Administrative Law CAN Kellan McKeen

# OVERVIEW - Admin Law

* Admin law source – enabling statute – about delegated power
* Admin tribunals are “creatures of statute”
* JR – heart and soul of admin law
* Courts = guardians of the rules of law (oversee executive actions)
* Tension in admin law – where does the legitimacy of the judiciary come from? – Exec and legislature are elected

Constitution

* No mention of Cabinet/PM/delegation of power
* Institutional dialogue btw 3 bodies – executive, judiciary, legislature to uphold the rule of law

Executive power – political exec, minister, crown corps, armed forces, municipalities

* Universities, self-regulatory organizations (subject to JR)

## History of Admin Law

* started w/ railways – Railway Commission
* courts unhappy about admin bodies – saying legislature – no jurisdiction
* increasing complexity of society, need for expertise in different area – gov’t bodies, admin developed organically
* WWI – gov’t bodies to deal w/ rationing, etc
* Willis – states should look after subjects from cradle to the grave – established “governments in miniature”
* First tribunals – labour tribs 1920s (tri-partite structure)
* Courts pushed back – concerns of patronage, appointment, merit for Boards
	+ In the era of legal formalism
* WWII – explosion of Crown corps, boards, tribs, agencies – welfare state
* OPC – had invasive powers, against privacy rights – established commission, brought courts back in – allowed for JR
* Then political shift (Mulroney) – gov’t too rigid, anti-bureaucratic platforms
* Now, move from welfare state to regulatory state – gov’t steers, private actors row (critique that maybe this has gone to far? – GFC)

### Administrative Bodies

* “sharp end” of constitutional law – affect ppl’s daily lives
* Agencies- are quite independent – can’t be fired, high expertise, power in statute
* Tribunals – more judicative (dispute resolution, enforcement) or more legislative (policy) or both (eg. Securities commission)
* If bodies impact your life, you have right to participate
	+ Formal – chance to submit application, appeal, etc
	+ Informal – chance to make written submissions, or right to get notice
* Tribunals
	+ Better than courts for specific expertise
	+ Efficiency/accessibility
	+ Certain functions more suited – eg. MVA driver’s tests
	+ Creating them – how much power/independence to give, appoint, rights (eg. To counsel), budget, expertise

### Court Oversight

3 forms of court jurisdiction:

1. Original Jurisdiction
* Sue admin body using contract, tort (very limited)
1. Statutory right to appeal
* Only have right if enabling statute allows (very rare) – eg. BC *Securities Act*
1. Judicial Review
* Courts using inherent jurisdiction to referee exercise of exec power
* 2 principles: 1) procedural fairness 2) substantive review

#### Crevier v AG (Quebec) (1981 SCC)

**Facts:** Quebec created prof trib adjudicating professional conduct. Privative clause that said their decisions can’t be reviewed.

**Issue:** is it a violation of s. 96 inherent jurisdiction of superior court?

**Outcome:**

* Ultra vires legislature’s jurisdiction to exclude judiciary from JR
* **Constitutionalized judicial review prerogative and the role of the courts as guardians of the rule of law**

# RULE OF LAW

ROL represents: 1) Political morality 2) Institutional control 3) Principle of legality

* Governs normative relationship btw institutions, state, individuals
* Prevents arbitrary exercise of power by state
* Judicial independence and access to justice

## 4 Legal Scholars View on ROL: Dicey, Fuller and Raz

### Albert Dicey, 1885 – Institutional Focus

* 3 features: 1) absence of arbitrary authority 2) formal legal equality 3) constitutional law
* mechanism: common law, parliament and unwritten constitution
* he was anti-admin agencies – untrustworthy, dangerous to ROL
* concerned about arbitrariness

### Lon Fuller, 1964 – Relationship Focus

* relationship btw state and ppl – not anti-institution
* procedural protections make productive social interaction possible
* Law must be general, public, clear, non-contradictory, prospective
* Admin agencies not inherently lawless – if follow rules (like courts)
* Respect law not b/c of content, but b/c built in reliable, fair way

### Joseph Raz, 1979 – Structure Focus

* Legality is practical guide for making effective law – means to end
* 3 principles: certainty, generality, equality
* system of law – prospective, access to justice, independent judiciary
* Doesn’t care about content – all about structure
* Total separation of law and politics – challenge for admin state

### Ronald Dworkin, 1985-2013 – Individual Rights Focus

* Rights conception – focus on legal subject – autonomy, liberty, equality
* Law as interpretation (judges and chain novel) – judges must apply principles
* Judges as keepers of political order – loves judges (not leg/exec)
* Doesn’t care enough about structure and moral heavy

## Supreme Court of Canada and the Rule of Law

Pre-Charter

Roncarelli v Duplessis (1959, SCC)

**Facts:** R is Jehovah’s Witness restaurant owner. D in gov’t persecuting JWs. D tells liquor commissioner to take away R’s liquor license. Statute vested all power of liquor licenses in commission. Statute said may refuse to permit any liquor license.

**Outcome:**

* Action was dictated by D, and his decision became liquor commissioner’s
* Substantive rule of law: no such thing as absolute and untrammelled discretion
* Without express language, no Act gives unlimited arbitrary power exercisable for any purpose, however capricious/irrelevant

Note – Fuller and Raz would have problem w/ lack of openness, and Dicey would have arbitrary problem. Rand (majority) imports Dworkin-type rights approach (for JWs).

Post-Charter

Re Manitoba Language Rights (1985, SCC)

**Facts:** Manitoba statutes required to be published in both official languages (MA and CA 1867). They didn’t comply – violation of constitution. All laws that violate are of no force and effect. If all laws invalid – no law, no one to pass new laws. Repealing and not repealing both ROL problems.

**Outcome:**

* Laws are invalid, and always have been.
* Constitutional supremacy and ROL must reign
* Suspended declaration of invalidity for 6 mos to adapt before ineffective

Secession Reference (1998, SCC)

**Four unwritten principles of constitution**

1. Federalism
2. Democracy
3. Constitutionalism and Rule of Law
* ROL guarantees formal conduits for dialogue
* Restrains Parliamentary supremacy
* Restrains courts from unilaterally substituting their views for another
1. Respect for minorities

**Outcome:**

* b/c of 4 unwritten principles, Quebec needs more than 50% + 1 vote to secede.
* Need clear, qualitative majority

Note – Court took Dworkin interpretive approach (next step in chain novel)

#### Imperial Tobacco (2005, SCC)

**Facts:** Statute allowed prov. Gov’t to recover costs from tobacco companies for healthcare. Imperial said it violated UP of ROL.

**Issue:** Was the statute a violation of the ROL?

**Outcome:**

* May have been arbitrary, but in terms of procedure was validly enacted
* Not for court, based on UP, to invalidate statute based on content

#### Christie v BC (AG) (2007, SCC)

**Facts:** Pro-bono lawyer for lots of ppl who couldn’t afford to pay. New tax in BC put 7% tax on legal services. He paid for his clients, access to justice issue. He argued part of UP ROL is access to justice, and this tax undermines ppl’s right to legal services in non-criminal cases.

**Outcome:**

* No such thing as general right to legal services in UP of ROL
* Can’t use Ups to override written principles of Constitution, and valid statutes

# REMEDIES

## Administrative Remedies – at the Tribunal/Agency Level

* Remedies are statutorily authorized – no general/inherent jurisdiction
	+ Authorization can be listed or general, explicit or implicit
* Broader in remedial scope – than court (b/c purpose built) – systemically oriented, forward-looking, diachronic (seised over time), polycentric (multiple parties)
* Affected by unique nature of membership and expertise
* Relationship to regulated communities – policy concerns and gov’t priorities
* More efficient – cheaper, more accessible (access to justice)

### Novel Remedies

Issues:

* When can tribunals create new remedies?
* Should tribunal decision-making and interpretive approaches mirror judicial ones?
* How do alternative remedies affect access to JR?

Factors:

* Ongoing seisin
* Broad mandate – not just privately contained – broad statutory/constitutional policies – relief is ad hoc, ongoing, prospective (far-reaching effects)
* Remedies address underlying structural or systemic problems
* Different expertise – diversity (maybe more economic than legal) - eg. Competition Tribunal is 6 judges, 8 lay members
* Crossing of public/private divide – admin bodies may outsource implementation of programs to private/third-party actors, but remain accountable

Innovative remedies:

* Independent third party – develop remedial measures w/in org/corp to effect systemic change – common w/ securities regulators
	+ Facilitate a deliberative process w/in org – to work through problems internally
* Is it appropriate to use law to simultaneously enforce rights, redress wrongs, and cure systemic problems?
* Int’l law has had impact – eg. Federal labour policies, int’l human rights

#### McKinnon V Ontario (Minister of Correctional Services) (2004 OCA)

**Facts:** Poisoned work environment for corrections officer M. Discrimination/harassment b/c he is aboriginal. Mgmt allowed it to continue, even after ordered to fix it. Complaint to OHRC, failed – then Board made orders – damages, promotion, relocation. Remained seised of matter until satisfied they complied. They didn’t comply – new Board hearing – crafted new orders: both Ministry wide and specific, including a 3rd party monitor.

**Outcome:**

* Remedies – emphasis on training, expertise of HR consultants – more about effecting wide-ranging ,permanent, systemic change to institutional culture
	+ Eg. Executive training, anti-racism training, Compliance committee
	+ Paid leave of absence, promotion
* Can’t create new remedies if imposed ones didn’t work – BUT if had good remedy and ppl didn’t comply, are entitled to produce more specific description of initial remedy

Are remedies appropriate?

* Maybe overstepping – legitimacy problem (massive jurisdiction)
* Correcting problems maybe through political means – collective will
* Fines not enough – might just prevent them from hiring Aboriginal ppl

#### Moore v BC (Education) (2012, SCC)

**Facts:** Boy w/ severe dyslexia. In-class support for k-grade 3 insufficient. Budget shortfalls, closed Diagnostic Centre in grade 3. He goes to private school, learning improves. Parents allege discrimination on basis of disability. Goes to HRT. HRT found individual discrimination against boy – failed to assess early or provide appropriate support after Centre closed. Remedy: parents reimbursed for private school tuition +$10K pain/suffering. Also found systemic discrimination against severe LD students by school district/province. Ordered systemic remedies: more funding, monitoring, develop plan/policy. Goes to SCC.

**Outcome:**

* Applied individual remedies only – remedy must flow from claim, HRT can only apply remedy to individual
* Shouldn’t distinguish btw individual/systemic remedies

Note – different than McKinnon – there M was still in poisoned environment (Boy graduated). Also Moore about core public funding (political realm), M more about cultural/environmental problems.

### Enforcing Tribunal Orders Against Parties

* Tribunal seeking to enforce own order –
	+ Tribunal statute power - rare (eg. Competition Tribunal)
	+ Conversion into court order (eg. Securities commission).
* Party seeks to enforce tribunal’s order
	+ Courts don’t like, don’t know jurisdiction – prefer trib to enforce
* Criminal prosecution
	+ Statutory provisions – quasi-criminal (Securities Act)
	+ Criminal Code provision – indictable offence to disobey order from tribunal – this is rarely, if ever, enforced)

### Challenging Administrative Action

* Internal tribunal mechanisms
	+ Slip rule – clerical error
	+ Reconsideration & rehearing
	+ Internal appeals/reviews (eg. IAD) – must exhaust before JR
		- Tribunal Administratif du Quebec
* External non-court mechanisms
	+ Ombudsman, media
* Going to court – Judicial Review (or appeals)

## Administrative Remedies – Beyond the Tribunal

* May be internal appeals available – look in statute (eg. IAD)
	+ Efficient, expertise, consistent decisions based on policies
* If not in enabling statute, for court appeals – for provincial trib, go to provincial superior court – for federal tribs, go to federal court

### Availability of Court Appeal

1. Enabling Statute
* Found where lack of trust of trib, and affects rights of indivs (eg. penalties)
1. Scope of appeal
* Check statute for possibly different standards (than court): *de novo* review, correctness standard, can only consider record, etc.
* Amount depends on trust of trib, or deference to body
1. As of right or with leave
2. Stay of proceedings
* May be automatic on appeal, or may have to appeal

### Availability of Judicial Review

**Discretionary – Court to grant JR or not**

* JR is extraordinary remedy; not in statute, but judicial function as guardians of the rule of law
* Inconsistency of trib decisions not independent basis for JR ***(Domtar)***
* Post-Domtar, JR becoming less discretionary overall

#### Domtar v Quebect (1993 SCC)

**Facts:** Domtar has plant, worker injured 3 days before plant set to close for 2 wks, w/o pay. How long should he be paid for? CALP (labour) says whole time, Labour Court (criminal) says just 3 days – interpreting same statutory provision.

