
- **Why** is the decision being made?
- **How** is the decision to be made?
- **Timeliness**: Was the notice timely, in the sense that it provided adequate time to allow the recipient to respond?
- **Sufficiency**: Did the notice provide sufficient information to allow the recipient to make an informed response?

The **ATA**, if imported by the tribunal's enabling legislation, sets out certain guidelines as to the duty to provide notice. Subsections **11(2)(g),(h)**, and **(i)** of the **ATA** should be read in tandem with **sections 19-21**:

Service of notice or documents

19 (1) If the tribunal is required to provide a notice or any document to a party or other person in an application, it may do so by personal service of a copy of the notice or document or by sending the copy to the person by any of the following means:

(a) ordinary mail;

(b) electronic transmission, including telephone transmission of a facsimile;

(c) if specified in the tribunal's rules, another method that allows proof of receipt.

(2) If the copy is sent by ordinary mail, it must be sent to the most recent address known to the tribunal and must be considered to be received on the fifth day after the day it is mailed, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(3) If the copy is sent by electronic transmission it must be considered to be received on the day after it was sent, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(4) If the copy is sent by a method referred to in subsection (1) (c), the tribunal's rules govern the day on which the copy must be considered to be received.

(5) If through absence, accident, illness or other cause beyond the party's control a party who acts in good faith does not receive the copy until a later date than the date provided under subsection (2), (3) or (4), that subsection does not apply.

When failure to serve does not invalidate proceeding

20 If a notice or document is not served in accordance with section 19, the proceeding is not invalidated if

(a) the contents of the notice or document were known by the person to be served within the time allowed for service,

(b) the person to be served consents, or

(c) the failure to serve does not result in prejudice to the person, or any resulting prejudice can be satisfactorily addressed by an adjournment or other means.

Notice of hearing by publication

21 If the tribunal is of the opinion that because there are so many parties to an application or for any other reason it is impracticable to give notice of a hearing to a party by a method referred to in section 19 (1) (a) to (c), the tribunal may give notice of a hearing by public advertisement or otherwise as the tribunal directs.

Document Disclosure

Kane buttresses the general common law principal stating that SDMs **must disclose** any evidence on which **they intend** to **rely** for their decisions.

Courts have repeatedly held that certain circumstances that may **greatly impact** an **individual** or lead to a **loss** of **livelihood**, such as **professional disciplinary** hearings, require a **high level** of **disclosure**: **Baker** and **Kane**

Courts have recognized that the duty to disclose may be **fettered** or **abandoned** by the needs of the authorities in particular situations and/or the protection of other persons' interests or rights. Consideration should be given to personal safety if witness' or informants' identities are disclosed and sensitive or secret national security information such as immigration or criminal records: **Ruby v Canada** and **Charkaoui v Canada**

Section 34 of the **ATA** allows applicants and/or SDMs to **summon witnesses** and/or **compel document disclosure** during proceedings.

Oral Hearings

The right to an **oral hearing** is one of the few central procedural duties making up the **fundamental participatory** rights **underlying** procedural fairness. Generally, courts have held that oral hearings are **not** an **inherent requirement**.

…

However, the SCC held in **Singh** that in some *limited circumstances* courts have held that oral hearings are **required**. In **Singh** and **Khan**, the SCC concluded that the duty of fairness **required oral hearings** whenever

1) **the crux of a decision is witness credibility, and**
2) **where the consequences to the interest at stake are grave**.

The decision-makers may not be able to determine factually disputed evidence without seeing and hearing from the claimant. An oral hearing should include an opportunity to appear, to make oral representations, and correct or contradict circumstantial evidence on which the decision might be based.

Even though parties often request oral hearings, they are *seldom required. They often are not necessary for the decision-maker to form an informed decision*. As an aside, the expense and delay oral hearings occasion are prominent reasons against granting them. The administrative decision-making process would likely grind to a halt if courts imposed a mandatory duty to hold oral hearings before any decision may be made. We must heed this fundamental principle as succinctly stated in the **Baker** decision: the flexible nature of the procedural fairness duty recognizes that **"meaningful participation can occur in different ways in different situations."**

Djakovic case illustrates that **WCAT** tribunals are construed as very **court-like** and therefore owe a **high degree** of procedural fairness duties. The BCSC held that the WCAT process **violated** the applicant's right to **cross-examine** material witnesses thereby **quashing** the decision and **returning** it to the tribunal for **rehearing**.

Written Submissions In Lieu of Oral Hearings:

The SCC in **Baker** held that in circumstances in which **oral hearings** may **not** be **essential** to the tribunal proceedings, the **opportunity to submit written arguments** herself and/or through legal counsel, may be sufficient.

Singh: Party argues that oral hearing required in refugee status case. Enabling legislation expressly denied oral hearings. Nevertheless, the court held that the person claiming refugee status was entitled to an oral hearing. The decision depended on whether the claimant had a "well-founded fear of persecution" in their homeland, and such a determination was impossible to make using only written submissions. The Claimant must be given an opportunity to **"tell their story"** in various circumstances.

Khan: Law student claims that her exam was wrongly graded because one of her examination booklets went missing. Court held that such a factual determination **revolved entirely around** the **student's credibility** and **required an oral hearing**.

Section 38 of the **ATA** allows for counsel or an agent to represent a party to a tribunal hearing. The provision is **not** absolute and **permits** the tribunals to **limit examination** and **cross-examination** to a level which **they consider sufficient** in the given circumstances. Of note is that the **ATA** expressly allows for "**electronic hearings**":

Examination of witnesses

38 (1) Subject to subsection (2), in an oral or electronic hearing a party to an application may call and examine witnesses, present evidence and submissions and conduct cross examination of witnesses as reasonably required by the tribunal for a full and fair disclosure of all matters relevant to the issues in the application.

(2) The tribunal may reasonably limit further examination or cross examination of a witness if it is satisfied that the examination or cross examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the application.

(3) The tribunal may question any witness who gives oral evidence in an oral or electronic hearing.

Cross-Examine Witnesses

The right to call evidence and cross-examine witnesses necessarily fall within the purview of the **right to oral hearings**. It should be remembered that administrative decision-makers control their own procedures and may either limit or remove the right to call evidence and/or cross-examine witnesses. The **guiding principle** is that parties must be given a reasonable opportunity to present their cases and whenever the **enabling legislation provides** for "**full hearings**", then **express statutory** language is required in order to **curtail** the **right** to cross-examine witnesses: **Innisfil v Vespra** and **Allard**

Djakovic case illustrates that **WCAT** tribunals are construed as very **court-like** and therefore owe a **high degree** of procedural fairness duties. The BCSC held that the WCAT process **violated** the applicant's right to **cross-examine** material witnesses thereby **quashing** the decision and **returning** it to the tribunal for **rehearing**.

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Right to Counsel

There is **no common law** right to counsel in administrative proceedings. However, in limited circumstances **section 7** of the **Charter** requires a right to counsel in order to uphold the principle of fundamental justice. As an aside, even though section **10(b)** of the **Charter** guarantees a right to counsel, courts have consistently held that this right only applies in cases of detention or imprisonment. The involvement of counsel in administrative legal contexts would likely cause additional expenses, delay, and concomitant problems for the decision-makers: **New Brunswick v GJ**

Circumstances which may require right to counsel:

- **Fundamental Justice:** In circumstances where a deprivation of **life, liberty, or security of the person** is at stake (**Section 7 Charter** rights), the principles of fundamental or natural justice may in some cases require the right to counsel in administrative proceedings: **New Brunswick v GJ**
- **Factors to consider from New Brunswick v GJ:** A right to state-funded or private counsel may be argued for in certain circumstances and the following factors should be considered:
  - **Seriousness** of the interest at stake: **New Brunswick v GJ**
  - **Complexity** of the proceedings: **New Brunswick v GJ**
  - **Capacity** of the **party** to **self-represent**: **New Brunswick v GJ**
  - Are there any factors that would militate **against** a right to counsel? **New Brunswick v GJ**
    - Expensive
    - Inefficient
    - Delays
    - Need for informality

Example: Welfare mom in child-custody case spanning 15 days of hearings. Applicant denied right to state-sponsored counsel and appealed the denial. SCC Counsel granted a right to legal aid because the impact on the applicant was *"greater than ordinary stress or anxiety"* and therefore was caught within "security of the person" protection of the Charter: **New Brunswick v GJ**

Example: Prisoner presented with vague charges (incl. 3 charges for one act), may extend jail time. Liberty interest at stake, fairly complex, limited capacity. Counsel granted: **Howard**

Section 32 of the **ATA** allows for counsel or an agent to represent a party:

> **Representation of parties to an application**
>
> **32** A party to an application may be represented by counsel or an agent and may make submissions as to facts, law and jurisdiction.

Timeliness and Delay

Administrative decision-makers are generally not under specific legislative timelines for hearing issues and/or making final decisions. Neither does **Section 11(b)** of the **Charter** apply to the administrative scope because it is limited to persons charged with an offence. The landmark **Blencoe** case dealt with the issues of timeliness and delay. The court concluded that in certain limited circumstances delay in proceedings may give rise to a breach of procedural fairness or even violate the principles of fundamental justice pursuant to **section 7**. The court outlined 3 considerations that must be weighed within the administrative context:

1) The **actual time** elapsed **compared** to the inherent and reasonable time requirements of the issues in front of the tribunal. Factors such as legal complexities, factual complexities, and reasonable procedural safeguards aimed at protecting the public or the parties.
2) The **causes** of the delay beyond the inherent and reasonable time requirements of the matter. Considerations include whether the affected individual contributed or waived parts of the delay and whether the administrative decision-maker used their available resources as efficiently as possible
3) The **impact** of the delay on the complainant.
    a. The may engage **section 7** of the **Charter** and includes the **freedom** from **state interference** with **psychological integrity** of the applicant. **Blencoe** held that in order to successfully argue that the applicant's procedural fairness rights to a timely hearing were violated causing **psychological harm**, the applicant **must** successfully establish that his or her **psychological harm** was
        i. **State-imposed**; **AND**
            1. The applicant in **Blencoe** failed to make out his case because the court found that the applicant's psychological harm (severe depression) was **more likely caused** by **his *own* actions**, including concomitant civil litigation and relating media scrutiny.
        ii. **Serious**.
            1. The court in **Blencoe** concluded that the applicant's **severe depression** was **not serious enough** to meet the threshold for **section 7 Charter** violations.
    b. The impact of the delay may also engage **PF arguments**. However, **Blencoe** set a **high threshold** and held that in the administrative law context there **must** be **significant proof** of **prejudice** against the applicant **caused** by the **delay**.
    c. In **exceptional** cases, delay may permit admin law remedy for **abuse of process arguments** where administration of justice would be brought into disrepute
        i. Can apply even where hearing fairness has NOT been compromised
        ii. If delay is such that the human rights system would be brought into disrepute, i.e.:
            1. Caused **significant psychological** harm to a person
            2. **Attached** a **stigma** to a person's **reputation**
        iii. **TEST**: Is the delay **unacceptable**?
            1. In circumstances where "the damage to the public interest in the fairness of the administrative 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**", courts may declare such delays unacceptable.