**Issue:** Can inconsistency in trib decisions provide an independent basis for JR and therefore a judicial remedy?

**Outcome:**

* If grant JR, then rule of law values trump – arbitrariness bad
* Court says no – “principle of ROL itself must be qualified” – otherwise JR is arbitrary
* Court must respect tribunal autonomy, expertise
* Only intervene when conflict of decisions is serious or significant

#### Khosa (2009 SCC)

* Resurgence of list of principled reasons for not granting JR – based on historical factors – delay, laches, failure to exhaust remedies, bad faith, mootness, etc

#### Mining Watch (2010 SCC)

* Consider balance of convenience to parties – not exercising JR could compromise rule of law

#### Khela (2014 SCC)

* Habeus corpus is not discretionary, though JR still is
* If don’t grant JR, must have good reason – otherwise undermines ROL
* Conversation should be around merits of case, not whether to grant JR

**Threshold Question**

1) Public Body?

* Issues: where power comes from (statute)
* Public body exercising private contract? Then no
* Just b/c created by statute, doesn’t mean public (eg. Corps)
* Look at subject, not source – does decision fulfill public function or have public consequences? ***(McDonald)***

#### McDonald v Anishinabek Police Services

**Facts:** First Nation constable w/ APS, faced complaints of sexual misconduct. Training at OPP college. College officer interviewed him, then ordered out of college. APS chief decided he was investigated adequately, then discharged. Not a fair hearing. Said against PF – brought app for JR.

**Issue:** Are the APS Chief’s actions “public” enough to permit JR and the remedy of certiori?

**Outcome:**

* Look to subject of power, not source of power to determine remedy – if particular action affects individual rights
* If DM fulfills public function or if DM has public law consequences, then JR ok
* Criteria to consider:
	+ Source of power
	+ Function/duties of body
	+ Implied devolution of power – extent of gov’t direct control over body
	+ Body’s power over public at large
	+ Nature of body’s members and how appointed
	+ How funded
	+ Nature of body’s decisions
	+ Relationship to other stat schemes (“woven into network of gov’t”)
* Yes – this is public enough – not much more public than law enforcement

2) Standing?

1. Directly affected
2. Public interest standing (similar to civil litigation) (no class actions)

3) Which Court?

* Basic rule – if federally incorporated, then federal court, if provincially incorporated, then provincial court.

4) Deadlines?

* Very short for JR – usually btw 30 days and 6 months

5) Other means of redress exhausted?

* Must go through every other possible hoop before JR possible
* If availability of alternative adequate remedy, must exhaust – should presumptively view bodies as fair (***Harelkin)***

#### Harelkin v University of Regina (1979, SCC)

**Facts:** Student forced to withdraw, reasons unclear. Appeal to uni committee dismissed w/o hearing. Sought certiori (JR) for breach of PF rather than pursue right of appeal to uni senate. He wanted decision quashed so he could appeal initial decisions and present his side.

**Issue:** Could the senate apply alternative adequate remedy? If yes, then must go there. If not, then exhausted the remedy.

**Outcome:**

* Must show more than just a prior violation of PF – can’t assume the Senate will act the same as earlier committee
* Consider: the procedure on appeal (not de novo, but probably able to hear new info), composition of senate, efficiency, cost, etc.
* Presumption should be that bodies are fair, not unfair – respect legislative intent, uni’s autonomy, and convenience of both parties

**Remedies Available Under JR**

* Prerogative writs (common law)
	+ Certiorari = quashing
	+ Prohibition (preemptive) – used in advance, and rare
	+ Mandamus (mandate it be done) ***(Insite)***
		- Eg. Make tribunal hear it again
	+ Declarations – not enforceable, but statement of law
	+ Habeas Corpus and Quo Warranto
		- Produce the body, and explain why detention warranted
* Statutory Reforms
	+ In BC you seek JR
		- Now application for JR – writs rolled together
		- Not creating new remedies – old ones still matter
	+ Federal level – still use writs
		- Still use old writs
		- Eg. ***Khadr*** – writ of declaration. SCC declared that Cnd gov’t violated his Charter rights (creates political pressure). Can’t use mandamus b/c foreign affairs is Crown Prerogative

#### In-site (2011, SCC)

**Outcome**:

* Used writ of mandamus to mandate that Minister exercise his discretion in particular way to allow In-site exemption to keep operating (note Charter context)
* This is very unusual, and boundary pushing (usually Minister discretion off-limits)

## Charter, Private and Statutory Remedies

### Statutory Reform for Traditional Writs

**Statutory Responses:**

* + *Judicial Review Procedure Act* (BC)
	+ *Administrative Tribunals Act,* (BC)
	+ *Federal Courts Act* (federal)

*Judicial Review Procedure Act*

* S.2 (application for JR brought by petition proceedings
	+ (2) court may grant different remedies
	+ (a) mandamus, certiori, prohibition
	+ (b) declaration or injunction in relation to statutory power
* S. 12(1) no writs may be issued (2) application for writs must be treated as application for JR “in nature of” old writs (under s. 2)
* S. 14 sufficiency of app – as long as set out grounds for relief, don’t need to specify which writ using
* S. 3 if error of fact, can send back down for reconsideration

*Federal Court Act*

* No inherent jurisdiction - not a s. 96 court
* Constitutional challenge to fed stat creating fed admin agency – likely *concurrent* jurisdiction w/ provincial superior court
	+ Can choose to go to either court – forum shopping
* S. 28 – Federal court has jurisdiction to determine applications for JR for federal boards, commission, or tribunals (lists them – some go straight to FCA)
* S. 18 Kinds of relief – (1) FC has exclusive original jurisdiction:
1. To issue injunction, writ of certiori, prohibition, mandamus or quo warranto

Note – habeus corpus missing (provincial) except federal penitentiary (Khela)

- Concurrent jurisdiction – can go to either (usually provincial)

These are discretionary remedies (“may”)

* S. 18.1(2) limitation – app for JR must be made w/in 30 days of decision (but judge can extend if merit and reasonable)

Have you exhausted all remedies? – common law applies ***(Harelkin)***

* S. 18.5 – If statute expressly provides for appeal to Fed Ct., FCA, SCC, Tax Court of Canada, GIC or Treasury Board, then can never apply for JR – ousts JR!
	+ Eg. Wind Mobile – could appeal CRTC decision to GIC or FCA – choice of judicial (for error of law) or executive (don’t like law argument) but can’t argue PF b/c no JR
		- Could apply for JR after GIC decision re: PF, but unlikely successful

JR with leave or as of right?

* Have a right for everything except IRPA (where need to seek leave)

Standing to seek JR?

* S. 18.1(1) application made by AG of Canada or anyone directly affected
* Public interest standing – 3 part test – serious issue raised, genuine interest in outcome of litigation, and no other reasonable/effective way to bring to court
	+ Relaxed by DTES SWUAV – just need to show ‘a’ reasonable way

Grounds of Review

* S. 18.1(4) grounds for relief if tribunal/admin agency:
1. Acted w/o jurisdiction
2. Failed to observe PONJ or PF
3. Erred in law
4. Based decision on erroneous finding of fact – perverse/capricious manner
5. …fraud or perjured evidence
6. Acted in any other way that was contrary to law

Standards of Review

* Once in JR, court will decide which SOR to apply: correctness or reasonableness
* Grounds of review get you in the door – they don’t address SOR ***(Khosa)***

### Private Rights of Action

* Admin agencies can be sued for breach of contract
* Tort of negligence

**Tort of Misfeasance in Public Office**

* High bar to succeed – show 1) deliberate and unlawful conduct 2) public officer’s subjective knowledge that conduct unlawful and likely to harm
* Acknowledgment that tort exists ***(Odhavji)***
* Correctional staff didn’t get new shoes for inmate, injured ***(McMaster)***
* Is your claim fundamentally private? – if yes, then can proceed w/o JR ***(Telezone)***
	+ If public, like PF – then must go under JR
	+ Pick your remedy – damages or JR

### Charter Remedies in Admin Law

Policy question: should admin tribs be allowed to give Charter remedies or deal with Charter claims?

* Access to justice for more ppl
* Quicker, cheaper
* Charter rights should be protected frequently
* BUT…SCC are experts
* Tribs shouldn’t be haphazardly giving out Charter remedies
* Tribs don’t have proper remedies available (eg. Can’t name a law invalid)

#### R v Conway (2010 SCC)

**Facts:** Conway wants an absolute discharge from mental health institution based on alleged Charter rights violations. Can the Ontario Review Board grant it?

**Issue:** 1) Is ORB court of competent jurisdiction for s. 24 of Charter? 2) If so, does it have jurisdiction to grant remedy Conway is seeking?

**Outcome:**

* 1) See if trib has jurisdiction to grant Charter remedies generally – a) can it decide questions of law and b) has jurisdiction been removed by legislature?
	+ Look at enabling statute
	+ Court finds yes, it is
* 2) Must assess on case-by-case basis
	+ look to statute – here, ORB has to consider public safety, indiv’s condition
	+ no jurisdiction to grant absolute discharge

Note – this decision is limiting

# PROCEDURAL FAIRNESS

* standard of review = correctness (or actually fairness!)
* Various sources of procedural rights (usually everything BUT the enabling statute)
	+ Eg. Charter s. 7 (POFJ), agency guidelines, int’l law, Bill of Rights (for fed tribs), similar agencies’ procedures
	+ Sources (pyramid of power)
		- Charter (POFJ)
		- Legislation (statute, regs, guidelines) – can override CL through clear statutory language
		- Common law – “supply omission” of leg through stat interpretation
* 3 step analysis:
1. Threshold – any fairness?
2. Content – how much fairness?
3. Application to case at hand

## Threshold – Entitled to any Fairness?

Duty of fairness was in transition (starting w/ Nicholson, 1979)

#### Nicholson (1979 SCC)

* Natural justice = full oral hearing where judicial/quasi-judicial
* General CL duty of fairness on a sliding scale –admin
	+ Eg. Right to be heard, right to independent/impartial hearing
	+ N
* Note – natural justice term dead now (PF instead)

Duty of fairness today (via *Nicholson, Cardinal, Knight, Baker*):

* N/A to purely legislative decisions
* N/A to policy decisions
* May apply to subordinate legislation but not if essentially legislative in nature
* Applies to final or de facto final decisions, rarely to preliminary
* Triggered by effect on individual rights/privileges
* Can be suspended for emergencies

**Duty of fairness only applies to decisions that affect the rights, privileges or interests of an individual but not legislative decisions (*Cardinal v Kent)***

#### Cardinal v Kent (1985 SCC)

**Facts:** K segregates 2 prisoners after hostage situation. Segregation Board recommends release into general pop, director refuses – no independent inquiry, not informed of reasons, no opportunity to be heard.

**Issue:** Were they entitled to receive any PF in this decision?

**Outcome:**

* Look at statute – gives Director authority to segregate, SB gives recommendation, no time limit – not deprived of privileges (not punishment)
* CL principle of PF lies as a duty on every public authority making admin decisions not of a legislative nature + which affects rights, privileges or interests of individual
* Director should’ve informed prisoners of reasons, given opportunity to make reps, challenge info & decision
* Rights, privileges, interests seriously affected – segregation was unlawful

#### Knight v Indian Head School Division (1990 SCC)

**Facts:** His contract hadn’t expired, turned down new 1 yr contract. They fired him.

**Outcome:**

* 3 part PF test:
1. Nature of decision
	* Legislative or administrative?
	* Preliminary or final?
		+ Eg. Interlocutory decision = less PF
2. Relationship btw body and individual
3. Impact on individual

Note \*\* - Dunsmuir undermines on content but 3 part PF test for threshold still helpful – especially part (1) re: nature of decision

### Decisions

* Must be final, not interim decision – if too many interim steps, then no PF at early stages ***(Dairy Producers’ Coop)***
* With exceptions – if interim, but “practically speaking” the final decision ***(Re Abel)***
* Some PF may be required at initial hearing stage, if penalties large at final outcome ***(Irvine)***
* Note – courts more deferential in Irvine b/c economy involved

#### Re Abel (1979 Ont Div Ct)

**Facts:** He was in psych facility. Advisory board made recommendation to LG, who ultimately made decision about staying. A wanted to access his files to know case against him and respond.

**Issue:** Should the interim “decision” from the advisory board be reviewable?

**Outcome:**

* Advisory board is “practically speaking the patient’s only hope of release”
* Should look at degree of proximity btw board and LG
* At a minimum, he should have summaries/transcripts of files

#### Dairy Producers’ Coop (1994 SKQB)

**Facts:** Investigation from Commission into sexual harassment claims. Investigator wrote report about whether to go to HRT. Coop wants more info about the report – more PF at the investigation state (preliminary decision stage).

**Issue:** Entitled to PF at investigation stage?

**Outcome:**

* No duty of PF here b/c he’ll get it at board of inquiry (HRT)
* Too many interim steps = no PF at early stages

#### Irvine v Canada (1987 SCC)

**Facts:** Anti-trust competition and monopoly bureau. Hearing Office Report to see if go to Full Inquiry. Officer didn’t adhere to PF rules (elaborate process). Irving allowed at some stages, couldn’t CE witnesses. Irving said even to go to Full Inquiry damages reputation.

**Issue:** Are they entitled to full PF at hearing stage?

**Outcome:**

* Entitled to some PF at hearing stage – it was enough (counsel allowed there)
* Fairness flexible, depends on context –the seriousness of the penalty at Full Inquiry trickles down the entire structure (consequences greater than *Dairy Coop*)
* Don’t burden/complicate law enforcement process (already hard to prove crimes)

### That Affect the Rights Privileges or Interests of an Individual

* vested interest in remaining in property – owed PF ***(Re Webb)***
* PF rights apply equally to disadvantaged
* Are interests “sufficiently directly and substantially affected? Does it create a slur on reputation? ***(Re Hutfield)***

#### Re Webb (1978 Ont CA)

**Facts:** W was tenant in subsidized housing w/ disruptive children. Ontario Housing Corp. terminated her lease, kicked her out – no reasons, opportunity to respond. No statutory right to acquiring/staying in public housing.

**Issue:** Is she entitled to PF re: this decision?

**Outcome:**

* no right to subsidized housing, but once in, entitled to PF b/c she has a vested interest in remaining there (but low level – someone talking to her enough)
* PF rights apply equally to disadvantaged
	+ \*important b/c used used to be that property rights being affected entitled you to most PF – disadvantaged don’t have same property rights

#### Re Hutfield (1986 Alta QB)

**Facts:** H is licensed physician, but also need hospital privileges to practice in hospital. College of Physicians approved him; hospital board rejected him 3 times. No reasons, no opportunity to appear and speak.

**Issue:** Is he entitled to PF even though he has no vested interest?

**Outcome:**

* PF owed – doesn’t matter than interest not vested, b/c rejection casts a slur on his reputation as a doctor
* Interests sufficiently directly and substantially affected?

Note – may be inherent professional elitism – probably wouldn’t get PF for lower profession

### Not Legislative Decisions

* legitimate expectation don’t create substantive rights, can’t constrain democratic features ***(Canada Assistance Plan)***
* No PF re “purely legislative functions” or “purely ministerial decisions on broad grounds of public policy” ***(Canada Assistance Plan)***
* New legislation doesn’t create duty of fairness ***(Wells)***
* Even if heinous legislation, no duty of PF ***(Authorson)***

#### Reference re: Canada Assistance Plan (1991 SCC)

**Facts:** CAP = feds agree to cost-sharing w/ provinces. S. 8 provides for continuation, amendment, termination (by mutual agmt or giving 1 yr notice). Federal deficit reduction: Bill C-69 unilaterally reduced funding to BC, ON, AB (no notice). Provinces say they had legit expectation that they’d be consulted.

**Issue:** Does doctrine of legitimate expectations create legally enforceable consultation obligation in this case? Do feds have to consult provinces before creating leg?

**Outcome:**

* Legitimate expectations don’t create substantive rights – only goes to process, not outcome
* No PF re purely legislative functions or purely ministerial decision on broad grounds of public policy
* Constitutional or quasi-con statutes might bind future gov’t, but not here

#### Wells v Newfoundland (1999 SCC)

**Facts:** W was NFLD Utilities Commissioner. Gov’t reorganized the commission, essentially getting rid of his job (8 instead of 9 seats). He said owed PF.

**Issue:** Entitled to PF?

**Outcome:**

* Purely legislative – not owed any PF – province able to make new legislation

#### Authorson v Canada (AG) 2003 SCC)

**Facts:** Gov’t used interest from veterans benefits plan. Passed statute to retroactively remove their rights to interests. Challenge on absence of PF (no consultation).

**Issue:** Did they have a duty of PF – to consult w/ veterans? Bill of Rights apply?

**Outcome:**

* No PF – this is primary legislation, and Parliament is free to pass
* Even though heinous legislation, there is no right to notice/hearing
* Bill of Rights doesn’t help

### Cabinet or Ministerial Decisions

* In exercising its statutory power (Cabinet decision) the GIC is not *automatically* sheltered from review ***(Inuit Tapirisat)***
* But…if dealing w/ Cabinet decision, unless extraordinary decision, probably not entitled to PF (even if adjudicative seeming) ***(Inuit Tapirisat)***

#### Inuit Tapirisat v Canada (AG) (1980 SCC)

**Facts:** CRTC holds hearings re: rates in NWT. CRTC allows Bell rate increase. Inuit Tapirisat Council (ITC) in hearings. ITC appeals to G-in-C as statute directs. GIC shuts ITC out of appeal proceedings, then denies ITC’s appeal. ITC says didn’t receive PF at GIC. ITC could’ve chosen appeal to FCA (statutory right) but not really error of fact/law. Chose GIC b/c it’s a policy decision.

**Issue:** Are Cabinet and Ministerial decisions owed a duty of PF?

**Outcome:**

* in exercising statutory power, the GIC is not *automatically* sheltered from review
* Look at the statute (what legislator intended) – here procedure not appropriate:
	+ Broad discretion granted to GIC
	+ Polycentric decision
	+ This kind of decision was historically located w/ legislature
	+ Said admin structure (CRTC to GIC) irrelevant (CF doesn’t buy this!)
* Dividing line btw legislative/admin function not easy – here it is legislative

### Subordinate Legislation

* Muni can pass bylaw against interests of ppl, but must give notice and the right to be heard ***(Homex Realty)***
* Parties must come to JR with clean hands – court has discretion ***(Homex Realty)***
* Regulations aren’t reviewable, except in cases of excess jurisdiction, or failure to comply w/ legislative or regulatory requirements ***(Immigration Consultants)***

#### Homex Realty v Wyoming (Village) (1980 SCC)

**Facts:** Homex wants to develop subdivision, land was on previous contract w/ village. H wanted muni services to the land, begins developing. Village says never agreed/intended. Pass municipal by-law aimed at Homex: states that muni can pull registered status that has been around less than 8 yrs, no notice required (only applies to them). H says entitled to notice and to be heard seeks to quash by-law.

**Issue:** Entitled to PF?

**Outcome:**

* Normally if interference w/ property rights, extra CL PF (notice) required – but no longer automatic
* Must consider context – what was muni trying to do? Used as trump law to resolve dispute w/ party – so need to hear the other side
* Muni can pass bylaw against interests of ppl, but must give notice/right to be heard
* H has right to notice, but no remedy granted
* Court uses discretion to not grant JR remedy – H didn’t come with clean hands

#### Immigration Consultants (2011 FC)

**Facts:** CSIC = sole independent self-regulatory body for immigration consultants. Many complaints – Parliamentary committee recommends professionalizing it. Pressure and lobbying by CSIC/s nemesis CAPIC. Selection process for new regulator – then by regulation, Minister revokes CSIC’s regulatory designation and gives to other body, ICCRC (linked to nemesis CAPIC).

**Issue:** Regulation give rise to PF for CSIC, b/c affects rights/not purely legislative?

**Outcome:**

* Regulations or policies of GIC (or Minister here) aren’t reviewable, except in cases of excess jurisdiction, or failure to comply w/ legislative or regulatory requirements (eg. Publishing in Gazette).
* Eg. Of excess jurisdiction – bad faith/illicit purpose (like Homex)
* Legit expectations n/a, applicant isn’t individ whose rights affected, not bad faith to have policy preferences

### Policy Decisions

* purely ministerial decision, on broad grounds of public policy, typically gives no procedural protection ***(Martineau)***
* some admin bodies are required to assume duties traditionally performed by legislatures- should distinguish decisions of legislative/general nature from acts of more administrative and specific nature ***(Knight)***
* regulations or policies of G-in-C (Minister) aren’t reviewable, except in cases of excess jurisdiction, or failure to comply w/ legislative or regulatory requirements ***(Immigration Consultants)***

### Emergencies

* Can suspend PF temporarily, but can’t rid of completely (maybe lower amount)

## Content of Procedural Fairness – How much entitled to?

#### Baker v Canada (1999 SCC)

**Facts:** B entered as visitor, never PR, worked under the table. 4 children born in Canada, 4 from Jamaica. Mental illness, welfare, 2 kids in foster care. Ordered deported. Applied for H&C grounds. Supporting docs from doctor, social worker – making progress but psych problems – won’t have healthcare in Jamaica. Sr. Officer denies, no reasons. Counsel requests reasons, receives Jr. Officer’s inflammatory email (court finds these = reasons).

**Issue:** Is she entitled to any PF at all? (threshold question) How much PF?

**Outcome:**

* Test for how much procedural fairness – Factors to consider (non-exhaustive)
1. Nature of decision being made and process followed in making it
	* How close to judicial process it is, how much process does statute provide for, function of trib
	* Overall, more judicial the body = more PF; more policy = less PF
2. Nature of statutory scheme
	* How final is decision (more final = more PF), is there appeal?
	* Appeal = usually less PF BUT also creates a duty to provide reasons at lower hearing so appeal more meaningful
3. Importance of decision to individuals affected
4. Legitimate expectations of PF
	* Of a process (eg. Statute, etc)
	* In an outcome (higher legit expectations = more PF)
5. Choices of procedure made by agency itself
	* Under statute, how much power trib has to make its own procedure
		+ More control over procedure = less PF (deference)
	* Does trib have expertise of procedure that court doesn’t?
		+ More expertise = less PF

Application to facts:

* B argued LE of PF from UN convention – SCC says not domestic law, no LE
* Participatory rights
	+ This is agency, not very judicial – less PF
	+ b/c exemption from general rule, less PF
	+ but no appeal procedure – more PF
* Importance of decision to individual affected:
	+ Exceptional in life is this claimant – more PF
* Choice of procedure:
	+ Minister has system, discretion under statute – less PF, more deference
* On balance, PF owed:
	+ “more than minimal”, circumstances require “full an fair consideration…meaningful opportunity for those being affected to present evidence relevant to case, have it fully/fairly considered
	+ Not entitled to oral hearing – had chance to give evidence/docs
* Reasons
	+ Sometimes reasons required as matter of PF
	+ If duty to provide reasons, and none given, haven’t met duty of PF (note – content of reasons goes to substantive review)
	+ Here, officer’s email was enough – court flexible on what reasons are
* Court found she received PF, but she won on reasonable apprehension of bias

#### Mavi v Canada (AG) (2011 SCC)

**Facts:** PPl signed sponsorship undertakings, didn’t uphold. Clause in contract: “minister may choose not to recover money if default is result of abuse/other circumstances. Doesn’t cancel debt.” Permissive language “may” and “choose”. Sponsors claim they have 1) Legitimate expectations (procedural) to know when their sponsoree began racking up debt w/out their knowing, and 2) Legitimate expectations (outcome) that Minister will choose not to take enforcement action in other circumstances such as this one – a substantive expectation of the result.

**Issue:** Were they correct to have these LEs? Did they receive the PF entitled to?

**Outcome:**

* Content of PF (how much) depends on context
	+ This is ordinary debt proceedings (not benefits/licensing) and a contract undertaken in writing
	+ Policy concerns- public supporting relatives (this is their job!)
* Applied non-exhaustive 5-part Baker test
	+ Factor 1 – quite judicial = more PF
	+ Factor 2 -No scheme = more PF
	+ Factor 3 - Individual impact – effect is significant, large impact = more PF
	+ **Factor 4 (legitimate expectations)**
		- Representations must be “clear, unambiguous and unqualified” (so if reliance was enough that could’ve relied on in private contract law, then that is good enough)
			* Proof of reliance not required
		- LE created by wording of undertakings – bureaucracy shouldn’t proceed w/o notice or w/o permitting sponsors to make a case for deferral or other modification of enforcement procedures
	+ Factor 5 – legislation leaves enforcement decision to gov’t itself – this is compatible w/ debt collection = less PF

Application to case

* Content of PF includes a) notify sponsor, b) give opportunity to explain personal financial circumstances c) consider these circumstances d) notify sponsor of gov’t decision, w/o need to give reasons

Note - \*\* locates Baker 5-part test into bigger policy bubble – the goals the gov’t trying to advance, etc.