The Duty to Give Reasons

Baker established a duty to give reasons on statutory and prerogative decision-makers if:

1) a particular decision has "**important significance**" for an individual, and/or
2) a **statutory appeal** process exists to facilitate the workings of that process (it would be impossible or highly inefficient to allow for statutory appeals without providing the underlying reasons of the decision being appealed from).

Although **Baker** necessitates a duty to provide reasons in the above contexts, it **fails** to delineate the **precise *format*** or ***elements*** required to meet said duty. We can look to **Dunsmuir** to inform this particular **gap** because the SCC ruled that reasons **must be sufficient** to satisfy the criteria of **"*justification*, *transparency*, and *intelligibility*."** The SCC in **Dunsmuir** concluded that reasons are important because they let parties understand **why** decisions were made, **focus** the decision-makers **mind**, **creates** a **body** of

decisions with concomitant reasons to **assist** other 3rd parties, and help parties and courts determine if there are **grounds** for judicial review.

Newfoundland Nurses significantly narrowed the scope of a finding of adequate reasons. The SCC held that the adequacy of reasons is **not** an element of PF, but rather **integrated within** the challenge to the **substance** of the decision. The issue surrounding reasons should **not** be analyzed on **standalone** grounds but rather in a **contextual** manner. The court also ruled that a finding of **inadequate reasons** is **not in and of itself** grounds for a finding of procedural fairness violation resulting in the quashing of a decision.

In sum, If reasons exist, regardless of how minimal or seemingly insufficient, the duty to provide adequate reasons has been met thereby satisfying the procedural fairness stage. Scrutiny of the substance of reasons, however, must now occur during the substantive review stage. The court must determine whether the reasons, viewed as a whole given record, is reasonable: Driver Iron

Obligation to provide reasons is aspect of PF:

- A ***common ground of attack (when litigating or bringing appeal)***, given speed and volume involved in work of SDM

Features of *adequate* reasons:

- For **each important** conclusion of **fact**, **law** and **policy**, the reader should be able to answer the question: *"why did the tribunal reach that conclusion?"*
- **Rejection** of **important** items of **evidence** should be **explained**
- If finding of **insufficient evidence**, **deficiencies** should be **identified**
- Should reference **important factors required** in applicable law and policy
- *Reasons must **not** be complex, comprehensive, or perfect*. The court must be satisfied that the reasons as provided "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": **Newfoundland Nurses**
- BUT reasons need **not** be given on **every minor point raised** during the proceeding: **Gichuru v Law Society**
- **Dunsmuir**:
    - Justify the decision by showing that the decision-maker has considered relevant facts and law, applied legal principles and tests correctly, and is able to explain the decision in a way that both the affected person and the reviewing court can understand.
    - Reasons must be transparent and form the basis for the reasonable outcome.
    - Reasons should be viewed as an organic exercise, not with a forensic or microscopic lens because reasons are not a stand-alone basis for intrusive judicial review.
    - Reasons do not have to be perfect, do not have to comprehensive or lengthy, may contain some errors, do not have to be well written, and speed, economy, and informality may take priority given the daily realities administrative officials must face.
    - **Nevertheless, reasons must still permit effective review in order to satisfy the principles of legality, accountability, and the rule of law.**

Features of *Inadequate* reasons:

Newfoundland Nurses provides some guidance as to a finding of **inadequate reasons**:

- The reasons must address the substance of the live issues, key arguments, contradictory evidence, and non-obvious inferences
- Bare or opaque conclusions with no supporting information or not supported by principles will be found unsatisfactory
- Inconsistencies and irrelevant considerations, or when relevant considerations or obvious topics are omitted, will be considered serious flaws
- The decision-maker cannot write minimal reasons that effectively provide immunization from review and accountability

Finally, the decision-maker cannot exhibit an attitude of **"trust us, we got it right"**: **Vancouver International Airport Authority v Public Service Alliance of Canada**

ATA:

Section 51 of the **ATA** requires tribunals that have incorporated the ATA to provide final decisions in **writing accompanied** with **reasons for said decisions**:

Final decision

51 The tribunal must make its final decision in writing and give reasons for the decision.

STEP 5: Conclusion

The **final step** to a procedural fairness review is to make a **decision** respecting **whether** or **not** **any** **of the applicable** procedural fairness components have been **breached** by the SDM.

We must keep in mind that **no breach** of Procedural Fairness obligations is **too trivial**. The SCC in **Cardinal v Kent** held that if a SDM breaches **any** procedural fairness duties, **no matter** how **minor** or **miniscule**, then a reviewing court **must quash** the administrative **decision** via an order of **certiorari**.

However, some courts **may be reluctant** to **find breaches** of procedural fairness because of the inherent **costs** and **time constraints** in quashing such a decision and sending it back to be re-heard. Some courts **may therefore err** on the side of finding that the fairness duty has been met enabling the court to undertake a substantive review.

Discretionary Grounds for Refusing Relief In Case of PF Breach

There are some common **discretionary** grounds for ***refusing*** relief via judicial review even in instances where a reviewing court concludes that procedural fairness obligations have been violated. These discretionary grounds enable courts to **sidestep** the strict rule set out by the **Cardinal v Kent** decision requiring the **automatic quashing** of decisions found to violate PF obligations.

Prematurity/Curing/Adequate Alternative Remedies

Curing and Prematurity are discretionary bases allowing reviewing courts to refuse relief in certain circumstances where SDMs have violated an applicant's procedural fairness rights.

The superior courts put much weight on the availability of adequate alternative remedies in their discretionary decisions whether to grant relief via judicial review. Parties should exhaust all prescribed avenues of appeal before proceeding to the "last resort" of judicial review.

A remedy may **not** be granted where the error was or could have been "**cured**" either in the **originating hearing process** or by was "premature" because the applicant could have **pursued additional avenues** of **appeal** under the **statute**. So, if an applicant had the opportunity to pursue a statutory right of appeal or another internal appeal mechanism, he or she should exhaust these mechanisms prior to seeking judicial review outside of the statutory appeals provisions.

Prematurity and/or curing often occurs when applicants attempt to seek judicial review for interim, interlocutory, and/or evidentiary rulings.

Premature to proceed with judicial review before seeing the outcome of a **complete administrative** proceeding.

There are three primary principles underlying the refusal to issue a remedy in cases of prematurity/curing.

- Fragmented proceedings leads to inefficiency, cost, and delay.
- PF issues may become moot depending on the outcome of the administrative proceeding
- Need a full and complete record of the tribunal's record and its decision for the court to review

The final threshold matter that a party must establish before gaining access to judicial review is that he or she has exhausted all other adequate means of recourse for challenging the tribunal's actions. In **Harelkin v University of Regina**, the SCC rejected a writ of certiorari because the applicant had a statutory right to appeal the lower tribunal's decision to the senate committee but failed to do so. The court ruled that the senate committee would have provided the applicant an adequate alternative remedy.

The federal court of appeal concluded in **Zundel v Canada**, that reviewing courts should not permit judicial review of a tribunal's **preliminary determinations**, **except** where there is **some special circumstance** otherwise permitting the court to intervene.

However, some factors may render an alternative form of review **inadequate** and the reviewing court **may grant** an application for judicial review **even if** the party failed to **exhaust** all **alternative** means of recourse:

- The appellate tribunal lacks statutory authority over, or is not willing to address, the issues the appellant raises: **Canadian Pacific v Matsqui Indian Band**
- The appellate tribunal does not have statutory authority to grant the remedy the appellant requests: **Evershed v Ontario**
- The appeal must be based on the record before the original tribunal, but that record does not include evidence relevant to the applicant, or includes evidentiary errors that the appellate tribunal lacks authority to correct: **VSR Investments v Laczko** and **Cimolai v Children's and Women's Health Centre**

- The alternative procedure is **too inefficient** or **costly**: **Violette v Dental Society** and **Secord v Saint John (City)**
- In **Taiga Works Wilderness Equipment**, the BCCA concluded that **the first** Tribunal member **erred** in **overlooking** the **procedural defects**, **rather than actually curing them**. The first member **should have** performed a **fact-finding function** to determine which documents the Director's Delegate relied upon in coming to his decision. **The decision by the second member perpetuated the first member's error**. Thus, refusing to quash a decision because there may be alternative avenues to cure a deficiency in the decision-making process **may not** be a **valid** remedy in cases where the **internal process itself** is **faulty**.

The Slip Rule: Fixing minor errors prior to final decision

- All tribunals can fix certain things, such as *clerical errors or factual errors due to mistake or dishonesty*, **without** express statutory authority: **Chandler** and **Muscillo Transport Ltd**
- Tribunals can also "**change their minds**" *until the time a final decision is made*. Therefore, it is extremely important to understand what constitutes a "**final decision**". "**Preliminary rulings"** can also be changed until the final decision on a matter has been made.
    - **Example**: If an enabling statute provides that a "final decision" is in writing, then a verbal decision is not final and subject to changes. If and when a written decision is given, such a decision may not be changed because it would be considered a "final decision".
    - **Section 51 of the ATA outlines and defines "final decision:**

> **Final decision**
>
> **51** The tribunal must make its final decision in writing and give reasons for the decision.

Functus Officio in Relation to Re-Hearing and/or Re-Opening Tribunal Decisions: Statutory authority to change or rehear final decisions

- Because tribunals are statutory creatures, the enabling statute must expressly provide authority to rehear or reopen a previously heard case.
- **Functus officio** prevents the re-opening of a matter before the same court, tribunal or other statutory actor which rendered the final decision in the **absence** of statutory authority.
- Absent statutory authority to re-hear or reopen a previous tribunal decision, for policy reasons that favor finality of proceedings, a tribunal cannot reconsider or alter a final decision made within its jurisdiction. Once it has made a final decision and has no statutory authority to reconsider said decision, the tribunal is functus officio.

Waiver

Waiver is a discretionary basis allowing reviewing courts to refuse relief in certain circumstances where SDMs have violated an applicant's procedural fairness rights.

Even if a party seeking judicial review has met all of the formal statutory time limits for filing judicial review applications, the court may nevertheless reject such an application because of the doctrine of delay and acquiescence. Parties should **promptly object** to any **actual** and/or **perceived impropriety** on the part of the tribunal. Similarly, **choosing not** to **attend** a hearing **could waive** any **right** to **judicial review**. Reviewing courts may choose **not** to **grant** a remedy on judicial review where there is **PF breach** when the party **raising** the **PF issue** can **reasonably** be said **to have waived** its right to **complain** of the **problem** later on.

- Promotes **efficiency** by giving tribunal opportunities to correct/manage PF problem
- Otherwise, tribunal is wasting its time in the face of a PF breach which will lead to certiorari, and then re-hearing
- Can't keep PF breaches in **back pocket** for **easy JR win *if*** you lose at tribunal

KEY: Waiver can **only** be implied where in **all** the **circumstances** the **party** can be **reasonably** seen as ***knowing*** of the **problem** and ***intentionally*** **not raising it**. Such knowledge and intention depends on the actual state of mind of the applicant and/or the imputed state of mind based on implied knowledge and sophistication of the applicant.