### The Content of Procedural Fairness

* Notice
	+ If technical breach (lack of statutory notice) not important – assess whether it was still enough time to respond (but what about LE?)
* Disclosure aka Discovery
* Oral hearings
	+ Important when credibility at issue
* Right to counsel
	+ Most often given when rights are complex/consequences are severe
	+ When issue at stake very important to ppl involved, and having counsel impacts ability to respond
* Right to cross examine, call witnesses
* Timeliness and delay (less formal – must be egregious)
* Reasons
	+ See later in CAN for more details

Note- compare what was found in Nicholson, Cardinal, Homex, Baker, Mavi

## Charter and Procedural Fairness

* Charter applies to all tribunals, b/c exercising statutory power (*Blencoe)*
* To be entitled to PF, need s. 7 POFJ claim

Threshold question: are your “life, liberty or security” interests impaired?

* If not, can still look to CL principles (admin law)
* OR Bill of Rights (eg. *Singh*)
	+ Includes some parts Charter doesn’t
	+ (1)(a) right of “individual”, enjoyment of property
	+ (2) every law of Canada will not abrogate – quasi-constitutional
		- (e) deprive person of right to fair hearing in accordance w/ POFJ
		- Note – applies to all rights in Bill of Rights (not just s. 7)

#### Singh v Canada (Minister of Immigration) (1985 SCC)

**Facts:** Singh argued statutory design of IRPA makes it impossible to get PF. Claim refugee status, examined under oath by immigration officer. Counsel present. Transcript made, sent to Minister, who sends to IRB for recommendation based on transcripts. They recommended denial, Minister affirms, and he’s deported.

**Issue:** Does this procedure violate PF under s. 7 Charter? Saved by s. 1?

**Outcome:**

* Threshold – refugee claimants are physically present in Canada, so entitled to Charter protection
* Immigration Act procedures deny s. 7 rights – not keeping in POFJ
* In refugee context, credibility largely at issue – how to assess w/o oral hearing?
* Also process is adversarial – minister is waiting in the wings to deport
* Not saved by s. 1 – rejects utilitarian arguments (can’t give hearing to everyone)

Note – Beetz (concurring) – reluctant to use Charter, thought Bill of Rights tailor made

* Determination of rights and obligations = “fair hearing in accordance w/ fundamental justice”

#### Suresh v Canada (Minister of Immigration) (2002 SCC)

**Facts:** S gets Convention Refugee status. CSIS report says he’s Tamil Tiger. S. 40.1 Security certificate – then deportation hearings, he fails. S didn’t receive officer’s memo, or reasons, and can’t make submissions. S. 53(1)(b) cert –says deportation possible even facing torture. S seeks JR – procedure at issue.

**Issue:** 1) Do deportation procedures violate s. 2 and 7 Charter? Saved by s. 1? 2) What procedures would satisfy the POFJ?

**Outcome:**

* Same duties underlie s. 7 and the admin law duty of fairness, though not always identical
* S. 7 POFJ require, at minimum, compliance w/ duty of fairness principles
* Not constitutionalizing CL principles, but they “inform” content of s. 7 POFJ

Application to case

* Applying Baker 5 factors in s. 7 context
	+ Factor 1 – nature is serious, looks very judicial (more discretion though at 53(1)
	+ Factor 2 – no appeal from 53(1) = more PF
	+ Factor 3 – torture at issue (substantial PF) = more PF
	+ Factor 4 (LE) – Canada signatory to CAT
		- Note, similar to Baker’s argument – successful this time
		- Reasonsable to expect more PF when torture at issue
		- But no LE in outcome
	+ Factor 5 – choice of procedure made by agency itself = less PF
		- Statute gives much deference to agency
* Outcome: POFJ require more than what Suresh got
	+ More than Baker (facing torture) but not criminal law world
* At 53(1)(b), should’ve got: informed of case against him, opp to respond, opp to challenge Minister’s info, written reasons, NOT full oral hearing
* S. 1 – valid objectives alone don’t justify infringements
* Limitations in Act not connected to objective nor proportional to harm
* But extraordinary circumstances will justify deportation to torture

**When to use Charter argument instead of CL:**

* + CL PF only fills in blanks where legislation isn’t explicit
	+ But if legislation explicitly and intentionally allows/doesn’t allow certain procedures, might need Constitutional argument to overcome, whereas CL PF doesn’t overcome statute (pyramid of law)

#### Blencoe v BC (HRC) (2000 SCC)

**Facts:** B, former BC Cabinet minister, accused of sexual harassment. Stepped down as Minister, dismissed from Cab, ejected NDP caucus. HRC investigation. Trib hearing scheduled but 30 mos passed. HRC did nothing for 5 mos. His life ruined – applied to have complaints stayed due to unreasonable delay. Said violated s. 7 rights (POFJ), or admin PF violation.

**Outcome:**

**Issue 1)** Does Charter apply to BCHRC?

* Yes, it was exercising statutory authority (although independent)

**Issue 2)** Have B’s s. 7 rights been violated by delay in HR proceedings?

* No – life, liberty nor security of person violated – doesn’t cover emotional stress
* Obiter – said POFJ observed anyway (but delay could still produce s. 7 argument)

**Issue 3)** Was B entitled to remedy under admin law principles?

* Ask, was there prejudice to the fairness of the hearing – only then will delay violate PF (eg. Someone dies, moves away)
* No other prejudice – stress caused by media attention, not delay

**Issue 4)** If he is entitled to remedy, is stay of proceedings the appropriate remedy?

* No – can’t cancel tribunal hearing b/c of delay

Note \*\* - Possible the “tail” wagged the dog – court couldn’t think of appropriate remedy, so didn’t find that delay caused breach of admin PF or POFJ

#### Charkaoui v Canada (2007 SCC)

**Facts:** 5 detainees suspected of being Canadian Al Qaeda sleeper cell. Concerns ex parte, in camera hearing. Charkaoui is permanent resident; other 4 are convention refugees. Ministers can issue “certificate of inadmissibility” 🡪 detention for “threatening” PRs or foreign nationals. Review of certificate, detention by Fed Ct judge (can be ex parte (without other side there) or in camera (closed-door hearing). Limited disclosure to individual, no JR, no appeal if certificate “reasonable”. Then can be deported based on confidential info fed court judge saw. *Automatic* detention for foreign nationals while waiting; optional for PRs. Tension: national security and accountable constitutional governance.

**Issue:** Breach of POFJ due to lack of procedural fairness? Saved by s. 1?

**Outcome:**

* S. 7 rights engage – security context - still can’t excuse procedures from POFJ
* The effect on individual allows for high level of procedural protection
* POFJ: can’t detain someone w/o fair process –right to hearing before impartial/independent hearing (said yes)
* But wasn’t give right to know the case before him and respond – judge can’t compensate for lack of informed scrutiny
* Not saved by s. 1 – yes pressing and substantial objective, but means not proportional
	+ Compared to Air India trial counsel, UK special advocate

## Independence, Impartiality, Bias

* Different kind of PF right – Baker test doesn’t apply
* Importance of public faith in the system

Real Life Concerns:

* Appointment and removal process
* Operational realities, “culture” – maybe being a team player more important in the tribunal context
	+ May be ideology within culture of institutional workplace
	+ Appropriate for chair to seek members who contribute to values of tribunal?
* Policy making and adjudicative decision-making
* Public policy making role / influence – if more policy, should Minister be able to direct/influence more?
* How to manage necessary interactions w/ the exec branch of gov’t?

**Independence**: the means – look at structural factors and relationships

**Impartiality:** the ideal state, with open mind and no improper influences (includes appearance – reasonable apprehension of bias)

**Bias:** the evil – partiality toward a particular outcome

### INDEPENDENCE

* Sources include:
	+ CL (latin maxims) 1) *nemo judex* (no one shall judge in his cause) 2) *audi alteram partem* (hear the other side)
	+ Charter S. 7 – POFJ – right to be heard by impartial DM
	+ Unwritten constitutional principles
	+ Quasi-constitutional statues – Bill of Rights, Quebec BOR

Independence in the Judicial Model

* 3 formal indicia:
1. Security of tenure (guaranteed by s. 96)
2. Financial security/remuneration (guaranteed by s. 101)
3. Administrative control (adjudicative independence)

Independence of Admin Tribunals

* Security of tenure
	+ Ppl might be appointed for fixed term
	+ Can be fired for things other than cause (downsizing, etc)
	+ Depends on length of term
* Financial security
	+ Usually chair is part-time, paid on fixed term
	+ And maybe vice-chair
	+ Other members are part-time, paid hourly
* Independence
	+ Not the same as courts

Tribunal Independence Test

**Are you “sufficiently free” of *structural* factors that could interfere with your ability to make impartial decisions? *(Committee for Justice and Liberty)***

* in assessing level of independence, should consider factors like nature of tribunal, interests at stake, and other indicia of independence ***(Matsqui)***
* For fixed term appointments for tribunal, test is whether person can be terminated at any time at the pleasure of the executive? If yes, then not independent ***(Quebec v Regie)***
* No freestanding constitutional guarantee of tribunal independence ***(Ocean Port)***
* Depends on whether more adjudicative or policy – is it “on the high end of the adjudicative spectrum?” ***(McKenzie)***
* At pleasure appts attract a lower level of PF – but independence concerns! ***(Keen)***

First Wave

#### Canadian Pacific v Matsqui Indian Band (1995 SCC)

**Outcome:**

* Requisite independence level depends on nature of tribunal, interests at stake, other indicia of independence
* Determine independence as-acting rather than on-paper

Note \* - this is problematic b/c suggests if don’t overly act partially, it’s ok

#### 2747-3174 Quebec v Regie (1996 SCC)

**Facts:** Re role of lawyers, directors; fixed term appointment for liquor licensing board

**Outcome:**

* Mere fact that you have limited term isn’t show stopper – limited term ok
* Test: can these people be fired at any time at the pleasure of the executive? – if yes, then not ok (not sufficient security of tenure)

Second Wave

#### Ocean Port Hotel v BC (Liquor Control) (2001 SCC)

**Facts:** Hotel had alleged liquor license violations. Investigation, hearing, 2-day suspension imposed. Inspector T reports to Inspector J. OP appeals to Liquor Appeal Board – *de novo* hearing. LAB confirms suspension. OP appeals to BCCA to set aside LAB decision b/c sufficient independence for LAB members. They were part-time, fixed term appt, could be removed at pleasure (fired at any time). BCCA finds security of tenure lacking. Goes to SCC.

**Issue:** What does “sufficiently independent” mean in the context of at-pleasure appointments to admin agencies or whether that constitutes arbitrariness?

**Outcome:**

* Clear statutory direction from legislator overrules CL rules for independence (here the statute is unambiguous)
* May attract Charter rules, but generally do not – maybe if Trib is adjudicating a Charter claim (then more independence required)
* **Independence/role of tribunals is not constitutionalized** – distinct from courts (but the nature of admin tribs not distinct from executive

Note- problematic?

* Some tribs are powerful/important (major fines/issues like immigration/HR) – should they have more independence?
* Wrong lens – looking at through judicial lens rather than reality of day-to-day operations that raise independence issues
* This is unpopular decision – should the preamble re: ROL require independence?

Third Wave (stalled?)

#### McKenzie v Minister of Public Safety & SG (2006 BCSC)

**Facts:** M was tenancy arbitrator in Nanaimo – adjudicative, resolved disputes. On her second 5-yr term, she’s senior and well-respected. Fixed term but served at pleasure. After 18 mos, her job was rescinded (no cause). She argues this used to be jurisdiction of court and ppl in similar roles (small claims court, etc) have been found to have independence b/c of unwritten principle of rule of law.

**Issue:**

**Outcome:**

* BCSC found her role was “on high end of adjudicative spectrum” – similar to courts and so firing her was violation of independence (security of tenure)

BUT…died on the way to BCCA. Statute amended to give arbitrators more independence, and can only be fired for cause. Issue was moot, and said was TJ said was all obiter.

#### Keen v Canada (2009 Fed Ct)

**Facts:** K was member/president of Cnd Nuclear Safety Commission. President appt at pleasure for 5 yr term, member for good behaviour. License violation problem, reactor shut down – caused isotope shortage worldwide. K said couldn’t continue temporary, needed to follow formal procedures – public safety hearings, etc. Parliament passes bill to overrule CNSC decision to allow reactor to keep working w/o license for 120 days. PM Harper calls her liberal hack, not reasonable. Minister notifies K of intention to terminate her as president, gives opportunity to make submissions. She was concerned about independence, b/c PM called her hack. Minister doesn’t respond, terminates her as President by OIC (“at-pleasure” part terminated, not commission membership). She tried to quash decision.

**Issue:** Did the president hold office “at pleasure” or “during good behavior” – if at pleasure, the fairness requirements were met. If good behavior, they weren’t met.

**Outcome:**

* Court finds office was held at pleasure

Note – problems – should an office like this be held “at pleasure”? How should gov’t behave toward it?

She was facing undue influence from gov’t – inappropriate exercise of political power

### BIAS

Reasonable apprehension of bias – kind of like “I know it when I see it” test

* Context heavy, depends on statute intent,
* RAB raised often –must raise at first opportunity
* Based on *apprehension* of bias (not actual proof of bias) – substantial (like BOP)
* Can be individual or institutional (but this is different than structural independence)
* How much bias is “ok” depends on context – statutory scheme (what it permits), consider parties and relationships (eg. Tripartite labour board – bias intended)

Reasonable Apprehension of Bias Test

A reasonable apprehension of bias must reasonable, held by reasonable and right-minded persons, applying themselves to the question and obtaining required info. Ask:

**Test: Would an informed person, viewing the matter realistically and practically and having thought through the matter, conclude are you “sufficiently free” of factors that could interfere with your ability to make impartial decisions?**

* Important: don’t use Baker tests for RAB (although sometimes courts do this)
* Shouldn’t get more impartiality because issue if more serious
* Test is about whether person independent and impartial decision maker
* Should be about 1) statutory scheme and 2) parties and relationships
	+ Factors include:
		- Policy or adjudicative function?
		- Stage of hearing? Investigatory or hearing state
		- Need for expertise/familiarity with industry?
		- Significance of relationship (how close is relationship)
		- Statutory scheme (vs. informal directives)

**Individual Bias**

\*\* All about context!!!

Pecuniary Interest in a particular outcome

* Can be direct or indirect (eg. of direct = judge was shareholder in company, and refused to step down)
* Indirect: nature of decision matters, and nature of past interest ***(Energy Probe)***
* Widespread group of beneficiaries (eg. whole industry benefits from decision) not RAB b/c everyone would be equally biased
* May be statutory authorization of ‘bias’ (including pecuniary interest)
	+ Eg. BC Law Society – if fraud, then everyone’s insurance goes up

#### Energy Probe v Canada (Atomic Energy Control Board) (1985 SCC)

**Facts:** PT panel member of AECB appointed b/c had expertise an familiarity. He was president of a company that supplied cable to ON Hydro for a nuclear power plan. He had also been a director and s/h in the past. His company sold cable in the past, not present/future – it was through competitive tender process.

**Issue:** RAB based on this?

**Outcome:**

* Level of pecuniary interest not enough for bias – b/c it was competitive tender process, company wasn’t guaranteed to ever sell cable to ONH again
* The nature of the decision matters (eg. decision to shut down nuclear power in Ontario, and all company’s business comes from Ont – this would be bias!)

Prior Relationships with those in dispute

* How significant is the relationship?
* Look at statutory context – is partiality expected? (eg. Tripartite labour boards)
* There is a presumption of impartiality for tribunal members – onus is on person alleging bias to substantiate bias ***(Brar)***
* Must be a reasonable RAB in context ***(Brar)***

#### Brar v BC College of Veterinarians (BCSC 2011)

**Facts:** B and other applicants made HRT complaint against BCCV – discriminating against them b/c Indo-Cnd. After 200 days of hearing, and 150 days to go, trib member P not re-appointed (3 wks notice). Applicants just closed case and respondents starting. P said should stop, too much uncertainty – though there was no way she could be reappointed until end of matter. B went to media, said gov’t didn’t reappoint P to favour college. Then they reappointed P for enough days to finish hearing. College argues RAB b/c the applicants supported her publicly, basically got her her job back.

**Issue:** RAB?

**Outcome:**

* B’s decision to go to media unanticipated by P – she wasn’t linked to it/welcome it
* When reappointed, just for enough to finish – she didn’t owe them anything
* Presumption of impartiality – onus on person alleging bias to prove it

Prior Knowledge or info about matter in dispute

* Mediation privilege – you are biased if you’re later a decision maker in the process (know stuff that was said in mediation context)
* Did the person play an active role with their involvement in past position? - should consider the degree of past familiarity ***(Wewaykum)***
* If role is adjudicative, past involvement will be taken seriously – high potential for bias (***Committee for Justice and Liberty)***

#### Wewaykum (2002 SCC)

**Facts:** Property dispute involving w/ 2 FN bands. Binnie J was former federal ADM of Justice. He previously was involved in the case in 1985 (was in meeting about it received info about claim) – the band argued RAB b/c of his prior involvement/knowledge.

**Issue:** Was his prior involvement enough to show a RAB?

**Outcome:**

* No – he didn’t play an active role after the previous claim was filed – not involved in litigation in material way (main role was Van DOJ lawyers)

Prior involvement in matter / context in dispute

* If role is adjudicative, past involvement will be taken seriously – high potential for bias (***Committee for Justice and Liberty)***
* If decision is policy, with public interest in mind (not adjudicative), there will be no RAB ***(Imperial Oil)***

#### Committee for Justice and Liberty v National Energy Board (1978 SCC)

**Facts:** NEB in charge of reviewing applications for pipelines. Chair of Board was previously involved in a study group that had put an app into the Board. Study group had developed boarder guidelines for when a pipeline should/shouldn’t be permitted. CJL argued guidelines drafter by Chair would be transported into app process and no fair hearing.

**Issue:** Did his prior involvement w/ the study group raise a RAB?

**Outcome:**

* Yes – b/c Board is adjudicative, bias is taken very seriously – he has power to accept/reject proposals

Note \* - this is tricky line to draw, because also want expertise in the role

#### Imperial Oil v Quebec (Minister of Environment) (2003 SCC)

**Facts:** MOE was previously involved in a plan to decontaminate a site. Site bought by someone new, sued by site’s new owners b/c still contaminated. Then Minister ordered Imperial to undertake a study and decontamination measure for the site (cost them $). Imperial says Minister has RAB – retaliation b/c of lawsuit.

**Issue:** Did the Minister’s order to Imperial involve a RAB?

**Outcome:**

* No RAB b/c this was a policy decision – done with the public interest in mind (Minister acting in policy capacity – *not* adjudicative)
* Fact that Minister was sued in the past was irrelevant

Attitudinal predisposition toward particular outcome

* Test is still RAB but it may be on a spectrum – depends on whether adjudicative, investigative, or policy, or muni gov’t. decision binding, etc
* Prior scholarship/expert scholar doesn’t present RAB ***(Great A&P)***
	+ In fact, want trib members to have expertise
* Judge-like role – may be attitudinal predisposition about what their role is – should be neutral ***(Chretien)***
* Far end of spectrum – low standard of PF required – test is closed mind (generally used for policy-making / investigatory functions
* For municipal gov’t, test is whether councilor has closed mind so any representations made would be futile ***(Old St. Boniface)***
* Investigative work does not attract high PF – so closed mind (***NFLD Telephone)***

#### Chretien v Canada (2008 Fed Ct) (upheld at FCA)

**Facts:** Sponsorship scandal from PM involving money from gov’t to liberal media outlets. Commission Inquiry w/ Gomery (“much-speaking judge”). Spoke to media in colourful words, said work was juicy, he was dismayed. Issue w/ Chretien’s name on golf balls. Question of what his role was – he saw his missions as truth-exposing rather than neutral hearing and inquiry.

**Issue:** Did he have a RAB?

**Outcome:**

* He had RAB based on his attitudinal predisposition about what he was supposed to do, what his role was (not neutral hearing)
* Gomery inquiry was set aside

#### Great A&P v Ontario (HRC) (2003 FC)

**Facts:** B was involved in gender discrimination case at Osgoode re appt of new dean, and was expert in gender discriminations. Later, appointed to ONHC b/c she was expert. A&P faced gender discrimination complaint at ONHC. B heard case. A&P alleges RAB b/c of B’s previous employer and her expertise (attitudinal predisposition).

**Issue:** Does her involvement with previous case and her scholarship raise a RAB?

**Outcome:**

* Found RAB (attitudinal predisposition\_ b/c she was party in prior similar matter
* Did not comment on her prior scholarship (likely no RAB) b/c sometimes want ppl with expertise on tribunals (also less potential for other pecuniary interests, etc)

#### Old St. Boniface v Winnipeg (City) (1993 SCC)

**Facts:** Municipal councilor elected on certain platform. Then he sat on committee making zoning decisions directly relevant to the platform he ran for. So obviously had a previous attitude about this issue.

**Issue:** Is this RAB ok in this context?

**Outcome:**

* In municipal context, only find RAB if person has closed mind, or can be open minded (would any representations be futile?)
* This is lower standard for degree of PF required

#### Newfoundland Telephone v NFLD (Public Utilities) (1992 SCC)

**Facts:** Wells was long-time consumer advocate. Appointed to Utilities Commission – press conference saying he would be advocate for consumer rights. While investigating matters, still holding press conf. Then began sitting on hearing (stopped talking to media).

**Issue:**

**Outcome:**

* During investigative stage, standard is closed mind
* Everyone knew he had predisposition, and that’s why was elected
* Once in adjudicative stage, then standard changes to RAB (making decisions)

Note – CF doesn’t like this decision – doesn’t solve problem of his obvious bias (press conf doesn’t affect bias). Maybe court trying to balance concerns for independent DM process w/ fact that Wells was appointed to represent particular views.

**Institutional Bias**

* *Delegatus non potest delegare* (person making decision needs to be one making decision – can’t delegate) and administrative independence
* DM has evidence, they make decision – but how to ensure consistency of decisions? Necessary for rule of law
* Look at structure of decision making
* Based on informal strategies – not statutorily authorized bias

Test for Institutional Bias

**Would an informed person viewing the matter realistically and practically and having thought through the matter, conclude you are “sufficiently free” of factors [in a substantial number of cases] that could interfere w/ your ability to make impartial decisions? *(Committee for Justice and Liberty + Lippe)***

* If not substantial number of cases, can still allege RAB on case-by-case basis

Full Board Meetings

* Ok as long as don’t discuss facts of specific case, and disclose any new policy grounds to parties (opportunity to respond) **(*Consolidated Bathhurst)***
* There is difference btw “permissible pressure” and “unacceptable compulsory consultation” ***(Tremblay)***
* Because FBM are internal directives, they can be scrutinized more than statutory structure ***(Tremblay)***
* Factors that indicate “systemic pressure”: whether attendance/vote/minutes taken, who can initiate it, and whether it’s compulsory ***(Tremblay)***

#### Consolidated Bathhurst v IWA (1990 SCC)

**Facts:** CB closed plant, didn’t tell union – bad faith? Union/company dispute goes to 3 member panel of Ont Labour Relations Board, argue a legal test should be changed (bad faith test). If change the test, will affect all OLRB hearings. Panel members discuss at Full Board Meeting (no attendance/minutes). Panel reconvenes, upholds old test. Company challenges, asks Board to reconsider. Board reconsiders and upholds FBM process if limited to policy implications.

**Issue:** Does PF mean that panel not allowed to discuss w/ other members after hearing but before decision? Able to pause hearing, go to FBM to discuss policy, then return to hearing? Note, tripartite board, can develop own practice (jurisdiction/privative clauses).

**Outcome:**

* Reality – board faces institutional constraints
* Natural justice is context-specific – NJ not so specific that can’t take advantage of wisdom of other board members (judges able to do this – analogy to judiciary)
* 2 conditions on FBM:
	+ 1) Can’t discuss facts of specific case at meeting
	+ 2) Must disclose any new grounds – if new policy consideration comes up from board meeting, must give parties opportunity to respond
* Entitled to go to meeting and change mind, as long as legitimate and weren’t coerced
* Possible that no attendance/minutes/vote taken maybe preserves independence

Note – Dissent: collision of uniformity/consistency and NJ – NJ should win (quash decision)

#### Tremblay v Quebec (Commission des affaires sociales) (1992 SCC)

**Facts:** T on social assistance, denied reimbursement for bandages. Appeals – pure question of law (whether entitled under social assistance). 2 member panel. They had FBM – went there with pre-written decision. Normally legal counsel vets, but on vacay, so commission president vetted, disagreed, sends to “consensus table” (not in statute). Took minutes/attendance, did a public vote. 1 of 2 members changes mind, so hung panel. President gets to decide.

**Issue:** Does ‘consensus table’ give rise to RAB?

**Outcome:**

* Yes – this is institutional bias – found to be coercive/pressure
* Problematic in terms of who can initiate, the compulsory consultation for panel, minutes/attendance/vote, and ‘prior commitment’ situation for President
* Internal directives can be scrutinized more than statutory scheme

Lead Cases

* There must be balance btw tribunal efficiency/consistency and bias ***(Geza)***
* RAB can arise from totality of “factual matrix” of evidence, as opposed to a single determinative fact ***(Geza)***

#### Geza v Canada (Minister of Immigration) (2006 FCA)

**Facts:** Large influx of Roma from Hungary seeking refugee status. Heavy caseload, insufficient resources at IRB – desire to generate “non-binding” lead case w/ all the info as basis for hearing panels going forward. Applicants consented, counsel actively participated, Minister participated in hearings, and team selected individual cases. Experiences panel members familiar w/ Hungary/Roma cases (Berger/Bubrin). Applicants in lead case lose (credibility issues). After this, applicants argue RAB in how built the case – said built the case to reduce successful number of Roma applicants. Fed Ct says no RAB –goes to RAB.