- **Practice Point:** More difficult to imply waiver against an unsophisticated and unrepresented party than against a party with counsel. If a party has counsel, they will be imputed certain knowledge and sophistication thereby **greatly increasing** the courts concluding that he or she **waived their right** to judicial review because they intentionally failed to **call attention** to any **improprieties** at **first instance**: **Kvelashvili v Canada**
- **The more sophisticated a party is deemed to be, the more likely courts will conclude that they have waived their right to judicial review for failing to bring a perceived or actual issue to the SDM's attention in a timely fashion.**

In **Allard**, The BCCA concluded that the applicant had been deemed to waive his right to an oral hearing because he did not pursue his request, and therefore he was **not denied** a **fair process**.

In **Cougar Aviation v Canada**, the Federal Court of Appeal concluded that the applicant had **failed** to **raise** its **allegations** of **apprehended bias** at the **earliest opportunity**: "Allegations of bias **must normally** be raised at the earliest practicable opportunity; **if not taken in timely fashion, an objection will be regarded as waived**."

In **Kvelashvili v Canada**, the federal court of appeal **refused** to **impute** that the applicant **waived** his right to **object**. The applicant was **not represented** by counsel, **barely spoke English**, and did **not understand** the **rules** of the decision-making **process** nor its **procedures**.

Mootness

Mootness is a discretionary basis allowing reviewing courts to refuse relief in certain circumstances where SDMs have violated an applicant's procedural fairness rights.

In **Moose Jaw Central Bingo Assn**, the Saskatchewan CA refused to quash a decision because the applicant couldn't have succeeded in obtaining a gaming license **even if** the decision were quashed. **Only two** gaming license were issued **annually** and **both had already** been **issued**.

In **Bago v Canada**, the reviewing court refused to review a decision of an immigration officer to refuse a work permit and temporary residency visa. The applicant, by the time the refusal was issued, had already been granted a permanent residency visa because of a separate application. The court held "the doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises **merely** a **hypothetical** or **abstract question**... If the decision of the court will have **no practical effect** on such rights, the court will **decline** to decide the case."

- The court outlined three rationales for the mootness doctrine:
  - (i) the existence of an adversarial context;
  - (ii) judicial economy and the conservation of judicial resources; and
  - (iii) a need for the Court to demonstrate awareness of its proper function.

In **Mobil Oil Canada**, the SCC ruled that even though the applicant's right to be heard had been improperly violated contrary to the SDM's procedural fairness obligations, it would have been **nonsensical** to **send** the decision **back** for **reconsideration**. The SDM would have been forced in law to again reject the applicant's application resulting in the same outcome. The court expressly references the **constraint** on **judicial resources** and that the **outcome** was **certain** to be the **same** had it quashed the board's decision.

Mootness: A remedy in judicial review will not be granted where the issues are moot. This includes situations where:

- A tribunal's order has expired or no longer affects the applicant
- The litigant no longer actually wants the remedy that the tribunal might have granted had it not erred
- The present circumstances make it impossible for the reviewing court to provide the remedy the tribunal would have granted
- The reviewing court believes the tribunal's error did not affect its overall conclusion

Triviality

Triviality is a discretionary basis allowing reviewing courts to refuse relief in certain circumstances where SDMs have violated an applicant's procedural fairness rights.

In **Westfair Foods**, the ***Alberta*** CA agreed that **procedural fairness** had been **breached because the SDM failed to give the applicant reasonable amount to respond to novel and material evidence**. However, because the post-hearing submissions had no bearing on the outcome of the arbitrator's reasoning (she had not considered or relied on them), it was **insignificant** that the arbitrator had failed to provide sufficient time for the employer to respond as the response ***would have had no impact*** on the final outcome of the award given that the **new issue** was **irrelevant**.

In **Compass Group Canada**, the chambers judge described the **new** evidence as of **only marginal relevance**, and concluded that **even if** the vice chair **had failed** to consider this evidence, the **effect** of this oversight on her decision was **so insignificant** as not to **merit** a remedy. The chambers judge therefore **denied** the employer's petition for judicial review. The crux of this decision was that judicial review was denied because the breach of procedural fairness duties was too trivial or insignificant to merit a remedy quashing the entire decision.

Unclean Hands

Another circumstance where a remedy may **not** be **granted**, **despite** a **breach** of **fairness**, is where the party has **unclean hands**. Because judicial review is an **equitable**, **discretionary remedy** flowing from the inherent jurisdiction of the superior Courts, it **may refuse** to provide a remedy where the **applicant** is, in effect, **abusing** the courts processes. Applicants cannot come to the equitable table with unclean hands.

Unclean Hands: The court may use its discretionary power to refuse to grant a remedy on judicial review where the party making the application does not come with clean hands.

- Seeking a remedy to facilitate illegal conduct
- Obtain an unfair advantage
- Breaking the law or making misrepresentations

In **Cosman Realty v Winnipeg**, the court concluded that the applicant intentionally waited to bring a challenge to the expropriation of his property until after construction of a college campus had commenced. The applicant's intention was to wait as long as possible with the aim of increasing the value of his property because the city would be too invested into the construction phase at the point of the challenge. The court held that "**If the true purpose is to achieve an improper result, then the equitable relief should be refused**."

In **Jaouadi v Canada**, the court ruled that the immigration applicant claiming refugee status had taken an oath to the tell the complete truth, and therefore, he had to **bear full responsibility** for any **perjury** he may have **committed** before the panel. The court **refused** his application for **judicial review** because he **lied** about his **association** with a political party in his home country.

Balance of Convenience

Balance of Convenience is a relatively new discretionary basis allowing reviewing courts to refuse relief in certain circumstances where SDMs have violated an applicant's procedural fairness rights and/or for a substantive error.

Balance of Convenience: The court in **Khosa** added a 6th reason for refusing a remedy on judicial review. The court concluded that the balance of convenience to the various parties justified ***reducing* the impact of the remedy granted**, from relief in the order of **certiorari** and **mandamus** to a **declaration**.

In **MiningWatch Canada**, the SCC held that "…the fact that an appellant **would otherwise** be **entitled** to a remedy does **not** alter the fact that the court has the **power** to **exercise** its **discretion not** to grant such a remedy, **or at least not the *entire* remedy sought**. However, because such discretionary power may make inroads upon the rule of law, **it must be exercised with the greatest care**." While, the SCC ruled that the decision maker made a procedural error by only performing a screening instead of a comprehensive study respecting the proposed mining operation, the court concluded that based on the balance of convenience it would make greater sense to **grant a *lighter* remedy** than simply quashing the entire decision.

- The **MiningWatch Canada** decision has been heavily criticized because the SCC is alleged to have erred in permitting the approvals/permits **to stand in the face** of a **clear jurisdictional error.**

KEY: Balance of convenience considerations will include any ***disproportionate impact*** on the interests of **third** parties.

Bias & Independence (Both find their genesis in the "rule of law")

One of the primary and chief functions of the *rule of law* is to fetter or preclude the possibility of *executive arbitrariness*. The **Baker** decision cemented the principle that the existence of a PF obligation also **requires** that SDM decisions are made free from a reasonable apprehension of bias. The **Newfoundland Telephone** SCC decision ruled that the **duty of fairness** applied to **all administrative bodies**, but "the **extent** of that duty will **depend** upon the **nature** and the **function** of the particular tribunal."

There are **two distinct categories** within the bias analysis. The **first** category is individual bias, which asks whether an individual decision-maker is being materially affected leading to an apprehension of bias in certain cases. The **second** category is institutional bias, which **arises** mainly when the methods adopted by decision-making bodies in their policy-making activities **appear** to **infringe** on or **fetter** the **adjudicative independence** of **decision-making bodies as a whole** in a multiple number of cases.

Independence and unbiased tribunals are elemental to ensure non-political and fair decision-making**.** If tribunal members are so dependent on or connected to the government that, if appointed, they cannot be perceived as being sufficiently able to make an independent decision, a RAOB arises.

Finally, the **onus of proof** is on the party alleging bias: **RDS**

Statutory Authorization Defence and the Use of Rights Documents to Override It

Impugned tribunal decisions for alleged RAOB may give to **statutory authorization defences**. We should note the **Ocean Port** decision held that there is **no constitutional guarantee** of administrative tribunal independence and therefore significantly narrowed the independence duty. The court held that **it is up to the legislators** to determine the structure, responsibilities, and degree of independence required of any particular tribunal. Lawmakers may choose to ***oust or limit*** **the degree of tribunal independence** with express statutory language, provided that such legislation is **constitutionally valid**. Of course such legislative intent is subject to the **Constitution**, **Charter**, and other unwritten constitutional principles. Of particular concern are legislative authorizations to violate **section 7 and 11(d) Charter** guarantees. The BCSC recently showed its disdain for the Ocean Port decision limiting the inherent right to an independent decision-making body. In McKenzie, the court held that the Ocean Port decision may have gone slightly too far and that applicants do indeed have a constitutionally guaranteed right to an independent and fair tribunal.

On exam, discuss which decision you agree with. If you are attempting to argue FOR an inherent right to unbiased tribunals, use McKenzie decision. However, make sure to note that Ocean Port overrules the BCSC decision and therefore remains good law.

Example: HR Committee decides which complaints to send to HR Tribunal, Committee Chair also gets to pick who's on the Tribunal's panels and appears before them. RAoB found, but statute authorizes scheme. *CBR* s. 2(e) applies – fair hearing for determination of rights: **MacBain**

Example: Minister of Labour gets to appoint arbitration panelist in health labour disputes. Financial bias alleged (could want to pay health workers less). Statutory authorization: **CUPE v NB Liquor Corp**

Category 1: Individual Bias

Reasonable Apprehension of Bias Test

The **reasonable apprehension of bias test** was first formulated in the opinion of **R v S (RD)** and subsequently adopted by the **Baker** decision.

In order to establish whether or not such personal bias exists, you must ask whether "**a reasonable and informed right-minded 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 fail to arrive at his decision free from reasonable apprehension of bias?"**

- Mere suspicion is not enough. A real likelihood or probability of bias should be demonstrated
- Be **fully informed** of all relevant circumstances
- **Not** have a "**very sensitive or scrupulous conscience**"
- And must have **raised** any issue respecting RAOB at the **earliest convenience.**
    - **Doctrine of Laches:** Bars recovery in an equitable action by the plaintiff because of the plaintiff's undue delay in seeking relief.

Type of SDM: Court-Like vs Popularly Elected Board Members

In **Newfoundland Telephone**, the court held that an **adjudicative** or **policy** board gives rise to a **similar standard** of bias applicable to **superior** courts. If the decision-making body is made up of **elected officials**, a much **more lenient** standard of bias is applicable.

A pecuniary interest in the outcome of the matter being decided

The existence of a decision-maker's personal pecuniary interest in the outcome of a particular case is one of the clearest circumstances giving rise to quashing a decision for reasonable apprehension of bias. The nemo judex principal aims to preclude an administrative actor from making decisions that advance his or her own cause.
Step 1: Figure out whether the pecuniary interest is "direct" or "indirect"
Step 2: If "direct", decision is automatically quashed
Step 3: If "indirect", standard RAOB test applies in order to find whether violation occurred.