**Issue:** Does the use of the lead case raise a RAB?

**Outcome:**

* Found RAB based on relationship btw IRB and its bureaucracy, CIC (who had concerns about Roma ppl), involvement of Bubrin
* “Entire factual matrix” raises reasonable apprehension of bias
* Recognize admin challenges and need for consistency but shouldn’t sacrifice impartiality/independence
* Problem is improper influence

# STANDARD OF REVIEW

* SOR is how probing a court’s review will be when looks at lower court or admin tribunal decision – how much deference/respect shown
* When should a court not defer?
	+ Expertise of DM
	+ Privative clause
	+ Nature of question – law, (but interpretation of own statute?), fact, discretion, policy

|  |  |
| --- | --- |
| **Appeal from Trial Court**- Uniform procedure- Substantive review of content: there is one right answer- SoR = correctness* Error of law: must correct it
* Error of fact: must correct “palpable and overriding error” (deference to trial court’s firsthand engagement w/ facts)
 | **JR from tribunal/agency**- procedure not uniform- but SoR for PF = correctness- substantive review of content: reasonableness **or** correctness* “*deference as respect* requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”
 |

## Privative Clauses

Jurisdiction-Conferring Clauses

* gives “exclusive jurisdiction” to a particular agency, to decide things under the act
* eg. *Vancouver Charter* gives jurisdiction to Parks Board to make certain decisions (eg. who can take down your tent)

Privative Clauses

* Matter where tribunal has exclusive jurisdiction and is final and conclusive, not open to question/review in any court
	+ Or may carve out for question of law/excess jurisdiction
* Purpose – to keep courts out, keep substantive trib outcomes from being overturned by courts all the time
* Strong privative clause has 3 elements:
1. Exclusive jurisdiction (jurisdiction-conferring clause)
2. Finality clause – “this is final/conclusive decision”
3. Ouster clause – “this decision is not open to review in any court”

**History:**

* Legislation can use statutory language, but courts police jurisdiction and “supply omission”
	+ Ie. They have jurisdiction and statutory interpretation
* Courts used strategy of statutory interpretation to justify non-deference
	+ Idea of preliminary/collateral question (can always frame differently to find tribunal acting *ultra vires* its jurisdiction)
	+ Eg. *Bell* – court said trib needed to ask preliminary question – is it a self-contained dwelling unit? No, so outside jurisdiction
* Courts were giving very little meaning to privative clause
* Changed w/ *CUPE* case (Dickson)
	+ Board had jurisdiction, so courts should exercise restraint
	+ Privative clause is strong, so courts should defer (even if disagree)
	+ SOR = patent unreasonableness – here, no right interpretation of statute – Board’s interpretation is at least as reasonable as court’s (not PU)

## Development of Standard of Review Analysis

**Post-CUPE development**

***Crevier*** – JR of executive action is constitutionalized (can’t completely oust court through privative clause

***Pasienchyk*** – legislature can’t protect admin body from review re: jurisdiction

***Bibeault*** (1988 SCC) – question is one of legislative intent:

* Central question is what legislature intended jurisdiction to be
* Indicia: wording and purpose of statute, reasons for tribunal, expertise, nature of problem

Now, this focus on the privative clause gives way to a focus on expertise

***Pezim*** (1994 SCC), ***Southam*** (1997 SCC)

* Expert tribunal + public interest mandate & broad powers + question within expertise + *no* privative clause + statutory right of appeal
* New SOR = reasonableness simpliciter
* Difference is in immediacy or obviousness of the defect – if not apparent on face of reasons, and must search or test, then not PU, but unreasonable

#### Pushpanathan v Canada (Minister of Immigration) (1998 SCC)

**Facts:** P claimed refugee status, then got PR (family tie). Then pleads guilty to conspiracy to traffic narcotics. Loses PR, renews application for refugee status. Has deportation order – deported unless Convention refugee. IRB – provision says Convention doesn’t apply if guilty of acts contrary to purposes/principles of UN. Does this include trafficking drugs? Jurisdiction conferring clause in Imm Act, no privative clause. JR provision – need leave from Fed Ct, and need to certify question for FCA.

**Issue:** What is the standard of review that should be applied for this question?

**Outcome:**

* Established 4 part test for determining SOR (not explicitly rejected in *Dunsmuir*)
* Focus on legislative intent – intended for IRB to have exclusive jurisdiction over this *particular* question? (re: principles of UN)
* 4 factors determine SOR:
	1. Presence of a privative clause
* “Full” vs. “partial or equivocal”
	1. Expertise: the most important factor
* Compare to courts’ expertise
* 3 step test:
	1. Construe expertise of tribunal
	2. Construe expertise of court
	3. Look at construction together and see who’s better
	4. Purpose of Act and particular provision
* Polycentricity suggests deference
* Policy/public vs adjudicative (dispute resolution)
	1. Nature of the problem
* Question of law? Or “general” law?
* Broader questions, further from core of tribunal, shown less def
* Proper standard in this case = correctness
	+ S. 83 would be incoherent otherwise
	+ Involves question of general law
	+ IRB has no expertise in this (even compared to HR tribs) and isn’t acting in policy capacity

**Lead up to Dunsmuir**

* Debate about which standard to apply – even among counsel (couldn’t predict)
* Disagreement at the SCC:

***Mossop v Canada (AG)*** – (gay couple, wanted bereavement leave) – 6 applied correctness standard (4 thought correct, 2 not) – 3 though PU SOR, and it was PU

***TWU v BC College of Teachers***  – applies Pushpan factors – court divides btw correctness/PU, but unanimous outcome

***Toronto v Cupe*** (2003 SCC) – Lebel’s critique of PU – no meaningful distinction w/ RS, flawed/tension w/ ROL

**Pushpanthan – Questions Arising – from textbook:**

Macklin @ 294 – the 4 factors really come down to 2: legislative intent vs expertise

Why is expertise more important than presence of privative clause?

Are there other ways to analyze this? Ex by tribunal’s subject area? Is this a shell game?

* + We do smoke and mirrors about SoR, and pretend talking about expertise and legislative intent, but in reality talking about places where courts do/don’t wanna weigh in, and what they do/don’t know stuff about
	+ Ex: courts see themselves as experts of general law, and things like Human Rights Law – never gonna give that up. So HRT will be seen as HR experts of FACT, not of LAW

Defer to things like: science boards, law society

Dunsmuir

**Facts:** Dunsmuir was court clerk in Fredericton. Non-unionized, statutory office holder at pleasure (appointed by LG-in-C). Reprimands & work history “not perfect” (errors in judgment). Terminated “not for cause” while prepping for performance review, got severance. D says he was terminated *for* cause – attracts PF. Statute – it matters – if for cause, he has alternative of grieving under Act – can seek reinstatement, gets PF. Grieves decision, goes to adjudicator.

**Issue:** What is SOR court should apply in reviewing decision of adjudicator?

**Outcome:**

**Majority (Bastarache):**

* 3 major changes

1) Move from 3 standards to 2

* + PU gone
	+ Bright line test:
		- Definition of correctness
			* De novo review/analysis
		- Def of reasonableness
			* Existence of justification, transparency and intelligibility within the DM *process*
			* Whether the decision falls within a range of possible, acceptable *outcomes* which are defensible in respect of facts and law
	+ When do they apply?
		- Correctness
			* Q of “general law” of central importance to legal system and outside the adjudicator’s specialized area of expertise
			* Constitutional q’s
			* Jurisdictional q’s
		- Reasonableness
			* Privative clause = “strong indication” of reasonableness review (para 52)
			* Nature of question: fact, intertwined mixed/law, discretion, policy – para 46
			* 54: DM interpreting own or connected statute, or particular expertise
	+ Application in Dunsmuir case
		- Does DM have jurisdiction to see if employer dismissed w/ notice?
			* Q of law, full privative clause, labour regime, home statute, purpose of statute – “quick and cheap justice”, remedial, legal q not of central importance to system = reasonableness
		- Found DMs decision not reasonable – poor interpretation of statute

2) Two step SOR process: respect for JR precedent

1. Ascertain whether jurisprudence has already determine whether amount of deference has already been answered
2. If no satisfactory answer, then do the above analysis

3) Move away from language of “pragmatic functional” analysis – Now called **Standard of review analysis**

* Values for reasonableness:
	+ Deference: respectful attention to the reasons offered or which could be offered in support of a decision”
	+ Margin of appreciation
	+ Justification, transparency, intelligibility
	+ Respect legislative choice, expertise, different constitutional roles
* Value for correctness:
	+ Consistency, uniformity, predictability, stability
	+ Right answer
	+ Judicial expertise
	+ No deference to other reasoning
	+ Rule of law and unique role of the courts
* Note – expertise no longer most important factor – but didn’t overrule Pushpan

**Concurring (Binnie)**

* Agrees that need for reform, 2 standards, outcome
* Critiques: need broader reappraisal, “reasonableness” is big tent, doing more work
	+ Should be a spectrum of reasonableness?
	+ This is for admin trib, what about others? (eg. Ministerial discretion)
* Should create presumptions re SOR (easier, less costly)
	+ Presumption should be reasonableness, and that decision is reasonable

**Concurring (Deschamps)**

* Different approach – substance of case over SOR – look at nature of question
* Question of law = correctness
	+ Can defer if privative clause, lots of expertise, discretionary, home statute
* Problems: more court intervention, more room for correctness review, efficiency issues

### Relating Dunsmuir to Persistent Questions

**– GOOD POLICY DISCUSSIONS HERE.**

* + Whatever happened to the privative clause?
		- Is it dying as something you worry about?
		- Binnie says privative clause matters – strong indicator of LI, need courts to take seriously
		- But majority doesn’t really go there
		- Original distinction
	+ Jurisdiction: the living dead (pre-*CUPE*)
		- Courts still tip-toeing around jurisdiction Qs since this case, don’t want to get into complicated Qs of past admin law
	+ What was point of *PU?* What have we lost?
		- Binnie said there was more going on than we realized. PU was about who decision maker was supposed to be, and respect to the legislative scheme.
		- Now that we have reasonableness, have we lost that higher level of deference? Aren’t there places where court shouldn’t intervene bc it isn’t their business
	+ What is Q of central importance to the legal system, outside tribunal’s expertise?
		- This concern hasn’t surfaced yet
	+ What are the big issues now? (*Khosa; Dore;* what counts as “reasonable”?)
		- Reasons are part of reasonableness
		- Intersection btwn admin/Charter issues

**CF commentary on Post-Dunsmiur:**

* + Nowadays there’s probably a presumption of reasonableness SoR at lower courts
	+ Expertise, privative clause still important – and most decisions end up in reasonableness

Romantic & Skeptical Accounts of Substantive JR

* Romantic
	+ Constitutional pluralism?
		- * Institutional dialogue between judiciary, legislature, executive
			* Work on ROL together
			* In pluralistic way, they create Cdn Constitution together as living document
	+ Ethos of justification?
		- * Want to get rid of arbitrariness
			* Need reasons for what they do
			* All bodies must justify reasons and therefore you get a deep ROL
	+ Shared commitment to (new) rule of law?
	+ “democratic constitutionalism”? – different than other countries
* Skeptical
	+ Tug of war, irreconcilable differences
		- * This is power struggle, not beautiful dialogue
			* Courts and exec have diff priorities, will be at odds sometimes
			* Irreconcilable power/authority struggle
	+ “Shell game” & vast judicial discretion
		- * Judges not actually engaging in respectful deferential process
			* They’re using JR tool to knock things down when they want to
* CF commentary: CF thinks courts are less romantic than they used to be

## Correctness Review

* Courts substitute own answer – no deference – original decision quashed
* Arguments for: jurisdictional and constitutional q’s, judicial expertise, predictability, certainty
* Arguments against: when is trib’s contextual understanding ever not helpful?
* Do we need correctness review to ensure consistency, predictability?
* Correctness – correct? In line w/ CL/civil law OR statutory purpose, or court territory, or court safeguarding ROL?

Correctness standard of review:

* Q’s of “general law” of central importance to legal system and outside adjudicator’s specialized area of expertise
* Constitutional q’s re: division of powers, and other
* Jurisdictional q’s or “true q’s of vires” including btw tribs (note – might be dead, courts avoiding)

For correctness review:

* Statutory interpretation – Dreidger’s Modern Rule – look at legislative history, purpose/scheme/objecte of statute, textual analysis based on rules of construction
* For purposes of any potential essay question on this, some of the other stuff we talked about in class might be useful – e.g., the fact that “correctness” and statutory interpretation can be quite subjective, Sheila Wildeman’s suggestion that the SoR of correctness is becoming obsolete given the more pluralistic way that courts now think of judicial review, some of the theoretical context in which this is situated, etc.

#### Canada v Mossop (1993 SCC)

**Facts:** Civil servant Mossop applied for bereavement leave to attend funeral of same-sex spouse’s father. Denied – leave applied to “immediate family” – spouse only defined as someone of opposite gender. Complains to CHRC on basis of CL, not charter. CUPTE collective agmt defines CL spouse as opposite sex, and Cnd HR Act intentionally left out sex orientation as grounds of discrimination. At CHRT, “family status” read to include same sex spousal relationships.

**Issue:** What is the SOR and how should correctness be applied?

**Outcome:**

Majority (Lamer)

* Pure statutory interpretation (purpose of leg) = question of law = SOR of correctness
* Legislative intent is clear (absent Charter challenge)

Concurring (LaForest)

* SOR = correctness
* Text is clear: “family” = traditional family (uses textual analysis)

Dissent (L’Heureux-Dube)

Note – Lamer and LaForest – 2 variants of positivist approach to statutory interpretation

* Lamer – grounded in legislative intent
* LaForest – purely textual
* L’Heureux-Dube is more normative approach – CL constitutionalism

How can there be different judgments about correctness? – Courts are so sure, but don’t give any deference to experts (but they can’t even agree).

#### Northrop Grumman (2009 SCC)

**Facts:** Major military procurement bid – NG Overseas bids, doesn’t get it. Complains to CITT about process. CITT agrees to hear it – Canada seeks JR.

**Issue:** Can CITTT hear NG overseas? Not a Cnd supplier (American)

**Outcome:**

* Parties agreed on correctness standard
* For Standing under CITT (like jurisdiction) – look at scope of AIT, what is agmt about?
* Problems if AIT applies to non-Cnd suppliers

## Reasonableness Review

* Reasonableness is existence of justification, transparency and intelligibility w/in decision making process, and whether decision falls w/in range of possible, acceptable outcomes which are defensible in respect of the facts and law
* This is an organic test, not two

**How to do reasonableness analysis?**

1) What should *court’s reasoning about reasonableness* look like, to be appropriately deferential?

* + - * Stay “close to the reasons” – start w/ tribunal reasons, not all by yourself
			* Don’t reweigh factors tribunal considered.
			* Ex: *Dunsmuir* – arbitrator weighed factors

2) how to identify “reasonableness”:

* + - * Did tribunal show “ethos of justification”?

### Reviewing Discretion

Indicative language of discretion:

* + “Believes is required”, “deems to be reasonable”, “his or her discretion”, “deems necessary”
	+ Authorizes administrative action and/or decision aimed at individual or small group
	+ Language of “may” vs shall
	+ Delegate broad powers through vague language – ie provisions for “good government”

**Traditional “abuse of discretion” doctrine – 1959-1999**

only these reasons could make discretionary decision unreasonable:

* + 1) improper purpose and/or considerations
	+ 2) Bad faith
	+ 3) Dictation/influence (*Roncarelli*)
	+ 4) Wrongful delegation of powers
	+ 5) Fettering

#### Baker rolls discretion into reasonableness analysis

* SOR = reasonableness
* Application – was decision unreasonable – they found yes, it was
* Found that the manner in which decision reached = inconsistent w/ values underlying grant of discretion, and failed to give weight to:
	+ Interpretive context: H&C provision
	+ Relevant factor: children’s interests
* **Outcome: you can re-weigh discretionary factors in reasonableness review**

***Suresh*** – modifies *Baker* re: discretion

* Question of weight and discretion:
	+ Changed from Baker
	+ NO – reviewing court must limit itself to ensuring that only relevant considerations were taken into account
* Outcome: CANNOT re-weight discretionary factors that one person weighed

**FOR FACT PATTERN: w/ discretion always mention BAKER, SURESH, and Roncarelli floats in background.**

### How to do a Reasonableness Analysis

#### Celgene Corp v Canada (AG) (2011 SCC)

**Facts:** Celgene making drug, T. T will never pass normal standards drug circulation. But exception for experimental drugs, trials, terminally ill people – doctors can prescribe drugs in those contexts that wouldn’t normally pass health and safety standards. T sold in Canada under exception. Sold out of Pennsylvania. They decide to get patent. Can Patented Medicine Prices Review Board review if consumers getting gauged. Under choice of law principles, this is sale in US not Canada, and in US currency, so board shouldn’t have jurisdiction. But say they do, ignore choice of law principles because they interpreted “sold” different from CL based on statutory power under *Patent Act*.

**Issue:** What standard applies, and was it met – what should be considered?

**Outcome:**

* SOR – likely reasonableness (but court stuck b/c both parties agreed correctness)
* To determine if it was reasonable, consider:
	+ Board’s reasoning *process and outcome*
		- Statutory mandate was consumer protection, can consider this mandate and ignore the CL – if mandate is to protect Cnd consumers, have to interpret law this way
		- Therefore reasonable outcome
		- Outcome “incongruity” based on mandate
	+ Statutory scheme is a basis of finding that the decision was reasonable
	+ Takes into account value-laden purposive analysis that drives tribunal’s decision – this reasoning is rationally grounds in statutory mandate
* **To determine reasonableness, tribunals are allowed to give effect to their own statutory scheme – can be unreasonable according to CL as long as reasonable within own scheme**

#### Nor-Man Regional Health Authority v Manitoba (2011 SCC)

**Facts:** Employee w/ NM for 20 yrs, hired on a PT basis. She starts accruing seniority after 10 yrs, but wants extra vacation under provision that says additional vacation ater 20 yrs employment. Employer says she didn’t start accruing seniority until 10 yrs previously, so only been working 10 yrs. Goes to experienced labour arbitrator, who invokes CL idea of “estoppel” – employer has been open about this policy so she isn’t entitled to seniority from beginning. Arbitrator not legally trained, uses estoppel wrong.

**Issue:** What SOR? Is the standard met? For reasonableness, can you be wrong about law but correct w/in world of labour arbitration?

**Outcome:**

* Standard of reasonableness applies (labour trib, PC, not q of central importance)
* Looks at arbitrator’s reasoning process
	+ Reasons are comprehensive, had 2 precedents ( he didn’t invent)
	+ Reasoning process reasonable even if it was wrong
* Looks at outcome
	+ Reasonable arbitral remedy – not promissory estoppel, w/in context of labour arbitration it is reasonable
	+ Arbitrator not bound to the law – didn’t necessarily get it wrong (just wrong legal idea)
* Tribunal is not a court and is not expected to be a court
* Considerations:
	+ Arbitrators must exercise mandate consistent w/:
		- Objectives/purpose of statutory scheme
		- Principles of labour relations
		- Nature of collective bargaining process
		- Factual matrix of the grievance

#### Catalyst Paper v North Cowichan (2012 SCC)

**Facts:** CP is paper mill paying disproportionate tax to municipality (way higher than residential tax). CP says not using any services. Municipal taxation bylaw – can it be JR’d (dealing w/ elected officials, plus taxation = policy driven). Note – there is no “reasoning process” to test.

**Issue:** Can municipal taxation bylaw be JR at all? What is SOR? How reasonableness applied?

**Outcome:**

* Previously, in Thorne’s Hardware, said couldn’t JR muni’s bylaw – but here, says yes
* Contextual: reasonableness is flexible deferential standard that varies w/ context and nature of impugned administrative act
* Municipal reasonableness:
	+ Only if bylaw is one “no reasonable body informed by these factors could have taken will the bylaw be set aside”
	+ Substance of bylaw must conform to rationale of statutory regime
	+ Must adhere to appropriate processes & can’t act for improper purposes
* Application – was N. Cowichan’s bylaw reasonable?
	+ Assess *process*: there are no explicit reasons – how to assess w/o reasons?
	+ Assess *outcome:* it’s harsh but countervailing considerations exist
* Muni bylaw doesn’t need to give reasons
* High standard for courts interfering

Note \*\* - CF ^^^ can see w/ discretionary decisions or political decisions, standard for intervening will be higher even if standard is still “unreasonable”

^^this looks like PU

### Reasons

* in applying Reasonableness Standard: “justified, transparent & intelligible”
* *Baker* – duty of PF to provide written explanation for decision where:
	+ Decision important for individual
	+ Statutory right of appeal
	+ Other circumstances
* For substantive review – need to show good DM process

NFLD Nurses Union v NFLD (Treasury Board) (2011 SCC)

**Facts:** Casual nurses – question of whether their casual hours count towards time for accrued vacation pay. Labour arbitrator decides that they don’t. Arbitrator decision is 12 pages long – sets out relevant facts, parties’ arguments, collective agmt provisions, interpretive principles, then his decision. Missing- how she reached that decision. Goes to JR.

**Issue:** How to deal w/ reasons that are less than comprehensive in analysis. Do deficient reasons = no reasons for failure of PF?

**Outcome:**

* SOR = reasonableness – was decision reasonable – how to tell?
* What is standard for non-legally trained person? Maybe set of facts could also serve as reasons
* Reasons that “could be offered” in support?
	+ Court must first seek to supplement the reasons before it seeks to subvert them
	+ Decision should be presumed correct, even if reasons not perfect
* Reasonableness review an “organic exercise” – read process & outcome together
* Reasons don’t need to be completely comprehensive – just able to understand why trib made its decision, and whether outcome w/in range of reasonable outcomes
* No reasons vs. questionable reasons – PF vs. reasonableness review
	+ No reasons = failure of PF (*Baker)*
* Look at context – purposes of arbitration
	+ Different than statutory right of appeal (need to build case)
	+ This is about bargaining/collective agmt
	+ Purpose is to resolve disputes ASAP- knowing new agmt in few yrs
* **For ‘deficient reasons’ – should seek to supplement them first – there is a presumption of reasonableness**

Inferring Reasons

* Can imply reasons – if reasonable basis – but if find it reasonable, then should remit to tribunal to provide reasons (ALTA Teachers)
* For discretionary decision, give more deference to DM re: implied reasons (Agraira) – BUT … what is the limit?
* Don’t remit for reasons if “nothing to be gained” from explaining what’s “readily apparent” (McLean)

Alberta (I&P) v Alberta Teachers’ Association (2011 SCC)

**Facts:** ATA posted private info about some of its teachers. They complained to Privacy commissioner, said violation of privacy rights. PIPA had statutory 90-day deadline for commissioner to make decision – but they can extend. After 22 mos, he says he will extend deadline. This issue never raised (by either party) at adjudication. Then decision was JR – all way to SCC. Alta QB – jurisdictional q, so SOR=correctness. Alta CA – no SOR analysis, *de novo* review. Alta CA (dissent) – JR impossible.

**Issue:** 1) Should there have been any JR at all of an issue not raised at trib? 2) If so, what is SOR for issue not raised? 3) Did arbitrator’s implied reasons on issue not raised meet SOR?

**Outcome (Rothstein):**

* 1) Yes JR – even though JR discretionary – DM’s decision/reasons are implied
* 2) Reasonableness
* 3) Yes was reasonable – implied reasons from other tribunal decisions considering similar language

Note - \*\* seems like only imply reasons when issue not raised at tribunal – but this may change.

* **Reasons “which could be offered” – not carte blanche for courts to reformulate**
* **Find implied reasons, use restraint before finding it was unreasonable**
	+ Should remit so trib has chance to provide reasonable basis
* **Other decisions of trib can help determine** – not based on precedent (can use subsequent ones)

**Dissent (Binnie):**

* On the spectrum, this is reasonableness FAR from correctness

#### Agraira v Canada (Public Safety & Emergency Preparedness) (2013 SCC)

* **Facts:** A from Libya, denied refugee status. Lived on temporary visas. Applied to be PR. S. 34 IRPA denies PR if have ties to a terrorist org. He had ties to Libyan Front. S. 34(2) Exception – if “satisfy Minister that presence in Canada not detrimental to the national interest”. Onus on applicant - Discretionary decision (exception to normal rule, satisfy minister, “detrimental”) – so reasonable SOR. Assumed Minister had duty to provide reasons. Didn’t explicitly analyze IRPA guidelines (5 factors) for ministerial relief. Didn’t define “national interest” in reasons. Officer produced briefing note (for Minister). Said M should grant discretionary relief.