Direct Pecuniary Interests: The common law has a strict stance against direct pecuniary interests by an administrative decision-maker and reviewing courts will quash such tribunal decisions: **Dimes v Grand Junction Canal Co**

Indirect Pecuniary Interests: Although the common law is extremely strict when it comes to direct pecuniary interests, it becomes much more flexible when dealing with indirect pecuniary interests: **Atomic Energy Board**.

- **If the interest is found to be only an indirect pecuniary interest, then the standard RAOB test applies**: **Pearlman**

A "**direct**" pecuniary interest requires a **relatively high** level of **certainty**: **Atomic Energy Board**

- **Example:** Owning shares in a company that *might* benefit as a result of a regulatory decision is not sufficiently direct. An assured contract would be direct: **Atomic Energy Board**
- **Example:** Lawyer is up for a disciplinary hearing from the Bar. If he wins, the Bar must pay costs. Lawyers pay for the Bar's costs, and lawyers sit on the administrative panel. Complainant lawyer alleges that the tribunal process was contrary to natural justice as the Society had pecuniary interest in his guilt, and that the Committee was biased him. Court held that the financial interest is too "*remote, speculative and attenuated*" that it can't be said to be direct: **Pearlman**
    - Court considered what a reasonable person would look at in determining directness: the scheme is created by statute, panel's members have the same interest as any other lawyer, it's just recouping costs and not profiting. Overall, reasonable to say no RAOB.
- **Example**: Egg producer in an action with a regulatory board that has other egg producers on it due to statutory requirement. Not direct, no RAoB: **Burnbrae**
- **Example**: CP challenges the decision by Aboriginal band members on band appeal body over determining whether CP is subject to the band's taxes. Not a direct interest, no RAoB; they're members of the public: **Matsqui**
    - A pecuniary interest that members of a tribunal might be alleged to have, such as an interest in increasing taxes to maximize band revenue, is far too attenuated and remote to give rise to a reasonable apprehension of bias at a structural level. No personal and distinct interest in money raised exists on the part of tribunal members, and any potential for conflict between the interests of members of the tribunal and those of parties appearing before them was speculative at this stage.
- **Example**: Minister has statutory authority to order parties to clean up environmental damage (otherwise the gov't pays). No direct interest; acting as a rep. for Crown: **Imperial Oil**
    - The duty to remain untainted by personal interest applied in a context in which the members of the Discipline Committee were performing their duties in the common interests of the profession and for the protection of the public, **not for their personal benefit**. Any interest they may have had in recovering the costs of the proceedings was too remote and attenuated to give rise to a reasonable apprehension of bias in the eyes of an objective and properly informed observer.

A non-pecuniary material interest in the outcome of the matter being decided

Although pecuniary interests are the classical and most common personal interest giving rise to a reasonable apprehension of bias, other non-pecuniary personal interests may vitiate tribunal decisions: **Obichon v Heart Lake First Nation**

- **Example**: In the **Obichon** case, a decision of a band council to evict a band member so that his house could be given to a larger family was set aside because the intended beneficiary resident of the home was one of the councillors.

Personal relationships with those involved in the dispute

- Evidence of personal animosity is a surefire way to find a RAOB: **Baker**

- The category of personal relationships giving rise to a RAOB is not only concerned with the decision-maker's relationship with the **parties to the decision**, but also reaches as far as any of the other individuals involved in the decision-making process such as **witnesses** or the parties' **counsel**: **Li v College of Physicians**
- **Time Passed as Contextual Factor**: In **Marques v Dylex**, a tribunal member who was hearing a case of a union, used to be a lawyer for that particular union. The court put great weight on the contextual factor of time passed. Over 1 year had gone by since the lawyer had acted qua counsel for the union.
- In **Bennett and Doman**, a business director found himself before a disciplinary board for sanctions. A director for a competing company was a sitting member of the board. Court found a RAOB.

Prior Knowledge About or Involvement With the Matter in Dispute

In general, in deciding whether a RAOB arises because of a decision-maker's prior involvement with an issue, reviewing courts will focus on the **nature** and **extent** of the decision-maker's **previous involvement.** In general, sufficiently close prior involvement may disqualify due to a RAOB: **Wewaykum Indian Band**

- **Example**: D is former President of the Canada Development Corp, part of a group making a pipeline proposal that the National Energy Board is reviewing for approval. D is on National Energy Board. Court finds RAOB; "personal and extensive" involvement with project; use strict (lawyer-like) standard because National Energy Board needs to keep public confidence: **Committee for Justice and Liberty**
    - **Dissent**: But this board needs expertise, and experts have history in the field! And it's discretionary, policy-based; should be a lower standard: **Committee for Justice and Liberty**
- **Example**: Two Aboriginal bands sue each other over land claims. At SCC, Binnie J writes the unanimous opinion. 15 years prior, Binnie J was the Deputy AG for Canada for all non-tax matters, and had attended a meeting on these issues. Court rejects RAOB; it was a **long time ago**, involvement was limited, the decision was unanimous anyways, and there is a **strong presumption of judicial impartiality**: **Wewaykum Indian Band**
- **Example**: In another case, an entire board was found to be disqualified to hear a case due to prior knowledge. The members of the board received material information at a **plenary** meeting **prior** to the actual hearing: **Service Employees International Union, Local 204 v Johnson**

Re-hearing of a Matter:

Re-hearing a matter **after** judicial review is generally **not** an issue for an administrative decision-maker.

In **Innisfil v Vespra**, the SCC held that a tribunal re-hearing the same issue and refusing the cross-examination of new evidence violated natural justice and found a RAOB.

An attitudinal predisposition toward an outcome ("Prejudice" or "Pre-Judgment")

Predispositions or prejudgment giving rise to a RAOB have been gleaned from decision-makers' **comments** and **attitudes** in **both** the **course** of the **hearing** and **outside** or **external** matters. Things such as **antagonism** toward litigants, **ex parte** discussions, **sexist**, **racist**, and/or **irrelevant** comments in addition to the adjudicator

Interventions by tribunal members into hearings:

In **Law Society of Upper Canada v Cengarle**, the court ruled that **interventions** by the original panel, led by the chairman and law society member, gave the appearance of "descending into the arena and **assuming** the **role** of the **prosecution**… The panel chair **intervened** almost from the outset of the case… The nature and form… of the **lengthy questions** during the examination-in-chief of the lawyer **departed** from the proper role of **neutral fact-finder** and *appeared* to be **cross-examination**."

Inquisitorial versus Adversarial Process:

Thamotharem v Canada demonstrates that the **inquisitorial** adjudicative process, instead of the more familiar common law **adversarial** process, in and of itself presents **no** challenges to the notion of fairness or bias.

Ex Parte Communications

Both **Yusuf v Canada** and **Law Society of Alberta v Merchant** held that **ex parte** communications (where the decision-maker chooses to speak privately with one party without the knowledge or notice of another prejudiced party) and hearings during which **sexist**, **condescending**, or other **irrelevant comments** have been made, give rise to a RAOB.

Closed Mindedness and Comments Before and/or Outside of Hearing Room:

In **Newfoundland Telephone**, the SCC concluded that decision-makers' comments **outside** the **hearing room** and/or **prior** to the **commencement** of a hearing **might** give rise to a RAOB. The court stated that a finding of bias due to such comments requires a

finding that the decision-maker has "a mind so closed that any submission [by the parties] **would be futile".** The Court held that Wells' statements **during** and **after** the hearings **gave rise** to a RAOB, rendering the decision **void**.

In **Baker**, the SCC held that a RAOB arose because the immigration officer's notes revealed that he may have reached his decision based on **arbitrary elements** such as the complainant's **single-parent** and **welfare status** in addition to a prejudgment respecting her **mental illness**.

Closed Mindedness and Disparaging Comments made During a Hearing:
In **Moreau-Berube**, the court concluded that the disparaging remarks respecting residents of a particular neighbourhood made by a judge during a sentencing hearing give rise to a RAOB.

In **Paine**, a professor applied for tenure. Other professors, including one with a negative opinion towards the applicant, were asked for their opinions and placed on the tenure committee. Court found no RAOB because in such circumstances professors are supposed to have opinions respecting their colleagues.

In **Great Atlantic**, a feminist human rights advocate **wrote extensively** on social issues. She eventually became a party to a discrimination complaint that was stalled. She gets put on a panel reviewing a similar systemic discrimination complaint at another company. She **withdraws** as a **party** from the **initial** complaint, but the court concludes her actions are **too late** – she has an **interest** in the **1st complaint**, and can't be put on a panel where she has a chance to **create** a **precedent** that can be used in that case. However, the court held that her **writings** are **not** a factor.

In **Large**, Police officers are suing the city to remove mandatory retirement at age 60 because it isn't a *bona fide* requirement. City argues that such a requirement is bona fide. Tribunal member has expressed views that mandatory retirement for professors is **not** *bona fide*. Court held that there is **No** RAOB because experts shouldn't be excluded merely because they have **expressed** views in the **field**, plus this does **not** indicate **pre-judgment**.

Closed Mindedness During Investigatory Phase versus Adjudicative Phase:
In **Newfoundland Telephone**, the SCC concluded that tribunals that employ **varying functions** during decision-making processes may hold a predisposed position during the **investigatory** and/or **policy-making stages** because their impact on the applicant is not binding. However, closed mindedness will **certainly give rise** to a RAOB during the **adjudicative stage** of the tribunal process. The court found that a RAOB existed on the facts of the case.

Comments made by Politicians and Municipal Councillors During Election Time:
In **Old St. Boniface Residents Assn v Winnipeg**, the SCC held that, due to the nature of **municipal** and **local government**, it is to be **expected** that **politicians** and **municipal councillors** would have **campaigned** and **advocated** a position during **election** time or before different committees before sitting on municipal council in the final decision of the same issue. The SCC concluded that in such limited circumstances the **RAOB test must be relaxed** and a finding of **bias** must be **established *in fact***, and **not** simply based on reasonable *apprehension*.

Comments Made to Media:
In **Chretien v Canada**, the Federal Court concluded that a commissioner's **media comments during public hearings,** which showed prejudgment of the matter in front of the tribunal, might give rise to a finding of RAOB.

Overlapping Functions

Overlapping functions refers to circumstances where the **same party** is **both** an **investigator *and* adjudicator** of the same matter before an administrative decision-making body. In **Brosseau**, the court held that such an arrangement will give rise to a RAOB. However, we must keep in mind that legislation may expressly fetter or preclude a finding of RAOB, subject to such a provision's constitutionality.

Category 2: Institutional Bias

Policy-making is one of the **elemental** and concomitant functions for administrative decision-making: **Ocean Port**. Such policies primarily serve to 1) **further** the **law** outlined by the **enabling legislation**, 2) **promote consistency** in rendered decisions, and 3) **promote efficiency** of administrative decision-making. **Institutional** Bias issues **arise** mainly when the methods adopted by decision-making bodies in their policy-making activities **appear** to **infringe** on or **fetter** the **adjudicative independence** of **decision-making bodies as a whole in a multiple number of decisions.** What is of note is that even in cases where individual decision-makers may be **free** from bias, the finding of an institutional apprehension of bias raises concerns that he or she lacks an open mind.