**Issue:** Was the exercise of discretion reasonable? Reasons met the standard?

**Outcome:**

* Court inferred reasons and then said they were reasonable – she said she “considered material and evidence submitted in its entirety” (so she considered briefing notes, guidelines, etc).
* Discretionary decision – so she can interpret national interest how she wants
* Guidelines not a “fixed and rigid code” (soft law)
* SCC then supports definition of national interest w/ statutory interpretation (Note – again this looks like correctness review) – w/in range of reasonable outcomes
* **If Minister says its reviewed all material submitted –look at what’s submitted, infer reasons**

Note - \*\* We don’t know what the limit is of inferring reasons

#### McLean v BC (Securities Commission) (2013 SCC)

**Facts:** She was securities trader. Kicked out of Ontario for fraud. Moved to BC. BCSC said no – used Ontario decision as basis for their own. Statute of limitations issue – they said it ran from decision, not from behaviour

**Issue:** Lack of reasons – does this = unreasonableness?

**Outcome:**

* + Unlike Alberta Teachers, no reasoning from other cases.
	+ Reasons would’ve been preferable, nothing to be gained from requiring commission to explain and do it again
	+ Concerns about cost of remitting things back down to tribs (for better reasons)
	+ **Don’t remit for reasons if “nothing to be gained” from explaining what’s “readily apparent”**

## Standard of Review and the Charter

1. Can challenge the enabling statute of a tribunal – via Charter (can tribunal make opinion about constitutionality of its own statute?
2. Tribunal can make decisions/take actions that involve Charter values
3. Is admin trib a court of competent jurisdiction (s. 24(1)) to order Charter remedies?

On JR, should it be reviewed in PF or substantive review?

2 issues: 1) Should admin tribs have general jurisdiction to apply the Charter? 2) How is Charter review of decisions conducted, and how does it differ from “normal” JR in admin law?

### General Jurisdiction of Admin Tribs re: Charter & Remedies

Charter s. 24(1) anyone whose rights infringed, can apply to court of competent jurisdiction to obtain such remedy as court consider appropriate and just in the circumstances

s. 52(1) Constitution supreme law of land, if law inconsistent it’s of no force or effect

**Conway: Merger of 3 Streams**

1. Admin agencies must act consistent with the Charter “and its values” when exercising statutory functions
2. Admin agencies with power to decide questions of law + no clear contrary legislative intent = can resolve constitutional questions before them
3. What is a “court of competent jurisdiction” per Charter s. 24(1) needs to be based on the same analysis as point 1 above

#### R v Conway (2010 SCC)

**Facts:** C wants absolute discharge from mental health institution based on alleged Charter rights violation.

**Issue:** 1) Is ORB court of competent jurisdiction for Charter? 2) Can the Ontario Review Board grant this remedy?

**Outcome:**

* 1) For “court of competent jurisdiction”, ask can it:
1. Decide questions of law
2. Has that jurisdiction been removed by legislature?
* Here, courts looks at enabling statute – yes, has jurisdiction
	+ This includes applying Charter to their own enabling statute
* 2) No power to grant absolute discharge
	+ determine on case-by-case basis
	+ look at statute – ORB has to consider public safety, individ’ mental condition
	+ no jurisdiction to grant absolute discharge (so not necessary to look at merits of violation)

Joined 3 streams of jurisprudence – Slaight, Cuddy Chicks, Mills

*Cooper* dissent (McLachlin) – Charter is “not some holy grail which only judicial initiates…may touch. The Charter belongs to the people”

#### Nova Scotia (WCB) v Martin (2003 SCC)

**Outcome (Gonthier):**

* applies dissent from *Cooper*
* Cnds entitled to assert rights/freedoms in accessible forum
* Admin review provides record for JR, SOR = correctness
* Look to enabling statute for explicit/implicit jurisdiction to consider q’s of law
* Presumed to include q’s of constitutional validity
	+ Explicit jurisdiction = in statute’s terms
	+ Implicit jurisdiction = look at statute as a whole
* Any evidence of contrary legislative intent? Burden of rebutting presumption of jurisdiction rests w/ party challenging it
* Agencies must apply the Charter if they jurisdiction to

### Charter Review of Admin Decisions (JR)

How is Charter review of decisions conducted, and how does it differ from “normal” JR in admin law?

Different approaches over the years – charter based, mixed approach, and admin law approach.

*Multani –* (kirpan case)

* (Majority - Charron) used Charter based approach, worry that reasonableness from admin dilutes Charter value
	+ more structured, incorporates social values
	+ no issues with how to apply standards
* (Concurring – Deschamps/Abella) - admin law approach
	+ judicial minimalism re Charter
	+ admin law “fit” to admin law context
	+ avoids standing or other issues
	+ s. 1 analysis not suited – designed for policy analysis
	+ admin law principles are just as demanding, better fit to admin issues
	+ BUT…how to apply reasonableness standard

*Slaight Communications –*

* (Majority – Dickson) – Charter based approach
	+ Admin law reasonableness/PU shouldn’t impose more onerous test than Charter s. 1
* (Dissent – Lamer) – Mixed approach
	+ for admin issues, use admin law
	+ 2 step process – charter right infringed, and saved under s. 1?

*TWU, Chamberlain*  - admin law approaches

#### Dore v Barreau du Quebec (2012 SCC)

**Facts:** Lawyer disciplined for writing intemperate letter to judge (who was also reprimanded). Challenged constitutionality of Barreau’s decision itself to suspend. He claimed his freedom of expression was unduly infringed. Note – challenging the constitutionality of Barreau’s decision itself, *not* the constitutionality of the statute.

**Issue:** How to review admin law / Charter rights question? Admin law SOR or Charter Oakes test?

**Outcome:**

* Adjudicated admin decision is different than a statute – Oakes test doesn’t work – but can distill essence of it (balance and proportionality) into admin law – “richer conception of admin law”
* For trib determining constitutionality of its statute, SOR = correctness
* SOR reasonableness to determine if DM has taken sufficient account of Charter values in making discretionary decision (precedent, home statute, expertise re: Charter values in context)
* How to apply Charter values in exercise of statutory discretion:
	+ Consider and define statutory objectives
	+ Ask how Charter value at issue is best protected in view of statutory objectives
	+ An admin act that disproportionately impairs Charter values = unreasonable decision
* Disciplinary bodies must demonstrate they have given due regard to importance of expressive rights at issue (individual and public) – this is fact dependent/discretionary
* Application here – Barreau’s reasons show balance of expressive rights and statutory objective, so found reasonable

#### Loyola High School v Quebec (AG) (2015 SCC)

**Facts:** Catholic religious teaching in high school in contravention of mandatory “impartial” religion/ethics education policy in Quebec. The Minister denied the exemption, said that Catholic teaching was not “equivalent.”

**Issue:** Did the Minister properly exercise his discretion w/ regard to Charter values/rights? What approach – Charter or admin law?

**Outcome:**

Majority: applied Dore

* Minister’s decision requiring that all aspects of teaching be taught neutrally limited freedom of religion more than necessary given statutory objectives – not proportionate (not reasonable)
* Takes into account Charter protections and values and rights at stake – tension w/ admin law
* Outcome – can teach Catholic religion in religious manner, but other religions must be taught in secular way

Minority applies Charter analysis!?

* Uses 24(1) to craft own remedy rather than remitting to Minister
* Note – maybe this is about the remedy – because hot political topic

### Admin Law and the Charter:

# Adminstrative Tribunals Act (ATA)

* Attempt at streamlining/harmonizing different tribs in BC
* Focuses of ATA – independence, accountability, institutional design & stat powers for tribs, dispute resolution, Charter and HR jurisdiction, SOR
* Note – policy and politics connected – keep out of courts, limits court’s role as guardian of ROL
* Different tribs have adopted different sections of ATA

Definitions:

“dispute resolution process” –confidential w/o prejudice process established by trib to settle issue in dispute

“privative clause” – must be full PC – finality provision and ouster clause

“tribunal” – professional bodies don’t apply (must be under Charter)

* SOR – s. 58 – if trib’s enabling act has privative clause, then:
	+ Has all 3 SORs (including PU)
	+ Khosa deals w/ this problem
	+ Post Dunsmuir – this is statutory language, so trumps CL
	+ PU still exists in BC under ATA
	+ Defines when PU used- defines discretionary decision (if exercised in bad faith, improper purpose, etc)
* SOR – s. 59 – if trib’s enabling act has no privative clause
	+ Shouldn’t set aside finding of fact unless no evidence to support it
	+ Default is correctness unless finding of fact, discretionary decision, PF
		- BUT PF is actually fairness
	+ Note for PF – fairly –this is same as correctness
* Note – definition is strong privative clause – so no availability to think about how strong the privative clause is (like in Push) – to see about deference
	+ So may actually be less deferential system
* Problem – describes PU for discretion, but not otherwise

## Application of SOR in the ATA – Khosa Decision

* Note- Khosa is out of date re: reasons (before NFLD nurses)
* Also uses Pushpan analysis – but it’s stil useful for expertise of court
* Binnie-Rothstein arguing about when to defer, but now we have basic default of reasonableness
* Still important case
	+ Previously had argument about SOR, now argument happens over when reasonableness is met
	+ Less clear about when met – lost clarity (like Pushpan)
	+ Includes all parts of admin law – tug of war btw legislature and courts
* About Federal Ct Act (but talk about ATA also)



#### Khosa v Canada (Citizenship and Immigration) (2009 SCC)

* **Facts:** PR from India. Convicted of criminal negligence causing death. Found to be street racing. 2 yrs house arrest. Caused removal order per IRPA s. 36. Would’ve pled guilty to dangerous driving causing death, but didn’t admit speed racing. IAD denies special relief on H&C grounds – great importance to his refusal to admit he was street racing. Seeks JR per Federal Court Act s. 18.1. Fed Ct applies PU standard, upholds IAD. FCA applies reasonableness, allows appeal.

**Issue:** What SOR to apply for Federal Ct. Act s. 181.? Does the IAD’s decision meet this standard?

**Outcome:**

**Majority (Binnie):**

* Legislation doesn’t displace SOR - If JR legislation (like FCA), analyze it and read in context – s. 18.1 read flexibly, applying SOR analysis from *Dunsmuir*
* FCA s. 18.1 creates threshold grounds of review- still have to analyze under CL SOR
	+ Need different SOR for different tribs – difference degrees of deference/reasonableness
	+ Need to be elastic (not Procrustrian/rigid)
	+ Permits but doesn’t require court to grant JR – still discretionary
* Legislature can expressly oust CL SOR analysis, but not w/ grounds of review
	+ Assumes court have discretion to make determinations about SOR
	+ NOTE – this is assertion of power over JR
* SOR analysis (from *Dunsmuir*) – look to precedent, then factor test (not Pushpan)
* Application – reasonableness is “single standard” that takes its colour from the context – IAD decision was reasonable

**Concurring (Rothstein):**

* Same result, didn’t overturn IAD – based on S. 18.1(d) analysis – says it makes it clear that findings of fact on highly deferential standard – don’t need to do SOR analysis
* Where no privative clause – just review on correctness standard like lower court
* Fundamental tension of ROL only caused from privative clause
	+ For Pezim/Southam, where courts started looking at expertise – courts made this up, and expertise is reason behind PC, not freestanding basis for deference
* W/o PC, courts should treat like lower court:
	+ Defer on q’s of fact or mixed fact/law
	+ Don’t defer (ie correctness) where –q of law, and no PC
	+ Only do SOL where PC + statute doesn’t prescribe SOR
* Courts have departed from CUPE – he doesn’t like
* Rejects grounds of review/SOR distinction – no justification for imposing duplicative CL analysis where the statute expressly provides for the SOR

Khosa: expertise or the privative clause?

Rothstein ¶¶ 76-98:

* Without privative clause, SoR on questions of law is correctness. Court’s view of “expertise” irrelevant
* Rejects Pezim, Pushpanathan, Dunsmuir for not taking legislative intent seriously enough

**Binnie ¶¶21-26**:

* With or without privative clause, tribunals entitled to some deference if legislature intended to allocate question to tribunal
* Might be more than one right answer, even on legal questions

Khosa: The common law and the BC ATA:

### ATA and Application in BC

* Rothstein ¶¶ 99-116:
* What Procrustean bed? ATA not more rigid than 2 bucket c. law options post-Dunsmuir
* BC legislator would be troubled by majority’s judgment
* Binnie ¶¶ 19, 50-51:
* Procrustean beds = bad
* Even “PU” in BC continues to evolve through broader admin law cases
* ATA specifies SoR but not content of that SoR

ATA – s. 58 and 59 lay out the SOR for JR

* Patent reasonableness standard still applies in BC