Courts have recognized 3 requisite elements to guarantee institutional independence: **Security of tenure, financial security, and administrative/institutional control**: **Valente.** Nevertheless, this is **not** an **exhaustive** list and other factors such as the structure of the tribunal, provisions of the enabling statute, and the nature of the decisions should be considered.

Reasonable Apprehension of Bias Test

The **reasonable apprehension of bias test** for institutional independence is very similar in nature to the individual bias test. However, a slight modification must be made to the individual bias test in order to account for the institutional characteristics of the institutional bias analysis.

To analyze whether an apprehension of institutional bias exists, you must ask whether "a reasonable and informed right-minded 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 fail to arrive at his decision free from reasonable apprehension of bias… **in a substantial number of cases**?"

- Mere suspicion is not enough. A real likelihood or probability of bias should be demonstrated
- Be **fully informed** of all relevant circumstances
- **Not** have a "**very sensitive or scrupulous conscience**"
- And must have **raised** any issue respecting RAOB at the **earliest convenience.**
    - **Doctrine of Laches:** Bars recovery in an equitable action by the plaintiff because of the plaintiff's undue delay in seeking relief.

The **institutional bias test** must be **applied contextually** and **flexibly**, with regard to the **operational realities** of the administrative decision-makers: **Regie** and **Newfoundland Telephone**

Security of Tenure

Common Law:

Security of tenure aims to preclude the government from removing a judge for such things as rendering decisions that do not meet the government's approval. As a result, the requisite security of tenure mandates that judges be removed only for cause and must be provided with an opportunity to respond to the allegations against them. Finally, appointments "**at pleasure**" allowing judges to be **removed without cause** and without being heard, have been largely held to **breach** the principal of security of tenure. **Fixed terms** of any length have been held not to violate the principle of security of tenure: **Ocean Port**.

- Again, it must be noted that the legislature may **expressly override** the element of security of tenure, subject to the constitutionality of such provisions.

In **MacBain**, the prosecutor in charge of a hearing was also empowered to decide **which parties sit on the tribunal**. Tribunal members are hired on a **per-case basis**, hence, such a policy does **not** formally violate the principal of security of tenure. However, the court noted that chosen and potential tribunal members are **financially dependent** on the prosecutor and **may** attempt to **curry favour** to get **put** on **future panels** more often (and thus get **paid more**). The court held that although such practice amounts to fixed terms formally, substantively such appointment practices give rise to a RAOB.

Regie held that although **significant contact** and communication **may occur** between the executive and tribunal board members without giving rise to a RAOB, the SDM **must have control** over administrative decisions which directly and immediately impact their judicial function in order to maintain an unbiased process.

- *"The directors' conditions of employment meet the minimum requirements of independence. These do **not** require that all administrative adjudicators, like judges of courts of law, hold office **for life**. **Fixed-term** appointments, which are common, are **acceptable**. However, the removal of adjudicators must **not** simply be **at the pleasure** of the executive. The orders of appointment provide expressly that the directors can be dismissed **only** for certain specific reasons."*

In **Bell Canada**, the Chair of the tribunal has the power to **extend board members'** positions **until** the **end** of the **case**(s) they're **currently hearing**. Court found **no** lack of independence because someone needs to be authorized to extend such employment tenures. Finally, the court noted that at **the moment** the **decision** is **rendered** such temporary tenure **extensions end**.

ATA:

Section 3 of the **ATA** outlines guiding principles and suggests that tribunal members be appointed for an initial term of 2 to 4 years with reappointment for additional terms of up to 5 years:

Member's initial term and reappointment

3 (1) A member, other than the chair, may be appointed by the appointing authority, after a merit based process and consultation with the chair, to hold office for an initial term of 2 to 4 years.

(2) A member may be reappointed by the appointing authority as a member of the tribunal for additional terms of up to 5 years.

Section 8 of the **ATA** aims to preclude removal of tribunal members without cause, thereby preventing circumstances such as "at pleasure" appointments:

Termination for cause

8 The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.

Financial Security

Introduction:

- First, financial security aims to guarantee that, notwithstanding the government's responsibility for the remuneration of judges, it will not alter their pay for arbitrary reasons such as displeasure with rendered decisions.
- Second, financial security aims to guarantee that judges are sufficiently paid in order to keep them from seeking alternative means of supplementing their income.

Common Law:

In **MacBain**, the prosecutor in charge of a hearing was also empowered to decide **which parties sit on the tribunal**. Tribunal members are hired on a **per-case basis**, hence, such a policy does **not** formally violate the principal of security of tenure. However, the court noted that chosen and potential tribunal members are **financially dependent** on the prosecutor and **may** attempt to **curry favour** to get **put** on **future panels** more often (and thus get **paid more**). The court held that although such practice amounts to fixed terms formally, substantively such appointment practices give rise to a RAOB.

ATA:

Section 10 of the **ATA** ensures financial security because it requires the minister responsible for the tribunal's enabling legislation to set the amount of remuneration thereby preventing arbitrary changes in pay:

Remuneration and benefits for members

10 (1) In accordance with general directives of the Treasury Board, members must be reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in carrying out their duties.

(2) In accordance with general directives of the Treasury Board, the minister responsible for the tribunal's enabling Act must set the remuneration for those members who are to receive remuneration.

Institutional Independence

Institutional Independence deals with the manner in which the affairs of the court are administered. Issues include budgetary allocations for buildings and equipment to the assignment of cases. Statutory decision-makers must be sufficiently independent from the executive in making administrative and policy decisions.

In **Regie**, the court found that the **many points** of contact between the Minister and tribunal, such as annual and other periodic reports to the Minister and Minister approval of proposed tribunal policies, do **not** violate institutional independence. The court held that such conduct is simply Ministerial oversight and not a concern for a finding of a RAOB. The SDM however, **must have and maintain control** over administrative decisions which directly and immediately impact their judicial function in order to maintain an unbiased process.

Board Members With Industry Connections

In **BC v BC**, the BCSC ruled that a **board** member **active** in the **industry** over which the decision-making body presides, **fails** to give rise to an institutional apprehension of bias. A **mere indirect** or **speculative** bias apprehension does **not** generally lead to a finding of bias. A **more direct** and **material interest** is **required** for a reviewing court to conclude that an institutional apprehension of bias exists.

Contact with Outside Counsel

In **Khan**, the Ontario CA held that outside influences or contact by counsel with the sitting decision-makers will not generally give rise to a RAOB. A finding of bias will only be made "if that counsel participates in the **drafting process**" in addition to other material involvements.

Full-Board Meetings

The purpose of **plenary** meetings including all board members is to facilitate the understanding and appreciation throughout the entire board of policy developments and to evaluate the substantive consequences of proposed policy initiatives of the administrative decision-making body. The issue of such a practice is that full-board meetings may give rise to a breach of the "he who hears must decide" natural justice principle because the actual decision makers may be placed in situations where the multitude of board members who are not privy to the actual tribunal hearings may unduly influence the sitting board members.

- In **Consolidated-Bathurst**, the Ontario Labour Relations Board held a **plenary meeting** of the full labour board to discuss **draft reasons** of one of its 3-member tribunal panels. The primary issue discussed at this particular meeting was whether a particular **legal test** established by this particular board through past decisions **should be replaced** by an alternative test. The SCC concluded that plenary meetings allowed individual members of a **large board** with a **heavy case-load** to **benefit** from the **acquired expertise of the *collective***: "*discussions with colleague do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently.*" Finally, the court held that plenary meetings aimed at fostering coherence may **not** compromise any tribunal member's **capacity** to **decide freely** in accordance with his or her **conscience**.
    - **Test:** The court in **Consolidated-Bathurst** concluded that **plenary** meetings will **not** breach natural justice principles if:
        - 1) The discussions are **limited** to questions of **law or policy** and ***not*** **factual** issues, **and**
        - 2) The **parties** are given **reasonable opportunity** to **respond** to any **new ground** arising from the meeting, **and**
        - 3) **No undue pressure** falls on **individual** decision-makers to **decide against** his or her **own conscience** and **opinions** and decision-makers must be able to **freely and independently reach decisions** (see below **Tremblay** decision where this **3rd** factor was **violated** because the plenary meetings were particularly **aimed** at **reaching *consensus*** on **future decisions**).
            - The court was heavily informed by and **approved** of the **checks and balances** employed by the Labour Relations Board during such plenary meetings. For example, **not keeping minutes** of any plenary meetings, **not keeping attendance records**, and **not holding votes** at the end of discussions.
- In **Tremblay**, the SCC considered whether **obligatory plenary meetings** required to be called whenever a proposed tribunal decision was contrary to previous decisions. Imposing such group consultations on individual decision-makers whenever they may decide contrary to previous decisions was held to be an act of compulsion and contrary to legislative intent. The SCC noted that these obligatory plenary meetings were primarily aimed to **reach a *consensus***. Finally, **unlike** in **Consolidated-Bathurst**, the plenary meetings in **Tremblay** **lacked** the **requisite checks and balances**: the board **took attendance**, **voted** by show of hands, and **kept meeting minutes**.
- In **Ellis-Don v Ontario**, the SCC concluded that a **change** made to a **draft** decision after a plenary board meeting was **not** a breach of natural justice. The court held that it *"would be **speculative** to argue that the change was prompted by a **re-assessment** of the particular **facts.*** [**Note** that the discussion of questions of **fact** are **expressly forbidden** by the **Consolidated-Bathurst test**] *Furthermore, a change from a **favorable** to an **unfavorable** decision by **itself** does **not** … justify judicial review. In the case of an alleged violation of the audi alteram partem rule, the applicant **must** establish an **actual breach**; an **apprehended breach** is **not sufficient** to trigger judicial review… There is **no indication** of a change on the **facts**… The **change** in the **decision** of the panel **concerned** a matter of **law and policy**."'*

Lead Cases

The purpose of lead cases is to enable a tribunal board to have one case in which there were informed findings of fact and thorough analyses of the relevant legal issues in order to deal with similar cases in efficient and consistent ways. However, lead cases may **not** fetter an administrative body's independent and unbiased decision-making capability.

In the **Geza v Canada** decision, the immigration board implemented a procedure with which it attempted to select one of several similar or analogous refugee claims to inform future similar decisions. The federal court held that, on the totality of the evidence instead of a single fact or shortcoming, the use of the lead case **was aimed at reducing successful future** immigration **applications** and found that such a practice gives rise to a RAOB.

Polycentric and Multifunctionality

Administrative decision-makers often have multiple functions. Many tribunals are tasked with **investigative** and **adjudicative** functions. It is quite evident that such polycentric arrangements may give rise to a RAOB.

In **Currie v Edmonton Remand Centre**, members of the disciplinary board were chosen from prison guards tasked with the daily oversight of prisoners. This arrangement of investigative and adjudicative powers mingled together gave rise to a RAOB.

Conclusion and Remedy of Bias Analysis

Regardless of the degree or nature of the apparent bias, whether personal and/or institutional, if a reviewing court concludes that a breach has occurred then it **must quash** the decision.

Finally, it is relevant to our bias analysis to consider and accord curial deference to certain procedures established by the decision-making body. Reviewing courts should consider the **operational realities** of a **high volume of cases, plenary policy meetings, budgetary constraints, policy targets and/or limits, polycentric policy concerns, geographical application targets, and various other material indicators.** These additional elements should inform our test for the reasonable apprehension of bias.

Based on the above discussion, it is likely that a reasonable apprehension of **individual/institutional** bias exists on the facts of the case. I conclude that this finding of bias will likely result in a reviewing court ordering a writ of **certiorari** and/or a writ of **mandamus** ordering the impugned decision back to the SDM for reconsideration.

Substantive Review

Substantive review is concerned with the **decision itself**, not with whether the tribunal met its procedural fairness obligations. Courts analyze whether the administrative decision-maker *made an error* of the *kind* or *magnitude* that the court is willing to get involved in. Substantive review seeks to respect administrative decisions while supervising the substantive legality of those decisions.

Is Substantive Review Constitutionally Protected?

The central common law principle of statutory construction is that interpretation should express the will of the legislator. **Crevier**, relying on **section 96** of the **Constitution Act, 1867,** concluded that jurisdictional questions must be reviewed with the standard of **correctness**. The court effectively **constitutionalized substantive review** of **jurisdictional** questions, **regardless** of the presence of **privative clauses**.

Step 1: The Appropriate Standard of Review (Dunsmuir Standard of Review Analysis)

The ATA

The **first step** to any standard of review analysis is the determination of the appropriate standard of review based on the given circumstances. Prior to looking at the common law however, we must first determine whether the enabling legislation of the statutory decision-maker expressly imports the **ATA**.

If the enabling statute is **silent** or **expressly** excludes the **ATA's** applicability, our analysis **continues** by looking to the **common law** to inform our decision respecting the appropriate standard of review.

After **Southam**, BC legislators explicitly adopted the **three standards** of review in the **ATA. Section 58 and 59** statutorily recognizes and codifies the three SORs and therefore entrenches the approach to judicial review. The ATA also provides a **specific definition** for the **PU** standard in relation to **discretionary** decisions.

Does the privative clause meet the ATA definition? If not, sections 58 and 59 do *not* apply:
Once we have determined that the **ATA** is applicable to the impugned statutory decision-maker, the next step is to determine whether **section 58 or 59** apply.

Section 58 is applicable in cases where **a** privative clause **exists and** the said clause **meets** the **specific definition** as set out in **section 1** of the **ATA**.

If we determine that **no** privative clause is present and/or the privative clause as stated in the enabling legislation **fails** to meet the **ATA section 1** definition, **Section 59** applies to the circumstances.

The definition pursuant to **Section 1** of the **ATA** requires a **strong privative** clause asserting that:

1) the tribunal has **exclusive and final jurisdiction** to **inquire into**, **hear** and **decide** *certain matters* and questions, **and**
2) that the tribunal's **decision** is **final** and **binding and not open to review** in any court.

> **"privative clause"** means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

Section 1 of the ATA provides a definition for "tribunal": "a tribunal to which **some** or **all** of the **provisions** of **this Act** are **made applicable** under the tribunal's **enabling** Act". We therefore must **never assume** that the **ATA** applies to a SDM **unless** the **enabling** statute **expressly imports** either the **entire ATA** or **some** specific **provisions**.

Section 58 Applies

If section 58 is applicable to the statutory decision making body, we must determine what express SOR the ATA requires.

Section 58(2)(a) stipulates that if the nature of the decision is a question of **fact**, **law**, or **discretion**, then a **patent unreasonableness** standard is applicable.

- If the decision is of **discretionary** nature, section 58(3) further defines the **patent unreasonableness** standard. A discretionary decision is patently unreasonable if:
  - 58(3)(a): is exercised **arbitrarily** or in **bad faith**,

- 58(3)(b): is exercised for an **improper** purpose,
- 58(3)(c): is **based entirely** or **predominantly** on **irrelevant** factors, or
- 58(3)(d): **fails** to take **statutory requirements** into account.

If we determine that the decision is **not** discretionary but rather a **pure question** of **law** or **fact**, we must look to the **common law** to ascertain whether or not the decision is **patently unreasonable**.

Finally, pursuant to section 58(2)(c), if we determine that the decision is **not** of **discretionary** nature, nor a question of **law** or **fact**, then a standard of **correctness** is applicable.

Standard of review if tribunal's enabling Act has privative clause

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

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

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

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

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

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

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

Section 59 Applies

If section 59 is applicable to the statutory decision making body, we must determine what express SOR the ATA requires.

Pursuant to section 59(2), if the nature of the decision is a question of **fact**, then a **reasonableness** standard is applicable or the reviewing court may determine that there is no evidence supporting the finding of fact.

Pursuant to section 59(3), if the nature of the decision is **discretionary**, then the correct SOR is **patent unreasonableness**.

- Section 59(4) further **defines** the **patent unreasonableness** standard for **discretionary** decisions. A discretionary decision is patently unreasonable if:
    - 59(4)(a): is exercised **arbitrarily** or in **bad faith**,
    - 59(4)(b): is exercised for an **improper** purpose,
    - 59(4)(c): is **based entirely** or **predominantly** on **irrelevant** factors, or
    - 59(4)(d): **fails** to take **statutory requirements** into account.

Pursuant to section 59(1), a determination that the decision is **not** discretionary or a question of pure fact, but rather a **question** of **pure law**, then a standard of **correctness** is applicable.

Standard of review if tribunal's enabling Act has no privative clause

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

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

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

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

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

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

The Common Law Re SOR

In cases where the ATA fails to provide a specific definition for a SOR or we may be required to fill certain legal gaps in our SOR analysis, we must turn to the common law.
Prior **Southam**, there were only 2 SORs: correctness and Patent Unreasonableness. The SCC concluded that there must be a middle ground between the two existing SORs (correctness and PU) and **introduced** a **3rd** SOR: the **reasonableness** standard. An **unreasonable** decision is one that, in the main, 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 the **defect** is **apparent** on the **face** of the tribunal's reasons, then the tribunal's decision is **patently unreasonable**. But if it takes **some significant** searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

Dunsmuir, a landmark administrative decision, **condensed** the **three** standards of review back into **two** common law **standards** of review: correctness and reasonableness. The SCC also *rebranded* the **pragmatic and functional** test as the **standard of review analysis** aimed at helping courts answer whether the "*legislator intended this question to attract judicial deference*".

Common law suggests that we may utilize pre-**Dunsmuir** decisions to inform our SOR analysis. Old cases suggesting correctness inform our current correctness analysis. Old cases suggesting reasonableness and/or PU inform our current reasonableness analysis.

- **CORRECTNESS**: Court can **easily overturn** any decision it deems is not correct
- **REASONABLENESS**: Court must find an error that **stands up to somewhat reasonable probing** in order to overturn the decision
- **PU**: Court must find something **really bad** and **obviously** wrong with the reasoning in order to overturn the decision

Reviewing courts, in deciding which standard is appropriate in given circumstances, must follow the process introduced by the SCC in **Dunsmuir** and **Mowat**:

- **First**, prior to engaging in a lengthy analysis to determine the appropriate standard of review, reviewing courts must first determine whether any past cases have already determined the appropriate standard of review to be applied to this type of administrative decision. In other words, the courts must determine how big an error must the tribunal make before the court will get involved. If the case at bar fails to fit into one of these precedential categories, only then does the reviewing court engage in a more in-depth analysis called the **standard of review analysis.**
- **Second**, the reviewing court must assume that the more deferential **reasonableness** standard is the **default** starting position. Hence, the analysis closely resembles a **defeasible rule**: the default position is reasonableness, unless one of the exceptions overrules the default position.
- **Third**, if the court determines that a **standard of review analysis is necessary** on the facts of the case, then 4 non-exhaustive factors must be weighed. The standard of review analysis is a contextual exercise and does not necessarily consist of all four factors. In many cases it will not be necessary to consider all of the outlined factors because some of them may be determinative on their own:
    1) **Privative Clause**
    2) **Expertise**
    3) **Purpose of the Tribunal as Determined by the Enabling Legislation**
    4) **Nature of the problem (question of law, fact, or mixed law and fact)**

Privative Clause

Privative clauses are aimed at insulating the statutory decision-making body from judicial review and interference.

Courts have consistently interpreted privative closes **narrowly** because of the inherent struggles between parliamentary supremacy and the rule of law.

The modern approach is to treat the **existence** of a privative clause as a **strong but not definitive** indicator militating in favour of curial and towards a **standard** of **reasonableness**. It is important to note that the privative clause **should** be **analysed** with reference to the **expertise** of the tribunal: **Dunsmuir**

The **Dunsmuir** decision states that the *"**existence** of a **privative clause** is a **strong** indication of review pursuant to the **reasonableness** standard, since it is **evidence** of **Parliament** or a **legislature's intent** that an administrative **decision maker** be given **greater** deference and that **interference** by reviewing courts be **minimized**. It is **not**, however, **determinative**."*

Privative Clauses are analyzed based on two fundamental elements:

3) the tribunal has **exclusive and final jurisdiction** to **inquire into**, **hear** and **decide** *certain matters* and questions, **and**

4) that the tribunal's **decision** is **final** and **binding and not** open to **review** in any court.

The **absence** of a privative clause has a **neutral effect** on the standard of review analysis: **Dunsmuir** and **Khosa** and **Pushpanathan**

The **presence** of a **full PC** militates in favour of great curial deference: **Dunsmuir**

The **presence** of a **PC** that may **not** be of a **full** and/or strong nature militates in favour of a standard of deference. However, compared to the presence of a full PC, less strongly-worded clauses point to a slightly lesser standard of curial deference: **Dunsmuir**

Statutory Right of Appeal:
If the enabling statute provides applicants with a **statutory right** of **appeal** courts will generally accord **less curial deference** to administrative decisions. In contrast to strict privative clauses which illustrate lawmaker's intent to grant administrative decision-makers greater deference by superior courts, allowing statutory appeals have the exact opposite effect.

Expertise

The Canadian jurisprudence has been clear that the administrative decision-maker's expertise was **one of the most important factors** in the determination of the standard of review: **Southam**. A high level of expertise militates in favour of a high level of curia deference, and vice versa.

- It must be noted that the expertise **inquiry** is **limited** to the legislative roBle of the administrative actor, **not** to the ***particular*** individual occupying it. Courts will only look to evidence of expertise from the enabling statute and surrounding context, and will not scrutinize the qualifications, competence, training, or experience of a ***specific decision-maker***: **Dunsmuir**

Pushpanathan outlined 3 questions that must be considered in order to categorize the level of tribunal expertise.

1) **The court must characterize the expertise of the tribunal in question;**
    a. Statutory criteria of appointment: for example, non-legal qualifications, length of term, and security of tenure
    b. **Dunsmuir** concluded that a **discrete** and **special** administrative scheme in which the decision-making body has special **expertise**, for example labour relations or immigration, militate in favour of **reasonableness**.
        i. General Bodies that deal with economic, financial, or technical matters seem to have enjoyed the apex of high deference for their relative levels of expertise. For example, members of securities commissions, international trade tribunals, and telecommunications bodies have all been recognized by the courts as possessing experience, expertise, and specialized knowledge that courts lack.
    c. Labour boards have also been consistently viewed as bodies of high levels of expertise: **CUPE v NB Liquor Corp**
    d. **Ad Hoc** appointments usually militate in favour of low degree of expertise. For example, if an arbitrator is appointed on an ad hoc basis, courts are reluctant to grant a high level of curial deference.
    e. **Professional Discipline Committees**, such as law society or judicial council discipline committees, tend to attract a high level of curial deference: **Ryan** and **Moreau-Berube**
    f. **Decision-making bodies staffed by elected officials** tend to militate in favour of curial deference. For example, in **Baker**, the tribunal authority was granted to the minister of citizenship and immigration, but delegated to civil servants qua immigration officers. The court concluded that such ministers are deemed to have some level of expertise and therefore some curial deference must apply.
2) **The court must consider its own expertise relative to that of the tribunal; and**
    a. Courts have consistently **refused** to acknowledge a high level of curial deference to **human rights tribunals**. This is mainly because the questions being considered are so closely related to the functions of superior courts that expertise will usually be disregarded: **Chamberlain v Surrey School District**
3) **The court must identify the nature of the specific issue before the administrative decision-maker relative to its expertise**
    a. Courts have held that in instances where a highly-specialized tribunal decides a broad and general question, high curial deference must apply, despite the generality of the issue at hand: **Southam**

Purpose of the Tribunal as Determined by the Enabling Legislation

In **Pushpanathan**, the SCC stated that the **"the central inquiry in determining the standard of review exercisable by a court of law is the *legislative intent*."**

Pushpanathan concluded that where the enabling statute can be described as **polycentric** (*engages a balancing of multiple interests, constituencies, and factors or contains a significant policy element, or articulates the legal standards in vague or open-textured language*), a higher degree of curial deference must apply.

Discretionary decisions are *generally* (see below exception) deemed to militate in favour of a high level of curial deference. This is mainly because courts have consistently categorized discretionary decisions as polycentric because they involve the weighing of multiple factors.

- **Exception:** However, **Baker** shows that even in highly discretionary environments, polycentric decisions may impact only certain applicants.

Disputes that more closely resemble the traditional **adversarial, adjudicative, or bipolar** model of opposition between private parties will generally attract a ***lower level*** of curial **deference**. This is mainly because superior court judges are deemed to have a relatively higher degree of expertise and experience in the traditional adversarial model of adjudication.

Nature of the Question at Issue (question of law, fact, or mixed law and fact)

The nature of the problem is exercise of categorizing the issue at hand into either a question of law, fact, or mixed law and fact. We should always keep in mind that "*without an implied or express legislative intent to the contrary… legislatures should be assumed to have left highly generalized propositions of law to [superior]courts*": **Retired Judges.**

Hence, the **more general** or **broad** the types of questions under consideration, the **less curial** deference the reviewing courts will accord.

The **REASONABLENESS** (high deference) standard may apply in the following circumstances:

- Questions of **fact**: **Dunsmuir**
- Questions of **discretion** (**Discretionary** decisions are decisions where the **law** does **not** dictate **any specific outcome** and/or where a SDM is given a **choice** of **options** within a **statutorily imposed** set of **guidelines**): **Dunsmuir**
    - **Limits** of **discretionary** power do **not** ***only*** derive from the enabling legislation. Courts may be informed by soft law (guidelines and departmental policies), the common law, the constitution (rule of law and principles of the Charter), and international law (even international conventions ratified but not internalized by Canadian Parliament). Although **discretionary** decisions are generally given deference, ***they must still respect boundaries*** set by the statute, the *Charter*, the rule of law, the requirements of administrative law, and the values of Canadian society: **Baker**
        - In **Baker**, the court held that the humanitarian and compassionate considerations finding their genesis in international human rights conventions were disregarded. The court concluded that the discretionary power was overstepped.
    - **Highly discretionary** and **fact-based** nature of decision militates in favour of **greater degree** of curial deference: **Baker**
    - **Most** decisions involve **elements** of **discretion** because enabling statutes generally authorize tribunals to grant **various different remedies** and authorize SDMs to **interpret** their **home statutes**.
- Questions of **policy**: **Dunsmuir**
    - **Dunsmuir** concluded that whenever a SDM is tasked with **polycentric** decisions that require balancing between different constituencies, interests, and/or government policies, a **greater standard** of **curial deference** is **required**. The courts should not disrupt such a complicated network of multiple policy issues and their intricate maze of interrelationships. Courts seek to avoid a scenario analogous to a "bull in a China shop".
    - The **Baker** decision was **not** of a **polycentric** nature because the decision was quite **narrow** in its application only affecting Ms. Baker's **individual interests**.
- Questions of **mixed law and fact**: **Dunsmuir**
- Questions involving **discretionary decisions** involving **statutory exemptions** generally attract **greater deference** and militate in favour of a **reasonableness** standard. In **Baker**, the court held that a **higher degree** of **curial deference** should apply because the immigration officer was considering a **highly individualized** and **personal issue** as to whether Ms. Baker should be caught by the statutory provision **granting** a **humanitarian exemption**.

Reasonableness will apply even in *some* cases of **pure questions of law**:

- **Always**, where a tribunal is **interpreting** its **own statute** which is closely connected to its functions with which it will have a **particular** familiarity: **Dunsmuir**. A **major exception** to this rule is in cases where **human rights tribunals** interpret their enabling legislation; such circumstances would militate in favour of a correctness standard.
    - Remember, the **modern** and **repeatedly endorsed approach** by the SCC of **statutory interpretation**: *"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."*
- **Sometimes**, where a tribunal has **developed** a **particular expertise** in the application of some general common law rule in relation to a **particular statutory** context: **Dunsmuir**
    - **Example**: Labour law tribunals may be caught within this category.

- **Presence of Privative Clause**:
    - **Presence** of a **privative** clause is a good indicator of statutory direction of the need for deference. Although the presence of a privative clause within questions of law is a strong determinative factor, it is not determinative: **Dunsmuir**
    - **No** privative clause has a neutral effect and does **not** suggest **correctness**: **Khosa**

The **CORRECTNESS** (low deference) standard will apply to **QUESTIONS OF LAW** ***automatically*** in the following categories:

- **General Questions of Law** of **central** importance to the **legal system as a whole** ***and*** **outside** the adjudicator's **specialized area of expertise**: **Dunsmuir**
    - Alternatively stated, an important **general clue** that courts have consistently relied on in the determination of the appropriate standard of review is whether the issue at bar will have an important **precedential value** in subsequent jurisprudence.
- **Constitutional** questions: **Dunsmuir**
- "**True**" questions of jurisdiction **"where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter"**: **Dunsmuir** and **Northrop Grumman Overseas Services**
    - Does the tribunal have legislative authority to make this decision/remedy?
    - Determining whether there is jurisdiction to hear a particular dispute from particular parties is a matter of "true jurisdiction"
- Questions regarding the **jurisdictional lines** between **two** or more **competing** specialized tribunals: **Dunsmuir**

ATA Standard of review:

- look to whether the tribunal has a privative clause.
    - Determines whether **section 58** or **section 59** of ATA applies
- If PC, then look to whether the issue in dispute is one of law, fact, or discretion within exclusive jurisdiction.
    - If not, then default correctness applies.
    - If it's a **PF** issue, the question is just whether it was **fairness**: **Section 58(2)(b)**
    - If discretionary, then you have a definition of PU.
    - The test for PU other than for discretion is whether there is any statutory/legal basis capable of supporting the legal finding, or evidence in support of the factual finding. It is wrong to reweigh the sufficiency of the supportive basis, PU is just concerned with whether that basis is present.
        - If **any** evidence for the decision then it is **NOT** patently unreasonable.
- If no PC, then apply SOR set out in s. 59

Discretionary Decisions:

Discretion **must** be exercised **reasonably** and in **accordance** with the **principles** of the **rule** of **law** and **natural justice**: **Baker** and **Pushpanathan**.

KEY: with **Baker**, the Court added to the traditional SOR of discretionary decisions.

- Test is still that a **discretionary** decision will be **set aside** if:
    - arbitrary
    - considered irrelevant evidence
    - failed to consider relevant evidence
    - failed to take into account statutory requirements
- **Baker** added to this test by grafting onto it the SOR analysis
    - a discretionary decision may also be set aside if it fails the relevant SOR.
    - In most cases, this will probably be PU not reasonableness though.

The **key reason** in **Baker** why reasonableness was selected in lieu of the higher PU SOR was because of the **absence** of a **privative clause**. Had a private clause existed in the enabling statute, the court would have likely accorded greater curial deference and applied the PU standard.

Abuse of Discretionary Decisions

Abuse of Discretion as a Ground for Judicial Review

- **Development**:
  - Pre-*Baker*, discretionary decisions were reviewed on two bases: (*Roncarelli*)
    - **Genuine Exercise**: This was an infrequent and fact-based inquiry. Issue include:
      - **Rule against sub-delegation**: The empowered party must be the one to use the power
      - **Rule against abdication**: No one can dictate the empowered party's exercises of power
      - **Rule against fettering**: The empowered party must fully exercise their discretion; they must not fetter the discretion with **blind adherence** to an internal policy.
    - **Legality**: Proper authorization of the discretion. The courts would ensure that:
      - The power was exercised for **proper purposes**
      - The decision was not made on the basis of **irrelevant or extraneous considerations**
      - All **relevant considerations** were taking into account (*i.e.* all the considerations **required** by the statute, implicitly or explicitly)
      - The discretion was not exercised in **bad faith**, **arbitrarily** or **capriciously**.
  - **Example**: Premier of Quebec gets liquor board to revoke π's licence because π's a Jehovah's Witness. Errors: improper purpose, irrelevant consideration, bad faith, dictation. (*Roncarelli*)
  - Pre-*Dunsmuir*, discretionary and non-discret. decisions were reviewed on the P&F approach (*Baker*)
    - Today, it's really just a very, very deferential **reasonableness** standard.
- A discretionary decision is only **reviewable** (and then only on a reasonableness SOR) if: (*Suresh*)
  - It was made **arbitrarily** or in **bad faith**
  - It **cannot be supported** on the evidence
  - The tribunal **failed to consider the appropriate factors**
    - The Court will not reweigh factors if the decision was discretionary. (*Suresh*)
      - *Baker* breaks this, but *Suresh* explains this away as a "special case", claiming that *Baker* just found some implicit primary factors that weren't considered (*Suresh*)
    - **Example**: Immigration board considered each factor required by statute. Court refused to re-weight; no factors were missed, so the decision is not reviewable. (*Khosa*)
    - **Example**: Statute requires Minister to appoint a person to a labour arbitration panel who he thinks is "qualified to act". Court finds that the statute **implicitly requires** consideration of the person's qualifications, as well as the acceptability of the person to the parties. Unreas.(*CUPE*)
- **Unreviewable** discretionary powers:
  - Exercise of the Crown prerogative for the purpose of national security was unreviewable (*CCSU*)
  - **Later**: Crown prerogative to advise the Queen on conferral of honours was reviewable (*Black*)
    - The source of the power (legislative vs. prerog.) doesn't matter – subject matter does.
    - Security/war-related subjects are not reviewable. Individual-related exercises are.

Conclusion and Determination of the Appropriate SOR

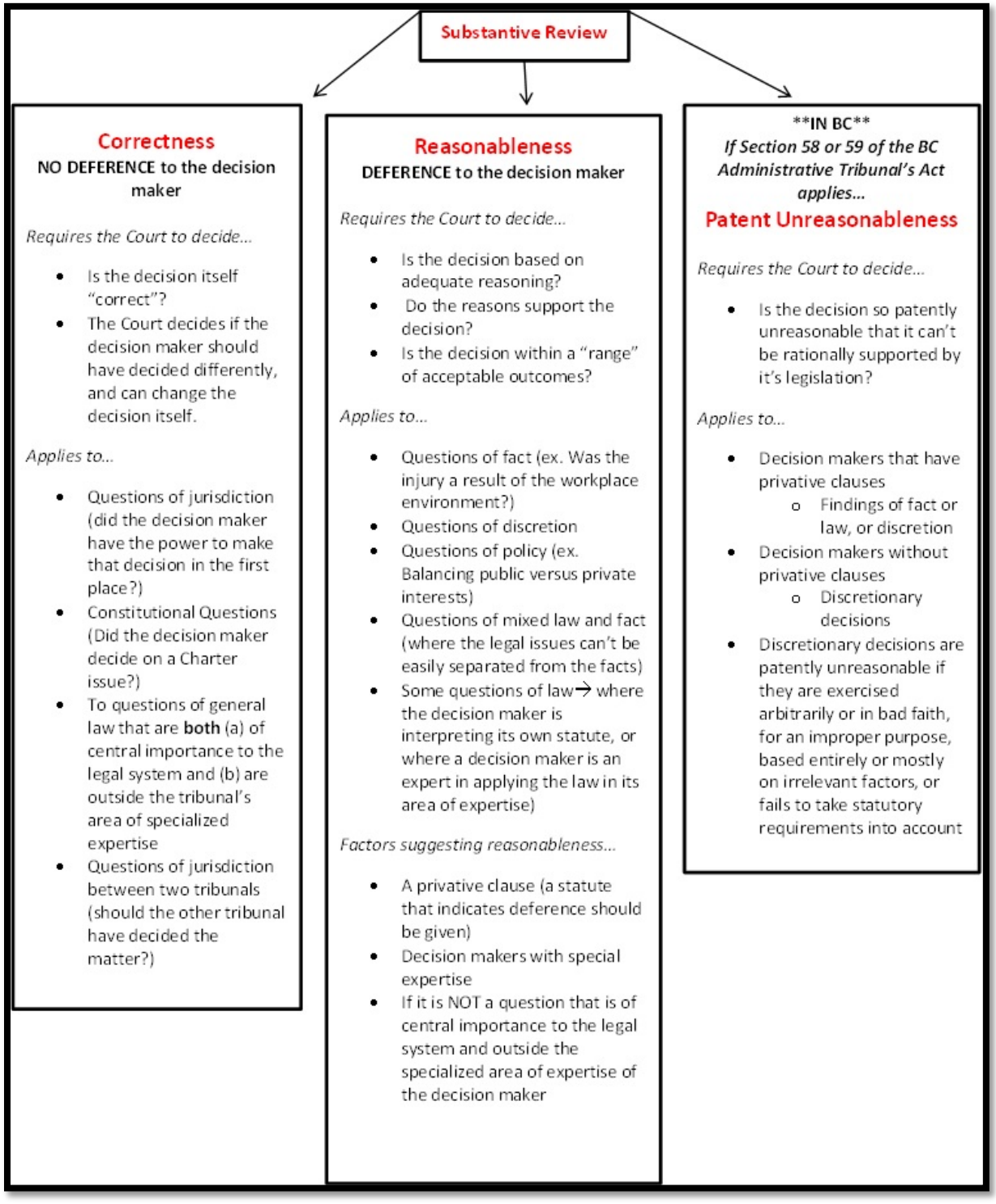
Based on the above factors, I conclude that the appropriate standard of review is **correctness, reasonableness, or PU (if ATA is applicable).**

Correctness: The standard of correctness is a standard of review and offers the lowest level of deference to tribunal decision makers. If the court deems the correctness standard as appropriate on the facts of the case, it must determine whether the decision was correct. Put differently, the court would only accept the tribunal's decision if it finds that the court itself would have reached the same decision. When applying the correctness standard, reviewing courts need not put any effort into assessing the administrative decision-maker's process of reasoning or final decision. A reviewing court "*undertakes its own analysis of the question*" and must determine "*whether the tribunal's decision was correct*": **Dunsmuir**

Reasonableness: The standard of reasonableness, a more respectful or forgiving standard of review than correctness, allows the court to evaluate whether the tribunal's decision falls within a **range** or **reasonable** alternatives. In **Dunsmuir**, the SCC stated that "*Reasonableness is concerned mostly with the existence of* ***justification, transparency and intelligibility*** *within the decision-making*

*process and with whether the decision falls within a **range of possible**, **acceptable** outcomes which are **defensible** in respect of the **facts** and the **law**".*

Patent Unreasonableness The **difference** between "**unreasonable**" and "**patently unreasonable**" lies in the **immediacy** or **obviousness** of the defect. If the **defect** is **apparent** on the **face** of the tribunal's reasons, then the tribunal's decision is **patently unreasonable**. But if it takes **some significant** searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.



Step 2: Substantive Review: Should the Decision Stand or Fall?

Once we have determined the appropriate SOR using either the applicable ATA provisions and/or the appropriate administrative jurisprudence, we must then ask whether the decision-making body's decision meets the applicable standard.

Remedies

Remedies: These were old common law 'writs' that were used when superior courts reviewed a tribunal's decision. However, historically, the courts could only implement one of the below remedies if the tribunal was found to have acted ultra vires. If tribunal stayed within its jurisdiction, the courts could not order any remedies.

Monetary Relief or Costs: Neither the old prerogative writes, nor the new statutory remedies of judicial review allow a party to obtain monetary relief through judicial review.

- In **Mowat**, the enabling statute provided the SDM discretionary authority to **"compensate the victim…for any expenses incurred by the victim as a result of the discriminatory practice."**
    - The tribunal decided to not only award $4,000 in **pain** and **suffering**, but also an **additional** $47,000 in "**legal** cos "compensate the victim…for any expenses incurred by the victim as a result of the discriminatory practice." ts". The SCC held that even though the SDM must be given curial deference to interpret its home statute, this particular decision was **not** reasonable.
        - The words of provision on own could support inclusion of legal costs, but in their statutory context, cannot be interpreted to create a stand-alone category of compensation supporting any type of disbursement
            - "costs" has a well-understood meaning that is distinct from expenses or compensation
            - Otherwise, would allow award for pain and suffering + potentially unlimited legal cost award
            - can't reconcile with monetary limit or lack of express provision for expenses.

- **Certiorari**: To quash or set aside a decision;
    - It should be noted that courts generally do not have the authority to substitute its decision for that of the tribunal's because the superior courts lack the statutory decision-making authority and lack the expertise that the tribunal has.
    - This is an *ex post facto* remedy because it provides relief after a decision is made.

- **Prohibition**: An order issued by an appellate court to prevent a lower court or tribunal from exceeding its jurisdiction, or to prevent a non-judicial officer or entity from exercising a power (To order a tribunal not to proceed);
    - Unlike certiorari, the remedy of prohibition provides relief *pre-emptively*. It arrests the proceedings of any tribunal exercising judicial functions in a manner or by means not within its jurisdiction or discretion.

- **Mandamus**: A writ issued by a superior court to compel a tribunal to perform a duty it is mandated to perform. In practice, an application for mandamus is often combined with an application for certiorari. Certiorari would be used to quash a decision – for example, for a lack of procedural fairness – while mandamus would be used to force a tribunal to reconsider the matter in a procedurally fair manner.
    - A variation of mandamus also allows a reviewing court to send a matter back to a tribunal for reconsideration *with specific directions*.
        - A superior court may only provide directions that protect against unfair procedures or excess of power and cannot tell a tribunal how to decide a certain matter. In other words, mandamus cannot be utilized to compel a tribunal to reconsider a discretionary matter in a specific way.
    - For example, in **PHS Community Services Society vs Canada**, the SCC used the remedy of mandamus to order the minister to grant an exemption from criminal drug possession laws to a government-sanctioned safe injection facility.

- **Declaration**: a declaration is a judgment of a court that determines and states the legal position of the parties, or the law that applies to them. In administrative law context, declarations are used to declare some government action ultra vires.
    - I should note that declarations are *not* enforceable and cannot be used to compel parties to undertake or refrain from taking any actions.

- **Habeas Corpus**: To order the release of the unlawfully imprisoned.
    - These old remedies were eventually adopted and/or subsumed into the tribunal statute providing specific guidance as to when a decision is judicially reviewable.

- **Remedial options outside the administrative law purview**: Government tribunals can be sued for breach of contract, for the tort of negligence, or the special tort of misfeasance in (or abuse of) public office. The main purpose of the tort actions is to protect a citizen's reasonable expectation that public officials will not intentionally injure public members through deliberate and unlawful conduct in the exercise of public functions: **Odhavji Estate v Woodhouse**

- The **ATA sections 45** and **46** expressly limit tribunals to consider either constitutional questions generally, questions relating to the Charter, and/or questions respecting BC Human Rights Code (because the legislature deems the BC Human Rights Tribunal the more appropriate forum for such challenges).

- **Enabling statute must state remedial options**: As a creature of statute, a tribunal cannot make orders that affect individuals' rights or obligations without authority from its enabling statute. Therefore, the first step in determining a tribunal's remedial options is to review the enabling statute itself. If a tribunal makes orders that fall outside its express statutory authority, then such orders will be found void.

- **If statute is silent, can still argue practical necessity**: If a statute is silent or does not set out any specific remedial authority, one may still argue that out of **practical necessity** the tribunal must have remedial powers to do the things its enabling legislation imputes it to do.

- **International and Transnational Agreements**: Judicial globalization has created an evolving transnational and international legal environment in which international and/or transnational agreements and obligations must be taken into account. Administrative tribunals must now consider such international obligations when making decisions and should be informed by international treaties and transnational human rights obligations.

Enforcing Tribunal Orders

The **ATA** permits tribunals to make certain enforceable orders by registering the same in the court registry. Once registered, such orders have the same effects as a court order (section 47).

A party to an administrative action may also bring an action against another party in court to enforce a tribunal's order(s). However, courts may only grant private applications to enforce a tribunal order where the court recognizes the tribunal's order as similar or analogous to the kind of order that a superior court might make.